G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	State Board of Education
SUBJECT:	Charter Schools
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 49-13-110(b), as amended by Public Chapter 219, 111th General Assembly; Section 4-5-208; and Section 4-5-102
EFFECTIVE DATES:	June 27, 2019 through December 24, 2019
FISCAL IMPACT:	N/A
STAFF RULE ABSTRACT:	This emergency rule establishes the timeline and appeal process for charter schools to submit an amendment petition to the charter school's authorizer and for a charter school to appeal a decision by the charter school authorizer to deny an amendment petition to the State Board of Education.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

This rule has no impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This rule establishes the timelines and appeal process for charter schools to submit an amendment petition to the charter school's authorizer and for a charter school to appeal a decision by the charter school authorizer to deny an amendment petition to the State Board of Education.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 49-13-110(b), as amended by Public Chapter 219, 111th General Assembly requires the State Board of Education to establish the "[t]imelines for approval and the appeal process" for a charter school governing body who wishes to appeal the denial of a petition to amend the charter agreement. This language contained in Public Chapter 219 went into effect on April 26, 2019.

T.C.A. § 4-5-208 authorizes state agencies to promulgate an emergency rule if the agency finds that it is required by an enactment of the general assembly to implement rules within a prescribed period of time that precludes utilization of normal rulemaking procedures for the promulgation of permanent rules.

T.C.A. § 4-5-102, as amended by Public Chapter 929 of the 110th General Assembly requires that any government agency "regulation, standard, statement, or document of general applicability" that "affect private rights, privileges, or procedures available to the public" must be contained in a rule and not a policy.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Existing charter school operators and charter school authorizers in the state of Tennessee are directly affected by this rule. The State Board of Education urges adoption of this rule, along with other authorizers of charter schools.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

N/A

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

N/A

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Angie Sanders
Angela.C.Sanders@tn.gov

Nathan James

Nathan.James@tn.gov

Tess Stovall
Tess.Stovall@tn.gov

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Angie Sanders
Angela.C.Sanders@tn.gov

Nathan James
Nathan.James@tn.gov

Tess Stovall
Tess.Stovall@tn.gov

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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Nashville, TN 37243
(615) 770-1190

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A

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Sequence Number: 06-32-19
Rule ID(s): 9212
File Date: 6/27/19
Last Effective Day: 12/24/19

Emergency Rule Filing Form

Emergency rules are effective from date of filing, unless otherwise stated in the rule, for a period of up to 180 days.

Agency/Board/Commission:	Tennessee State Board of Education
Division:	
Contact Person:	Angie Sanders
Address:	1st Floor, Andrew Johnson Tower 710 James Robertson Parkway Nashville, TN
Zip:	37243
Phone:	615-253-5707
Email:	Angela.C.Sanders@tn.gov

Revision Type (check all that apply):

___ Amendment
_X_ New
___ Repeal

Statement of Necessity:

Pursuant to Tennessee Code Annotated § 4-5-208(a)(5), the State Board is authorized to promulgate an emergency rule if the agency finds that it is required by an enactment of the general assembly to implement rules within a prescribed period of time that precludes utilization of normal rulemaking procedures for the promulgation of permanent rules.

Public Chapter 219 of the 111th General Assembly requires the State Board to set forth the timelines and appeal process for charter schools who wish to petition their authorizer for an amendment to their charter agreement. Public Chapter 219 went into effect on April 26, 2019. As a result of changes to the statutory definition of rules in 2018, the State Board is required put any such appeal process in a rule, as appeals concern the rights of third parties outside the internal operation of state government.

The State Board of Education has been informed by at least one authorizer that it has received amendment petitions from authorized charter schools and will act on those petitions in the near future. In order to ensure that the State Board has an appeal process in place should a charter school wish to exercise their legal right to appeal a denial of a charter amendment petition by their authorizer, an emergency rule is required. Since the language of Public Chapter 219 is already effective, the State Board would not have sufficient time to promulgate a permanent rule through the normal rulemaking procedures to set up the appeal process required by law. As such, an emergency rule is required to set forth an appeal process until the State Board can promulgate a permanent rule on this subject, including holding a rulemaking hearing to solicit public and stakeholder feedback.

Rule(s) Revised (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0520-14-01	Charter Schools
Rule Number	**Rule Title**
0520-14-01-.06	Amendments to the Charter Agreement

RULES
OF
THE STATE BOARD OF EDUCATION

CHAPTER 0520-14-01
CHARTER SCHOOLS

TABLE OF CONTENTS

0520-14-01-.01	Approval of a Charter School	0520-14-01-.04	Enrollment
0520-14-01-.02	Appeals	0520-14-01-.05	Annual Authorizer Fee
0520-14-01-.03	Allocation of State and Local Funds	0520-14-01-.06	Amendments to the Charter Agreement

0520-14-01-.06 AMENDMENTS TO THE CHARTER AGREEMENT.

(1) Charter Amendments.

(a) The authorizer shall rule by resolution, at a regular or special called meeting, on the approval or denial of an amendment petition within ninety (90) calendar days of receipt of the petition.

(b) Should the authorizer fail to either approve or deny an amendment petition within the ninety (90) calendar day time limit, the amendment petition shall be deemed approved.

(c) If an amendment petition is denied, the grounds upon which the authorizer based the decision to deny an amendment must be stated in writing, specifying objective reasons for the denial.

(2) Appealing an Amendment Decision.

(a) The governing body of a public charter school may appeal a decision by the authorizer to deny an amendment to the charter agreement to the State Board of Education within ten (10) calendar days of the denial. The governing body shall submit a notice of appeal by email to the General Counsel of the State Board. The notice of appeal must be received by the General Counsel of the State Board by 4:30 p.m. Central Time on the tenth (10th) calendar day. In order to be considered a complete appeal, the notice of appeal shall contain the following information:

1. A copy of the amendment petition submitted to the authorizer;

2. A summary of the petition timeline, including the date the petition was originally submitted to the authorizer and the date the petition was denied by the authorizer;

3. A copy of the letter informing the governing body of the authorizer's reasons for denying the petition; and

4. A brief statement, no longer than three (3) pages, including but not limited to, an explanation of why the authorizer's denial of the charter school amendment petition was contrary to the best interests of the pupils, school district, or community.

(b) State Board staff shall not accept an incomplete appeal or any additional documentation from the governing body of the charter school beyond the contents of the notice of appeal unless requested by the State Board staff.

(c) The State Board may request additional documentation from the governing body, the authorizer, and the Tennessee Department of Education.

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(d) Following the review of the documentation included in the notice of appeal, including the amendment petition and any additional information collected by the State Board, the Executive Director of the State Board shall provide written findings and recommendations to the State Board. The State Board shall consider the findings and recommendations of the Executive Director when rendering a decision on the appeal, but the State Board is not bound by the recommendation.

(e) Within sixty (60) calendar days after receipt of the appeal, the State Board shall meet to render a decision. If the State Board finds that the denial of the amendment petition is contrary to the best interests of the students, LEA, or community, the State Board shall remand the decision to the authorizer with written instructions for approval of the amendment. The State Board shall not become the authorizer, and the charter school shall remain under the supervision of the authorizer to whom the amendment application was submitted. The decision of the State Board is final and no other appeals shall be made.

Authority: T.C.A. § 49-13-110(b); Acts 2019, ch. 219. ***Administrative History:***

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* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Lillian Hartgrove	X				
Gordon Ferguson	X				
Elissa Kim	X				
Mike Edwards	X				
Bob Eby	X				
Wendy Tucker	X				
Nick Darnell	X				
Darrell Cobbins	X				

I certify that this is an accurate and complete copy of an emergency rule(s), lawfully promulgated and adopted.

Date: 6/11/19

Signature: Angela Sanders

Name of Officer: Angie Sanders

Title of Officer: General Counsel

Subscribed and sworn to before me on: 6-11-19

Notary Public Signature: C. O'Neal Griffin

My commission expires on: 3-8-21

CASEY ONEAL GRIFFIN
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY
My Commission Expires 03-08-2021

Agency/Board/Commission: TN State Board of Education

Rule Chapter Number(s): 0520-14-01-.06

All emergency rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

6/19/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/27/19

Effective for: 180 *days

Effective through: 12/24/19

** Emergency rule(s) may be effective for up to 180 days from the date of filing.*

Tre Hargett
Secretary of State

FILED
2019 JUN 27 PM 1:58
SECRETARY OF STATE
PUBLICATIONS

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Agriculture
DIVISION:	Consumer and Industry Services
SUBJECT:	Industrial Hemp
STATUTORY AUTHORITY:	Public Chapter 87 of the Public Acts of 2019
EFFECTIVE DATES:	June 3, 2019 through November 30, 2019
FISCAL IMPACT:	Minimal
STAFF RULE ABSTRACT:	This emergency rule repeals approximately 50% of existing hemp regulations including all requirements for hemp seed acquisition and submission of agronomic reports. The rule also amends the licensing structure to require hemp licenses only for the growth of rooted hemp material. This change will allow an entire level of the industry sector for wholesaling and distribution of non-rooted viable material (e.g. seeds) without a hemp license. Without this change, the sector is currently prevented from entry.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

No impact is expected on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This rule repeals approximately 50% of existing hemp regulations including all requirements for hemp seed acquisition and submission of agronomic reports. The rule also amends the licensing structure to require hemp licenses only for the growth of rooted hemp material. This change will allow an entire level of the industry sector for wholesaling and distribution of non-rooted viable material (e.g. seeds) without a hemp license. Without this change, the sector is currently prevented from entry.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

The Agriculture Improvement Act of 2018 decriminalizes hemp and allows for exclusive jurisdiction of state hemp regulation programs provided a state regulatory plan is submitted to USDA. Public Chapter 87 of 2019 mandates promulgation of rules for establishment of hemp licenses and fees necessary to sustain a hemp program on an ongoing basis.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Hemp growers, processors, distributors, and retailers are most directly affected by this rule.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

Tenn. Op. Atty. Gen. No. 18-46 opines on theoretical passage and constitutional provisions of cannabis and hemp legislation.

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

The estimated increase in departmental revenues or expenditures resulting from this rule is minimal.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

David Waddell, Director of Law and Policy, Tennessee Department of Agriculture

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

David Waddell, Director of Law and Policy, Tennessee Department of Agriculture;
Anni Self, Plant Certification Administrator, Tennessee Department of Agriculture

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

436 Hogan Road, Nashville, Tennessee 37220; (615) 837-5331; david.waddell@tn.gov
436 Hogan Road, Nashville, Tennessee 37220; (615) 837-5313; anni.self@tn.gov

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

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Sequence Number: 06-01-19
Rule ID(s): 9942
File Date: 6/3/19
Last Effective Day: 11/30/19

Emergency Rule Filing Form

Emergency rules are effective from date of filing, unless otherwise stated in the rule, for a period of up to 180 days.

Agency/Board/Commission:	Department of Agriculture
Division:	Consumer & Industry Services
Contact Person:	David Waddell
Address:	Post Office Box 40627, Nashville, Tennessee
Zip:	37204
Phone:	(615) 837-5331
Email:	david.waddell@tn.gov

Revision Type (check all that apply):

x Amendment
___ New
x Repeal

Statement of Necessity:

In December 2018 congress passed the Agriculture Improvement Act (farm bill) decriminalizing hemp provided that states submit to USDA a regulatory plan that meets minimum requirements. In response to the farm bill language the General Assembly enacted Public Chapter 87 in April 2019 providing the legislative framework for the department of agriculture to implement a federally compliant program. In light of these changes the current regulations need to be amended or repealed in large part to relieve the hemp industry from overly burdensome regulations that were put in place when hemp was a scheduled drug. By removing the burden of those regulations, Tennessee may remain competitive for hemp processors and manufacturers that are multiplying in the burgeoning hemp industry. Given the rapid growth of hemp industries, these regulatory changes are essential to protect Tennessee's competitive advantage for new and relocating hemp businesses.

For these reasons, the department finds that immediate repeal and amendment of state regulations are necessary to preserve Tennessee's hemp industry opportunities and its competitive advantage in securing future growers and processors of this now legal crop. Section 12, Public Chapter 87 of 2019, requires the department to promulgate rules within the 120 days of April 4, 2019. Accordingly, the department finds that it is required by an enactment of the general assembly to implement rules within a prescribed period of time that precludes utilization of rulemaking procedures described under the Uniform Administrative Procedures Act for the promulgation of permanent rules.

This rule is promulgated to continue in effect for 180 days from the date of its filing.

Rule(s) Revised (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0080-06-28	Industrial Hemp
Rule Number	**Rule Title**
0080-06-28-.01	Scope
0080-06-28-.02	Definitions
0080-06-28-.03	License Application and Fees
0080-06-28-.04	Repealed

0080-06-28-.05	Crop Distribution and Destruction
0080-06-28-.06	Movement Permits
0080-06-28-.07	Sampling and Inspections
0080-06-28-.08	Repealed
0080-06-28-.09	Violations

Amendments

Chapter 0080-06-28
~~Industrial~~ Hemp

Chapter 0080-06-28 Industrial Hemp is amended by re-titling the chapter "Hemp".

Authority: T.C.A. §§ 4-3-203 and Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.01 Scope is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-06-28-.01 Scope.

(1) This chapter applies to any person who ~~cultivates, processes, or distributes~~ grows ~~industrial~~ hemp.

~~(2) All distribution of industrial hemp and industrial hemp products in commerce is permissible to the extent of the department's authority under the Act and is conducted for the purpose of researching the marketability of industrial hemp through the department's industrial hemp pilot program. This research initiative includes the distribution of any industrial hemp cultivated or processed by a person licensed under this chapter and the distribution in this state of any industrial hemp or hemp product lawfully cultivated or processed under the jurisdiction of a foreign state.~~

~~(3) Neither the Act nor this chapter exempt any person from enforcement of regulations applicable to particular uses of industrial hemp, including but not limited to food safety regulations for food products and, feed regulations for commercial feed products, and seed regulations for agricultural or vegetable seeds in commerce.~~

~~(4)~~(2) Persons licensed under this chapter shall be responsible for operations conducted under their license until either the applicable license expires or the department receives written notification from the licensee desiring to terminate the license. The department shall not refund fees for early termination of any license issued under this chapter.

~~(5)~~(3) Licenses issued under this chapter are not transferable from person to person or location to location.

~~(6) Licenses issued under this chapter are not transferable from location to location without prior written authorization from the department. Once a license is issued for a particular growing area, the department shall not authorize changes to increase or relocate the growing area absent extraordinary circumstances.~~

Authority: T.C.A. §§ 4-3-203 and ~~43-26-103~~ Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.02 Definitions is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-06-28-.02 Definitions.

(1) Terms in this chapter share those meanings of terms set forth in the ~~Tennessee Right to Farm Act, T.C.A. §§ 43-26-101, et seq.~~ Section 12, Public Chapter 87 of 2019.

(2) When used in this chapter, unless the context requires otherwise:

(a) Act means the Tennessee Right to Farm Act, compiled at ~~T.C.A. §§ 43-26-101, et seq.~~ Section 12, Public Chapter 87 of 2019;

(b) Cannabis plant means any plant or any part of a plant of the genera Cannabis and includes ~~industrial~~ hemp;

(c) ~~Certified seed, grown from certified seed, or words of similar import mean:~~

1. ~~Grown from industrial hemp seed certified by a certifying agency as defined in T.C.A. §43-10-103; or,~~

2. ~~Grown from a lineage of mother plants that originated by growth from seed certified by a certifying agency as defined in T.C.A. §43-10-103;~~

~~(d) Commerce or words of similar import mean involving payment for an item or payment for services incident to production of the item;~~ Grow means to cultivate plants with attached roots;

~~(e)~~(d) Growing area means any contiguous land area licensed for the growth of ~~industrial~~ hemp. Bifurcation of a growing area by roads, thoroughfares, fencing or the like shall not render the area non-contiguous under this definition;

~~(f) Landrace varieties, seed or propagules derived from landrace varieties, or words of similar import mean any plant material grown from an industrial hemp variety found within the continental United States that is not traceable to growth from certified seed;~~

~~(g) License or words of similar import mean a valid license or registration issued under this chapter;~~

~~(h) Mother plant means an industrial hemp plant from which propagules are cultivated;~~

~~(i)~~(e) Move, distribute, transport, or similar words ~~of similar import~~ mean to relocate in any manner an item from one real property to another;

~~(j) Nonviable means unable to regenerate, reproduce, or survive;~~

~~(k)~~(f) Person means an individual, partnership, corporation, or any other form of legal entity;

~~(l) Process industrial hemp means to treat or transform harvested industrial hemp from its natural state for distribution in commerce;~~

~~(m) Propagule means any viable plant material cultivated from a mother plant;~~

~~(n)~~(g) Sample ~~or sampling~~ means ~~any cannabis plant or other material~~ to take material or the material taken ~~by the department~~ from a location licensed ~~for the cultivation or processing of industrial hemp~~ by the department;

~~(o)~~(h) Stop movement order means a written directive issued by the department to prohibit or limit the movement of plants or plant parts;

~~(p)~~(i) THC means delta-9 tetrahydrocannabinol; and,

~~(q) University means an institution of higher education as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C.A. §1001), located within the state that offers one or more baccalaureate or post-graduate level programs of study in agricultural sciences.~~

T.C.A. §§ 4-3-203 and ~~43-26-103~~ Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.03 License Application and Fees is amended by deleting the rule in its entirety and substituting

instead the following language so that, as amended, the rule shall read:

0080-06-28-.03 License Application and Fees.

(1) ~~All persons to whom these rules apply shall obtain a license in accordance with this chapter prior to conducting any activity for which a license is required.~~ A hemp license is required to possess rooted hemp and is issued to each person for each physical address where the person grows industrial hemp.

(2) ~~To be eligible for a license, an applicant must either be selected by the department for participation in the department's industrial hemp pilot program or be a university conducting agricultural or academic research.~~

~~(a) Non-university applicants may obtain licensure for participation in the department's industrial hemp pilot program. The department may select or limit in its discretion all participants in the program for the improvement or design of agricultural research related to industrial hemp and its growth, cultivation, or marketability. The department shall not select for participation in this program any person who has been convicted of a felony drug-related offense within the previous ten years. Non-university applicants in the industrial hemp pilot program shall sign a memorandum of understanding with the department regarding the parameters and manner of research conducted within the program.~~

~~(b) A university applicant shall submit with its application a statement of research goals and parameters related to its cultivation or processing of industrial hemp and proof of its status as an institution of higher education as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C.A. §1001). University applicants are not required to sign a memorandum of understanding with the department.~~

~~(3)~~ Application for ~~any~~ license ~~under this chapter~~ shall be made on forms provided by the department, which shall be completed in full and may include:

(a) Name of applicant;

(b) Date of birth of any applicant who is an individual or a partner in a general partnership;

(c) Proof of one of the following for any applicant that is not an individual or a partner in a general partnership:

1. Applicant's registration in its state of incorporation; or,

2. Applicant's business license issued by a local governmental authority;

(d) Contact information for applicant, to include name of person legally responsible for applicant's operations, telephone number, email address, and address of the principal place of business;

(e) Address of the location to be licensed for growth of industrial hemp and description of all growing areas at the location, including total number of growing acres and Global Positioning System (GPS) coordinates from the areas' central most points;

(f) ~~Address of any location to be registered for fixed processing of industrial hemp;~~

~~(g) Vehicle identification number of any facility to be registered for mobile processing of industrial hemp;~~

~~(h) Address of any location where the applicant intends to store industrial hemp or hemp products;~~

~~(i) Intended disposition of any industrial hemp cultivated or processed under the license;~~

~~(j) A statement signed by an owner of the real property or facility submitted for licensure, indicating the owner's consent for its use to cultivate or process industrial hemp;~~

~~(k) A statement signed by an owner of the real property submitted for licensure, indicating the owner's consent for the department to enter those premises as necessary for departmental inspection, sampling, and enforcement of the Act and this chapter;~~

~~(l) Quantity, form, and location of any viable industrial hemp carried over as inventory from a prior licensure year; and,~~

~~(m)~~ Other information as required by the department.

~~(4) An applicant may identify up to one authorized reporting agent for each license. Authorized reporting agents and licensees shall be the only persons authorized to report information or data to the department regarding a license, to request sampling or sampling results, to receive movement permits, and to otherwise communicate with the department regarding the license or licensed activity. A licensee shall be responsible for all activity conducted by an authorized reporting agent with respect to the license. To authorize a reporting agent, the applicant must include the reporting agent's name, telephone number, and email address in application records.~~

~~(5)~~(3) Licensees shall notify the department of any changes to ~~the~~ contact information ~~or contents~~ of an application within 30 days after the change takes place.

~~(6)~~(4) ~~Applicants for licensure shall include with their application payment of an annual license fee as appropriate for the following categories of licenses.~~

~~(a) Industrial Hemp Grower License. An industrial hemp grower license is required per person for each physical address where the person cultivates industrial hemp. There is no limit to the number of growing areas a licensee may cultivate at a licensed address. No grower license shall be issued for a growing area within ten miles of a certified seed license growing area without the certified seed licensee's consent.~~ The annual fee for a~~n industrial~~ hemp ~~grower~~ license is assessed under T.C.A. §43-1-703(f) and is determined according to the total size of growing area(s) at the licensed address ~~as follows~~:

(a) ~~1.~~ Less than 5 acres: Tier 6 fee;

(b) ~~2.~~ 5 acres to 20 acres: Tier 7 fee;

(c) ~~3.~~ More than 20 acres: Tier 8 fee.

~~(b) Industrial Hemp Certified Seed License. An industrial hemp certified seed license is required for any person who cultivates industrial hemp for certified seed. There is no limit to the number of locations or growing areas a licensee may cultivate for certified seed, provided that the growing areas are identified at the time of application for the license including address, size, and GPS coordinates from the areas' central most points. No certified seed license shall be issued for a growing area within ten miles of another certified seed license growing area without the consent of both certified seed licensees. An applicant for a certified seed license must submit evidence of membership with the Tennessee Crop Improvement Association. The fee for an industrial hemp certified seed licensee is a Tier 8 annual fee under T.C.A. §43-1-703(f).~~

~~(c) Industrial Hemp Processor Registration. Any person who processes industrial hemp for distribution in commerce shall annually register with the department each processing facility where the person processes industrial hemp. There is no fee for a processor registration; however, exemption from fee requirements shall not exempt any person from other regulations applicable to the cultivation, processing, possession, or distribution of industrial hemp, including but not limited to requirements regarding record keeping and availability for inspection.~~

~~(d) University License. A university license may be issued to qualified university applicants in lieu of any license or registration otherwise required under this chapter. There is no annual fee for a university license.~~

~~(7)~~(5) ~~Applicants for licensure shall submit an application and the appropriate annual license fee to the department between November 15 and February 15 of each year. All licenses issued under this chapter~~

~~shall be valid from the following March 1 through February 28 (February 29 in leap years). Licenses issued under this chapter shall not renew automatically, and therefore are not subject to late renewal charges. If payment of the appropriate annual license fee is not received by the department by February 15, the application for a license shall be deemed incomplete and denied.~~ License applicants shall submit an application and license fee to the department on or before July 1 of each year. The annual license fee shall be waived for any institute of higher education that offers programs of study in agricultural sciences seeking licensure for a growing area on university property. Licenses expire on June 30 following their issuance. If an applicant for renewal fails to submit payment of the license fee on or before the following July 16, the applicant shall also be required to pay a late charge assessed under T.C.A. §43-1-703 prior to renewal of the license.

~~(8)~~(6) The department may deny any application for licensure that is not completed in accordance with this rule.

T.C.A. §§ 4-3-203 and ~~43-26-103~~ Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.05 Crop Distribution, Destruction, and Return is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

Rule 0080-06-28-.05 Crop Distribution~~, and Return~~ and Destruction~~, and Return~~.

(1) Distribution.

~~(a) Nonviable. Any person—with or without a license issued under this chapter—may distribute or store nonviable industrial hemp or hemp products if the industrial hemp was grown or processed by a person licensed under this chapter or the industrial hemp was acquired from a person in a foreign jurisdiction where distribution of the material or product was lawful.~~

~~(b) Viable. Only the department and licensees may distribute viable industrial hemp material.~~

~~1. Unlicensed possession of viable industrial hemp material is prohibited and shall be considered possession of marijuana under the Act.~~

~~2. Licensees may distribute viable industrial hemp material only to persons licensed under this chapter, out-of-state universities, or out-of-state departments of agriculture authorized to conduct industrial hemp pilot programs in their states.~~

~~3. Prior to shipment of viable industrial hemp material out-of-state, the material must first be inventoried by the department at: Tennessee Department of Agriculture, Industrial Hemp Pilot Program, 436 Hogan Road, Nashville, Tennessee 37220.~~

~~(c) Distribution of all industrial hemp and hemp products shall comply with movement requirements of this chapter.~~ Licensees shall not distribute rooted industrial hemp to an unlicensed person. Any person may possess, distribute, or store all other non-rooted hemp.

(2) Destruction. Cannabis plants found to be in violation of the Act or this chapter shall be destroyed in accordance with a departmental directive or destruction order.

(3) ~~Return. The department may return to its sender any industrial hemp in the department's possession that was requested for shipment or distribution to an ineligible person or that was not approved for use in the industrial hemp pilot program. The department may destroy any industrial hemp that is not retrieved by its intended recipient or return to sender in a timely manner.~~

~~(4) Costs.~~ Licensees shall pay all costs incurred for ~~distribution, delivery,~~ destruction ~~or return~~ of any cannabis plant or plant product. ~~These costs may be incurred in the sole discretion of the department and are payable by licensees to the department or the department's designee upon reasonable notice. Failure to pay these costs in accordance with a departmental directive shall be grounds for revocation of any license issued under this chapter.~~

T.C.A. §§ 4-3-203 and ~~43-26-103~~ Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.06 Movement Permits is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

Rule 0080-06-28-.06 Movement Permits.

(1) ~~All movement of industrial hemp must comply with acquisition and distribution requirements of this chapter. Out-of-state movement of industrial hemp may occur only by lawful passage through states that have authorized the possession and distribution of industrial hemp.~~ Licensees shall not move rooted hemp plants without a valid movement permit issued by the department. Licensees also shall not move any hemp to any one who treats or transforms harvested hemp for distribution in commerce without a valid movement permit issued by the department.

~~(2) Any person may move nonviable industrial hemp or hemp products without a movement permit.~~

~~(3) Only licensees may move viable industrial hemp or hemp products. Licensees shall not move viable industrial hemp without a valid movement permit issued by the department.~~

~~(4)~~(2) ~~When required by this rule, industrial~~ hHemp movement permits are required per vehicle per day ~~the vehicle is used to move industrial hemp or hemp products. Movement permits authorize only the movement that occurs within the state~~. To receive a movement permit, the licensee shall submit a movement permit request on forms provided by the department, which may require:

(a) The ~~industrial~~ hemp license number for which movement is requested;

(b) Origin and destination of movement;

(c) Date and time of intended movement;

(d) ~~Description of industrial hemp parts or hemp products to be moved;~~

~~(e)~~ Weight, volume, or number of units of material to be moved;

~~(f) Names of individuals moving the material; and,~~

~~(g) Make, model, color, and license plant number of vehicle(s) to be used in moving the material.~~

(5) ~~Requests for movement permits must be submitted to the department at least three business days prior to movement.~~

~~(6)~~ The department may deny any application for a movement permit that is not completed in accordance with this rule.

(~~7~~6) Each cannabis plant or plant product moved not in conformity with this rule shall constitute a separate violation of this chapter.

T.C.A. §§ 4-3-203 and ~~43-26-103~~ Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.07 Sampling and Inspections is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

Rule 0080-06-28-.07 Sampling and Inspections.

(1) Scope ~~of inspections~~. The department may enter during normal business hours any location, licensed by the department, for purposes of inspecting any cannabis plant, record, or other material as necessary for the efficient enforcement of the Act and this chapter. ~~Inspections of processors under this chapter are~~

~~limited to sampling of cannabis plants or plant products and observation of record keeping requirements; the inspections do not evaluate or endorse in any manner the chemical or physical processes used by the processor or the safety of those processes in the workplace.~~

(2) Sampling. The department may conduct sampling of any cannabis plant or other material at a location licensed by the department. A sample collected according to uniform protocols approved by the commissioner shall be deemed representative of the location, growing area, or lesser lot from which the sample was obtained. After the department obtains a sample, licensees shall not move any cannabis plant ~~or plant product~~ from the area represented by the sample until the department determines the sample tests no higher than 0.3% THC on a dry mass basis.

(3) Testing protocols. The procedure employed by the Tennessee Department of Agriculture defines the preparation of hemp samples for the determination of THC and is conducted in a manner similarly reliable to post-decarboxylation. The preparation steps include extraction and quantitation of cannabinoids. Cannabinoid quantitation is accomplished using liquid chromatography tandem mass spectrometry (LC-MS/MS). Cannabinoids that can be analyzed by this procedure include delta-9-tetrahydrocannabinol (Δ^9THC), tetrahydrocannabinolic acid A (THCA), cannabidiol (CBD), and cannabinol (CBN).

The THC content of hemp samples is determined on a dry weight basis. Cannabinoids are extracted from test portions of prepared hemp samples by adding a suitable solvent and shaking the samples on a horizontal orbital shaker. Extracts are subsequently centrifuged, and an aliquot of the supernatant is taken for dilution. A portion of this diluted extract is transferred into an autosampler vial for analysis by LC-MS/MS. Quality Control samples are analyzed alongside unknown samples to demonstrate statistical control of the procedure.

(4) Test results exceeding 0.3% THC. Any sample test result higher than 0.3% THC concentration on a dry mass basis shall be conclusive evidence that one or more cannabis plants or plant products from the area ~~represented by the sample~~ sampled contain a THC concentration in excess of that allowed under the Act and shall be grounds for ~~issuance of~~ stop movement and destruction orders for any plant~~s or materials~~ within the ~~area represented by the sample~~ sampled area.

(4)(5) Destruction of any plants or plant products under this rule shall be performed in accordance with a directive from the department, which may include destruction by any means necessary for reasonable assurance that all cannabis plants exceeding allowable limits of THC ~~concentration~~ are destroyed, e.g. by removal and incineration, field burning, deep burial, composting, or other means ~~authorized~~ approved by the department. Any licensee aggrieved by an order issued under this chapter may petition the department in writing for review of the order under the Uniform Administrative Procedures Act. ~~Petitions for review of the order must be submitted to the department in writing within ten days of the order being issued.~~ If no petition is filed with the department within ~~the ten day period,~~ ten days of the department's order, the ~~department's~~ order shall become final and will not be subject to review. ~~For purposes of any hearing under this chapter, any cannabis plant grown or processed by a licensee under the department's industrial hemp pilot program shall be considered property of the department for researching the growth, cultivation, and marketability of industrial hemp and not a legal right, duty, or privilege of the licensee.~~

(~~5~~)(6) Laboratory analysis costs. Licensees shall pay a Tier 4 laboratory analysis fee under T.C.A. §43-1-703(f) for each sample collected by the department.

T.C.A. §§ 4-3-203 and ~~43-26-103~~ Section 12, Public Chapter 87 of 2019.

Rule 0080-06-28-.09 Violations is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

Rule 0080-06-28-.09 Violations.

(1) ~~Unauthorized possession of rooted industrial hemp shall be considered possession of marijuana when distributed or possessed by any person not authorized under the Act or this chapter and referred to law enforcement authorities.~~

~~(2)~~ In addition to other requirements of this chapter, licensees shall:

(a) Possess or grow rooted, hemp only within a licensed growing area or under immediate transport to a licensed growing area; and,

(b) Upon departmental request ~~by the department~~, provide full and accurate information regarding the person's acquisition, cultivation ~~or processing, and distribution~~ of ~~industrial~~ hemp

~~(b) Comply with any order issued by the department regarding cultivation, processing, distribution, research, or destruction of industrial hemp;~~

~~(c) Pay all fees associated with licensure, participation in the department's industrial hemp pilot program, and costs arising out of procurement, distribution, sampling, or destruction of cannabis plants or plant products;~~

~~(d) Pay all required fees within the time prescribed by the Act or this chapter. If time for payment of costs and fees is not prescribed by the Act or this chapter, licensees shall pay such fees upon reasonable notice issued by the department; and,~~

~~(e) Participants in the department's industrial hemp pilot program shall conduct themselves in a professional manner befitting a representative of the department~~.

~~(3)~~(2) In addition to other requirements of this chapter, licensees shall not:

(a) ~~Knowingly provide any false, misleading, or incorrect information regarding the person's cultivation or processing of cannabis plants;~~ Be convicted of any drug-related felony offense in any state or federal jurisdiction within the previous ten years. Violation of this provision is grounds for immediate denial or revocation of any license issued under this chapter;

(b) Cultivate, ~~process,~~ move, or distribute cannabis plants other than industrial hemp;

(c) Interfere with an authorized representative of the department in the performance of his duties;

(d) Market or represent ~~industrial~~ hemp or hemp products to be marijuana or any illicit substance in any form; or,

(e) Violate any state or federal quarantine~~, stop movement order,~~ or ~~destruction~~ order issued by the department~~;~~

~~(f) Violate any memorandum of understanding to which the licensee is a party;~~

~~(g) Violate any applicable seed or use agreement;~~

~~(h) Move industrial hemp in conflict with any movement permit issued by the department; or,~~

~~(i) Cultivate or process industrial hemp in an area not licensed by the department~~.

~~(4)~~(3) A person is responsible for violations of the Act or this chapter when committed by either the person or his agent.

~~(5)~~(4) Each violation of the Act or this chapter is grounds for issuance of stop movement or destruction orders against any cannabis plant held by the violator or his agent; denial or revocation of any license issued under this chapter; actions for injunction; and imposition of civil penalties or criminal charges against the violator.

Authority: T.C.A. §§ 4-3-203 and 43-26-103.

Repeal

Rule 0080-06-28-.04 Acquisition of Seed and Propagules is repealed in its entirety.

~~0080-06-28-.04 Acquisition of Seed and Propagules.~~

~~(1) Acquisition.~~

~~(a) Each licensee shall be responsible for acquisition and transport of seed or propagules used for growth of industrial hemp. Prior to acquisition of propagating material, the licensee shall submit on forms provided by the department a seed acquisition request, which may require:~~

~~1. A copy of the industrial hemp license for which the propagating material is requested;~~

~~2. The scientific or common name of the variety requested;~~

~~3. The name, address, telephone number, and email address of the person providing the requested material;~~

~~4. Evidence that the source of the variety is:~~

~~(i) A university;~~

~~(ii) A state department of agriculture authorized to conduct an industrial hemp pilot program. If the source is a pilot program participant in this or another state, a copy of that participant's industrial hemp license is sufficient to fulfill this requirement; or,~~

~~(iii) A lawful vendor of industrial hemp in the jurisdiction where it is distributed;~~

~~5. The form of material to be acquired (e.g. seed, seedlings, cuttings, etc.);~~

~~6. The quantity in pounds of seed or number of propagules to be acquired;~~

~~7. Test results from an ISO-accredited or state department of agriculture approved third-party laboratory certifying that material from the variety has been shown to contain no more than 0.3% THC on a dry mass basis; and,~~

~~8. Evidence that the licensee is authorized to propagate industrial hemp from the material, if applicable.~~

~~(b) Completion of a seed acquisition request for a landrace variety shall fulfill its registration requirement under the Act.~~

~~(c) Prior to cultivation by any licensee, all propagating material acquired through the department's controlled substance registration or acquired for growth by non-university licensees shall first be inventoried by the department at: Tennessee Department of Agriculture, Industrial Hemp Pilot Program, 436 Hogan Road, Nashville, Tennessee 37220.~~

~~(d) Acquisition of all industrial hemp shall comply with movement requirements of this chapter.~~

~~(2) Costs. Licensees shall pay all costs incurred for acquisition and delivery of any seed or propagules, including but not limited to costs for procurement, taxes, shipping, and customs brokerage. These costs may be incurred in the sole discretion of the department and are payable by licensees to the department or the department's designee upon reasonable notice. Failure to pay these costs in accordance with a departmental directive shall be grounds for cancellation of any seed or propagule procurement order and revocation of any license issued under this chapter.~~

(3) Pilot program design. The department may select or limit any propagating material used in the industrial hemp pilot program for compliance with this chapter or for the improvement or design of agricultural research related to industrial hemp and its growth, cultivation, or marketability.

(4) Use agreements. Licensees shall not use or possess seed or propagules unless expressly authorized by and in conformity with any applicable use agreement with the mother plant's seed breeder.

(5) Each cannabis plant cultivated from material acquired not in conformance with this rule shall constitute a separate violation of this chapter.

Authority: T.C.A. §§ 4-3-203 and 43-26-103.

Rule 0080-06-28-.08 Agronomic Reports is repealed in its entirety.

0080-06-28-.08 Agronomic Reports.

(1) Prior to the end of each licensure year or upon reasonable notice from the department, each non-university licensee shall submit a completed agronomic report on forms provided by the department. Reports may require information on various points of research interest and shall include description of any known commercial distributions of industrial hemp or hemp products.

(2) University licensees are not required to submit an agronomic report.

Authority: T.C.A. §§ 4-3-203 and 43-26-103.

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of an emergency rule(s), lawfully promulgated and adopted.

Date: 5/21/19

Signature:

Name of Officer: Charles Hatcher, DVM

Title of Officer: Commissioner

K. DAVID WADDELL
STATE OF TENNESSEE NOTARY PUBLIC
WILLIAMSON COUNTY

Subscribed and sworn to before me on: 5/21/19

Notary Public Signature:

My commission expires on: 10/11/21

Agency/Board/Commission: Department of Agriculture

Rule Chapter Number(s): 0080-06-28.01 through -.09

All emergency rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

5/30/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/3/19

Effective for: 180 *days

Effective through: 11/30/19

** Emergency rule(s) may be effective for up to 180 days from the date of filing.*

SECRETARY OF STATE
PUBLICATIONS
2019 JUN -3 AM 9:30

Tre Hargett
Secretary of State

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Agriculture
DIVISION:	Consumer and Industry Services
SUBJECT:	Civil Penalties, Health Requirements for Admission and Transportation of Livestock and Poultry, Dogs and Cats, and Dogs and Cats Dealers
STATUTORY AUTHORITY:	Tennessee Code Annotated, Sections 44-2-102 and 44-17-118
EFFECTIVE DATES:	September 8, 2019 through June 30, 2020
FISCAL IMPACT:	Minimal
STAFF RULE ABSTRACT:	This rulemaking hearing rule is intended to clarify requirements for import, export, and movement of dogs and cats within the state and for licensure as a dog and cat dealer. The rulemaking hearing rule also removes the following current requirements as unnecessary or unduly burdensome: health certificates for dogs and cats imported into the state, and tuberculosis testing and microchipping of primates moved within the state.

Public Hearing Comments

The Department of Agriculture held a public hearing on October 30, 2018. Jay Miller served as hearing officer for the Rulemaking Hearing concerning 0080-01-03 Civil Penalties; 0080-02-01 Health Requirements for Admission and Transportation of Livestock and Poultry; 0080-02-12 Dogs and Cats; and 0080-02-15 Dog and Cat Dealers. No questions or comments from the public were presented at the hearing.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

(1) Type or types of small business subject to the proposed rule that would bear the cost of and/or directly benefit from the proposed rule:

Persons who sell or offer for sale dogs and cats for commercial or research purposes are subject to the proposed rule.

(2) Identification and estimate of the number of small businesses subject to the proposed rule:

Based on records of the dog and cat dealer program reinstituted under the department of agriculture, approximately 10 dog and cat dealers are expected to be subject to the proposed rule.

(3) Projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record:

The proposed rule change is not expected to increase administrative costs of affected firms.

(4) Statement of the probable effect on impacted small businesses and consumers:

This rule does not significantly alter substantive regulatory requirements of dog and cat dealers. Rather it clarifies to whom the rule applies. The rule also lessens import and export requirements for dogs, cats, and primates.

(5) Description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and/or objectives of the proposed rule that may exist, and to what extent such alternative means might be less burdensome to small business:

No less burdensome method for achieving this purpose is possible.

(6) Comparison of the proposed rule with any federal or state counterparts:

This rule is consistent with federal requirements for the care, housing, and transportation of dogs and cats under 9 C.F.R. part 3.

(7) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Exemption of small businesses from this rule would undo the focus of the rule aimed at proper care of animals in commerce and may expose the state to greater risks associated with dog and cat disease.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

No impact is expected on local governments.

JAI TEMPLETON
COMMISSIONER

TENNESSEE DEPARTMENT OF AGRICULTURE

DIVISION OF CONSUMER & INDUSTRY SERVICES

HAND DELIVERY

November 20, 2018

Department of State
Division of Publications
8th Floor Snodgrass/TN Tower
312 Rosa L. Parks
Nashville, Tennessee 37243

RE: Rulemaking Hearing October 30, 2018

I served as hearing officer for a Rulemaking Hearing on October 30, 2018, concerning 0080-01-03 Civil Penalties; 0080-02-01 Health Requirements for Admission and Transportation of Livestock and Poultry; 0080-02-12 Dogs and Cats; and 0080-02-15 Dog and Cat Dealers. The public presented no questions or comments during the hearing.

Sincerely,

Jason B. Miller, Esq. /s/
Tennessee Department of Agriculture
Division of Consumer & Industry Services

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This rule is intended to clarify requirements for import, export, and movement of dogs and cats within the state and for licensure as a dog and cat dealer. The rule also removes the following current requirements as unnecessary or unduly burdensome: health certificates for dogs and cats imported into the state, and tuberculosis testing and microchipping of primates moved within the state.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. §§ 44-2-102 and 44-17-118 authorize the commissioner of agriculture to promulgate rules necessary to the efficient administration of laws governing animal health and dog and cat dealers.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Persons who import, export, sell or offer for sale dogs and cats are most directly affected by this rule. No public comments have been received urging adoption or rejection of this rule. No public comments have been received that would indicate the rules are not easily understood; unnecessary to the public health, safety, and welfare; arbitrary or unreasonable; or adverse to business or individuals.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

State v. Anderson, 243 S.W. 768 (Tenn. 1920) (licensing requirements are constitutionally valid for the keeping of dogs); *Griffin v. State*, 595 S.W.2d 96 (Tenn. Cr. App. 1980) (regulations promulgated by the commissioner of agriculture to prevent spread of disease in domestic animals are reasonable exercises of power and courts will not disturb reasonable decisions of agencies with expertise, experience and knowledge in the appropriate field).

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

The estimated effect on departmental revenues and expenditures resulting from this rule is minimal.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

David Waddell, Administrative Director, Tennessee Department of Agriculture, Division of Consumer & Industry Services

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

David Waddell, Administrative Director, Tennessee Department of Agriculture, Division of Consumer & Industry Services

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

436 Hogan Road, Nashville, Tennessee 37220; (615) 837-5331; david.waddell@tn.gov

(l) Any additional information relevant to the rule proposed for continuation that the committee requests.

Department of State
Division of Publications
312 Rosa L. Parks Ave., 8th Floor, Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615-741-2650
Email: publications.information@tn.gov

For Department of State Use Only

Sequence Number: 06-12-19
Rule ID(s): 8967-8970
File Date: 6/10/19
Effective Date: 9/9/19

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Department of Agriculture
Division:	Consumer & Industry Services
Contact Person:	Jay Miller
Address:	Post Office Box 40627, Nashville, Tennessee
Zip:	37204
Phone:	(615) 837-5341
Email:	jay.miller@tn.gov

Revision Type (check all that apply):

x Amendment
x New
x Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0080-01-03	Civil Penalties
Rule Number	**Rule Title**
0080-01-03-.01	Civil Penalties

Chapter Number	**Chapter Title**
0080-02-01	Health Requirements for Admission and Transportation of Livestock and Poultry
Rule Number	**Rule Title**
0080-02-01-.01	Definitions
0080-02-01-.11	Repeal
0080-02-01-.18	Repeal

Chapter Number	**Chapter Title**
0080-02-12	Dogs and Cats
Rule Number	**Rule Title**
0080-02-12-.01	Scope
0080-02-12-.02	Definitions
0080-02-12-.03	Transport
0080-02-12-.04	Disease Programs and Testing Requirements

0080-02-12-.05	Quarantine Areas
0080-02-12-.06	Orders
0080-02-12-.07	Violations

Chapter Number	**Chapter Title**
0080-02-15	Dog and Cat Dealers
Rule Number	**Rule Title**
0080-02-15-.01	Scope
0080-02-15-.02	Definitions
0080-02-15-.03	License Application and Fees
0080-02-15-.04	Reports and Records
0080-02-15-.05	Animal Identification
0080-02-15-.06	Transport
0080-02-15-.07	Inspections
0080-02-15-.08	Orders
0080-02-15-.09	Violations
0080-02-15-.10	Repeal
0080-02-15-.11	Repeal

New

Chapter 0080-02-12
~~REGULATIONS FOR FEEDER SWINE~~Dogs and Cats

0080-02-12-.01 ~~Repealed~~ Scope.

(1) This chapter applies to any person who owns or possesses dogs or cats within the state or exported from the state.

(2) The department is authorized to enter any premises or conveyance reasonably believed to pose an animal disease concern and to order the examination, testing, vaccination, destruction, and sanitary disposition of any animal within the state in accordance with the Act and this chapter.

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

0080-02-12-.02 Definitions.

(1) Terms in this chapter share those meanings of terms set forth in T.C.A. §44-2-101.

(2) When used in this chapter, unless the context requires otherwise:

(a) Act means title 44, chapter 2, part 1 of Tennessee Code;

(b) Move, ship, transport, or words of similar import mean to relocate in any manner an item from one real property to another; and,

(c) Vaccine, vaccination, or words of similar import mean any preparation used as a preventative inoculation to confer immunity against a specific disease, administered under direction of a licensed veterinarian in accordance with customary practices of veterinary medicine.

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

0080-02-12-.03 Transport.

(1) Import.

(a) Dogs. If a dog is older than three months of age, its import must be accompanied by proof of current rabies vaccination for the animal.

(b) Cats. If a cat is older than six months of age, its import must be accompanied by proof of current rabies vaccination for the animal.

(c) Import of any dog or cat into the state must comply with current federal movement requirements compiled at 9 C.F.R. §§ 3.13 – 3.19.

(d) A person shall not import any dog or cat infected with disease unless accompanied by written authorization from the state veterinarian.

(e) A person shall not import any dog or cat that originated from or is shipped through a quarantine area unless accompanied by written authorization from the state veterinarian.

(f) Absent extraordinary circumstances, the state veterinarian will not authorize import of diseased or quarantined dogs or cats except for research, destruction, or emergency purposes.

(2) Export of any dog or cat must comply with current federal movement requirements compiled at 9 C.F.R. §§ 3.13 – 3.19 and state regulatory requirements for any state through which the export passes.

(3) Movement within the state. [RESERVED]

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

0080-02-12-.04 Disease Programs and Testing Requirements.

(1) The department deems the following diseases in dogs and cats to be subject to state control programs:

(a) Rabies; and,

(b) Any disease for which the federal government has established a control program in dogs or cats.

(2) The department may order the destruction of any animal infected with a disease identified under this rule.

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

0080-02-12-.05 Quarantine Areas.

(1) Designated quarantine areas. [RESERVED]

(2) Temporary quarantine of non-designated areas.

(a) The department may temporarily quarantine any non-designated area upon written notice to its owner or upon general publication if:

1. Significant symptoms or indicators of disease commonly affecting dogs or cats are observed within the area;

2. Dogs or cats infected with or exposed to disease are shipped into the area; or,

3. Any dog or cat shipped into the area shares a common container, vessel, producer, or shipper with dogs or cats found to be infected with disease.

(b) The department may lift the temporary quarantine of a non-designated area if after due inspection the suspected disease is not observed within the area and there exists no reasonable cause to continue the quarantine.

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

0080-02-12-.06 Orders.

(1) The department may issue an order for the stop movement, testing, treatment, or destruction of any dog or cat within the state that is found to be diseased or moved in violation of the Act or this chapter.

(2) An order may be lifted by the department when the dog or cat that is subject to the order is tested, treated, returned, or destroyed as directed by the department at the owner's or possessor's expense. If the dog or cat is not tested, treated, or returned as ordered by the department within 10 days of the order being issued, the department may order the animal confiscated or destroyed in accordance with the Act and this chapter at the owner's expense.

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

0080-02-12-.07 Violations.

(1) A person is responsible for violation of the Act or this chapter when committed by either the person or his agent.

(2) Each violation of the Act, this chapter, or departmental order is grounds for issuance of stop movement orders, denial or revocation of any license issued by the department; actions for injunction; confiscation or destruction of animals in accordance with the Act and this chapter; and imposition of civil penalties or criminal charges against the violator.

(3) The department may refer to law enforcement officials for animal cruelty investigation any person who unreasonably fails to provide appropriate care for dogs or cats in his possession.

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

Amendments

Chapter 0080-01-03
Civil Penalties

Subparagraph 0080-01-03-.01(1)(n) Prevention and Treatment of Animal Diseases; Tennessee Garbage Feeding Law; Registration of Cattle Brands; Tennessee Livestock Dealer Act; and Livestock Sales is amended by deleting the subparagraph in its entirety and substituting instead the following language so that, as amended, the subparagraph shall read:

(n) Prevention and Treatment of Animal Diseases; Tennessee Garbage Feeding Law; Registration of Cattle Brands; Tennessee Livestock Dealer Act; and Livestock Sales.

1. T.C.A. §44-2-103. Minimum penalty $0. Maximum penalty $500.

2. T.C.A. §44-2-404. Minimum penalty $0. Maximum penalty $500.

3. T.C.A. §44-7-206. Minimum penalty $0. Maximum penalty $500.

4. T.C.A. §44-7-208. Minimum penalty $0. Maximum penalty $500.

5. T.C.A. §44-7-403. Minimum penalty $0. Maximum penalty $500.

6. T.C.A. §44-10-203. Minimum penalty $0. Maximum penalty $500.

7. T.C.A. §44-10-206. Minimum penalty $0. Maximum penalty $500.

8. T.C.A. §44-11-102. Minimum penalty $0. Maximum penalty $500.

9. T.C.A. §44-11-105. Minimum penalty $0. Maximum penalty $500.

10. T.C.A. §44-11-106. Minimum penalty $0. Maximum penalty $500.

11. T.C.A. §44-11-107. Minimum penalty $0. Maximum penalty $500.

12. T.C.A. §44-11-108. Minimum penalty $0. Maximum penalty $500.

13. T.C.A. §44-11-109. Minimum penalty $0. Maximum penalty $500.

14. Tenn. Comp. R. & Regs. 0080-02-01-.02. Minimum penalty $0. Maximum penalty $500.

15. Tenn. Comp. R. & Regs. 0080-02-01-.03. Minimum penalty $0. Maximum penalty $500.

16. Tenn. Comp. R. & Regs. 0080-02-01-.04. Minimum penalty $0. Maximum penalty $500.

17. Tenn. Comp. R. & Regs. 0080-02-01-.05. Minimum penalty $0. Maximum penalty $500.

18. Tenn. Comp. R. & Regs. 0080-02-01-.06. Minimum penalty $0. Maximum penalty $500.

19. Tenn. Comp. R. & Regs. 0080-02-01-.07. Minimum penalty $0. Maximum penalty $500.

20. Tenn. Comp. R. & Regs. 0080-02-01-.08. Minimum penalty $0. Maximum penalty $500.

21. Tenn. Comp. R. & Regs. 0080-02-01-.09. Minimum penalty $0. Maximum penalty $500.

22. Tenn. Comp. R. & Regs. 0080-02-01-.10. Minimum penalty $0. Maximum penalty $500.

~~23. Tenn. Comp. R. & Regs. 0080-02-01-.11. Minimum penalty $0. Maximum penalty $500.~~

~~24.~~ Tenn. Comp. R. & Regs. 0080-02-01-.12. Minimum penalty $0. Maximum penalty $500.

~~25~~24. Tenn. Comp. R. & Regs. 0080-02-01-.14. Minimum penalty $0. Maximum penalty $500.

~~26~~25. Tenn. Comp. R. & Regs. 0080-02-01-.17. Minimum penalty $0. Maximum penalty $500.

~~27. Tenn. Comp. R. & Regs. 0080-02-01-.18. Minimum penalty $0. Maximum penalty $500.~~

~~28~~26. Tenn. Comp. R. & Regs. 0080-02-03-.01. Minimum penalty $0. Maximum penalty $500.

~~29~~27. Tenn. Comp. R. & Regs. 0080-02-03-.03, Minimum penalty $0. Maximum penalty $500.

~~30~~28. Tenn. Comp. R. & Regs. 0080-02-03-.04. Minimum penalty $0. Maximum penalty $500.

~~31~~29. Tenn. Comp. R. & Regs. 0080-02-03-.05. Minimum penalty $0. Maximum penalty $500.

~~32~~30. Tenn. Comp. R. & Regs. 0080-02-03-.06. Minimum penalty $0. Maximum penalty $500.

~~33~~31. Tenn. Comp. R. & Regs. 0080-02-03-.07. Minimum penalty $0. Maximum penalty $500.

~~34~~32. Tenn. Comp. R. & Regs. 0080-02-03-.08. Minimum penalty $0. Maximum penalty $500.

~~35~~33. Tenn. Comp. R. & Regs. 0080-02-03-.09. Minimum penalty $0. Maximum penalty $500.

~~36~~34. Tenn. Comp. R. & Regs. 0080-02-03-.10. Minimum penalty $0. Maximum penalty $500.

~~37~~35. Tenn. Comp. R. & Regs. 0080-02-03-.11. Minimum penalty $0. Maximum penalty $500.

~~38~~36. Tenn. Comp. R. & Regs. 0080-02-04-.02. Minimum penalty $0. Maximum penalty $500.

~~39~~37. Tenn. Comp. R. & Regs. 0080-02-05-.03. Minimum penalty $0. Maximum penalty $500.

~~40~~38. Tenn. Comp. R. & Regs. 0080-02-05-.04. Minimum penalty $0. Maximum penalty $500.

~~41~~39. Tenn. Comp. R. & Regs. 0080-02-05-.05. Minimum penalty $0. Maximum penalty $500.

~~42~~40. Tenn. Comp. R. & Regs. 0080-02-05-.06. Minimum penalty $0. Maximum penalty $500.

~~43~~41. Tenn. Comp. R. & Regs. 0080-02-05-.07. Minimum penalty $0. Maximum penalty $500.

~~44~~42. Tenn. Comp. R. & Regs. 0080-02-05-.08. Minimum penalty $0. Maximum penalty $500.

~~45~~43. Tenn. Comp. R. & Regs. 0080-02-05-.09. Minimum penalty $0. Maximum penalty $500.

~~46~~44. Tenn. Comp. R. & Regs. 0080-02-05-.10. Minimum penalty $0. Maximum penalty $500.

~~47~~45. Tenn. Comp. R. & Regs. 0080-02-05-.12. Minimum penalty $0. Maximum penalty $500.

~~48~~46. Tenn. Comp. R. & Regs. 0080-02-06-.01. Minimum penalty $0. Maximum penalty $500.

~~49~~47. Tenn. Comp. R. & Regs. 0080-02-08-.01. Minimum penalty $0. Maximum penalty $500.

~~50~~48. Tenn. Comp. R. & Regs. 0080-02-08-.02. Minimum penalty $0. Maximum penalty $500.

~~51~~49. Tenn. Comp. R. & Regs. 0080-02-08-.03. Minimum penalty $0. Maximum penalty $500.

~~52~~50. Tenn. Comp. R. & Regs. 0080-02-08-.04. Minimum penalty $0. Maximum penalty $500.

~~53~~51. Tenn. Comp. R. & Regs. 0080-02-08-.05. Minimum penalty $0. Maximum penalty $500.

~~54~~52. Tenn. Comp. R. & Regs. 0080-02-08-.07. Minimum penalty $0. Maximum penalty $500.

~~55~~53. Tenn. Comp. R. & Regs. 0080-02-08-.10. Minimum penalty $0. Maximum penalty $500.

~~56~~54. Tenn. Comp. R. & Regs. 0080-02-09-.03. Minimum penalty $0. Maximum penalty $500.

~~57~~55. Tenn. Comp. R. & Regs. 0080-02-10-.01. Minimum penalty $0. Maximum penalty $500.

~~58~~56. Tenn. Comp. R. & Regs. 0080-02-10-.02. Minimum penalty $0. Maximum penalty $500.

~~59~~57. Tenn. Comp. R. & Regs. 0080-02-10-.03. Minimum penalty $0. Maximum penalty $500.

~~60~~58. Tenn. Comp. R. & Regs. 0080-02-10-.04. Minimum penalty $0. Maximum penalty $500.

~~61~~59. Tenn. Comp. R. & Regs. 0080-02-11-.01. Minimum penalty $0. Maximum penalty $500.

60. Tenn. Comp. R. & Regs. 0080-02-12-.03. Minimum penalty $0. Maximum penalty $500.

~~62~~61. Tenn. Comp. R. & Regs. 0080-02-13-.01. Minimum penalty $0. Maximum penalty $500.

~~63~~62. Tenn. Comp. R. & Regs. 0080-02-14-.02. Minimum penalty $0. Maximum penalty $500.

~~64~~63. Tenn. Comp. R. & Regs. 0080-02-14-.04. Minimum penalty $0. Maximum penalty $500.

~~65~~64. Standing orders of the state veterinarian. Minimum penalty $0. Maximum penalty $500.

Subparagraph 0080-01-03-.01(1)(r) Dogs and Cats is amended by deleting the subparagraph in its entirety and substituting instead the following language so that, as amended, the subparagraph shall read:

(r) Dog~~s~~ and Cat~~s~~ Dealers.

1. ~~T.C.A. §44-17-104. Minimum penalty $0. Maximum penalty $500.~~T.C.A. §44-17-103. Minimum penalty $0. Maximum penalty $500.

2. T.C.A. §44-17-105. Minimum penalty $0. Maximum penalty $500.

3. T.C.A. §44-17-107. Minimum penalty $0. Maximum penalty $500.

~~3~~4. T.C.A. §44-17-108. Minimum penalty $0. Maximum penalty $500.

~~4~~5. T.C.A. §44-17-109. Minimum penalty $0. Maximum penalty $500.

~~5~~6. T.C.A. §44-17-110. Minimum penalty $0. Maximum penalty $500.

~~6~~7. T.C.A. §44-17-111. Minimum penalty $0. Maximum penalty $500.

~~7~~8. T.C.A. §44-17-112. Minimum penalty $0. Maximum penalty $500.

~~8~~9. T.C.A. §44-17-113. Minimum penalty $0. Maximum penalty $500.

~~9~~10. T.C.A. §44-17-114. Minimum penalty $0. Maximum penalty $500.

~~10. T.C.A. §44-17-115. Minimum penalty $0. Maximum penalty $500.~~

11. ~~T.C.A. §44-17-117. Minimum penalty $0. Maximum penalty $500.~~Tenn. Comp. R. & Regs. 0080-02-15-.03. Minimum penalty $0. Maximum penalty $500.

12. ~~T.C.A. §44-17-118. Minimum penalty $0. Maximum penalty $500.~~Tenn. Comp. R. & Regs. 0080-02-15-.04. Minimum penalty $0. Maximum penalty $500.

13. Tenn. Comp. R. & Regs. 0080-02-15-.06. Minimum penalty $0. Maximum penalty $500.

14. Tenn. Comp. R. & Regs. 0080-02-15-.09. Minimum penalty $0. Maximum penalty $500.

Authority: T.C.A. §§ 4-3-203 and 4-3-204.

Chapter 0080-02-01
Health Requirements for Admission and Transportation of Livestock and Poultry

Subparagraph 0080-02-01-.01(1)(l) Domestic Animals is amended by deleting the phrase "dogs, cats," so that, as amended, the subparagraph shall read:

(l) Domestic Animals – Shall include cattle, bison, horses, mules, asses, sheep, goats, swine, ~~dogs, cats,~~ avian species, and all Class III animals as defined by T.C.A. §70-4-403(3).

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

Chapter 0080-02-15
Dog and Cat Dealers

Rule 0080-02-15-.01 Application is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.01 ~~Application~~Scope.

(1) ~~Any person operating or desiring to operate as a dealer, except persons who are exempted by this chapter must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form furnished by the Commissioner. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the Commissioner.~~ This chapter applies to any person who buys or sells dogs or cats for resale in commerce; any person who sells dogs or cats at a flea market; any person who provides services in commerce for dogs or cats used for research purposes; and any person who conducts research on dogs or cats.

(2) ~~Any person operating or desiring to operate as a dealer at more than one physical location must apply for and obtain a separate license for each location.~~ Persons licensed under this chapter shall be responsible for dealer operations under their license until it expires or until the department receives written notification from the licensee desiring to terminate the license. The department shall not refund fees for early termination of any license issued under this chapter.

(3) ~~The following persons are exempt from the licensing requirements of this part:~~ Licenses issued under this chapter are not transferable from person to person or location to location.

~~(a) Any person who buys or sells fewer than twenty-five (25) dogs or cats in any calendar year for resale within the State of Tennessee or for transportation out of the state.~~

~~(b) Any person who is a not-for-profit corporation or government agency.~~

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.02 Fees is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.02 ~~Fees~~ Definitions.

(1) ~~Each applicant for a license under Tenn. Code Ann. § 44-17-101 et seq. shall pay the appropriate application fee and annual renewal fee as set forth below~~ Terms in this chapter share those meanings of terms set forth in T.C.A. §44-17-102.

~~(a) Transactions of 25 to 50 animals per year: one hundred and twenty-five dollars ($125.00)~~

~~(b) Transactions of 51 to 150 animals per year: two hundred and fifty dollars ($250.00)~~

~~(c) Transactions of 151 to 300 animals per year: five hundred dollars ($500.00)~~

~~(d) Transactions of 301 to 500 animals per year: seven hundred and fifty dollars ($750.00)~~

~~(e) Transactions of more than 500 animals per year: one thousand dollars ($1,000.00)~~

(2) ~~The number of transactions used to determine the amount of the application fee and the annual license renewal fee under this section shall be the number of dogs and cats bought and sold during the last calendar year of the dealers operation. In the case of a new applicant for a license who has no record for~~

~~the past year, the applicant shall make a reasonable estimate of the number of transactions anticipated during the first year of operation. This estimate will be considered in determining the license fee for the first year.~~ When used in this chapter, unless the context requires otherwise:

(a) 25 or more dogs or cats within the definition of "dealer" under the Act refers to one cumulative total of animals and not separate totals for each type of animal. For example a person who buys 20 dogs and 20 cats in the same calendar year for resale within the state is a dog and cat dealer;

(b) Act means title 44, chapter 17, part 1 of Tennessee Code;

(c) Buying or selling for resale means a non-breeder's sale of a dog or cat in commerce, within 60 days of acquiring the animal;

(d) For research purposes means in commerce with a research facility;

(e) Incorporated entity means any entity that is not an individual;

(f) License means a valid license or registration issued under this chapter;

(g) Move, distribute, transport, or words of similar import mean to relocate in any manner an item from one real property to another;

(h) Sample or sampling means any biological material taken from an animal by the department or under direction of a duly authorized federal or state animal health official;

(i) School, hospital, laboratory, institution, organization or person within the definition of "research facility" under the Act means any person having physical research facilities within the state; and,

(j) Vaccine, vaccination, or words of similar import mean any preparation used as a preventative inoculation to confer immunity against a specific disease, administered under direction of a licensed veterinarian in accordance with customary practices of veterinary medicine.

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.03 Conditions for Granting a License is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.03 ~~Conditions for Granting a License~~ License Application and Fees.

(1) ~~The Commissioner shall issue a license, renew a license or continue a license if the Commissioner is satisfied that the applicant meets the following conditions:~~ All persons to whom these rules apply shall obtain a license in accordance with this chapter prior to conducting any activity for which a license is required.

~~(a) Each applicant must demonstrate that his or her premises and any animals, facilties, vehicles, equipment, or other premises used or intended for use in the business comply with the standards set forth in 9 CFR Part 3. Each applicant for an initial license or license renewal must make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection during business hours and at other times mutually agreeable to the applicant and the Commissioner, to ascertain the applicant's compliance with the standards and regulations.~~

~~(b) In the case of an application for an initial license, the applicant must demonstrate compliance with the standards, as required in paragraph (1) of this section, before the Commissioner will issue a license. If the applicant's animals, premises, facilities, vehicles, equipment, other premises, or records do not meet the requirements of this chapter, the Commissioner will advise the applicant of existing deficiencies and the corrective measures that must be completed to come into compliance with the regulations and standards. The applicant will have two more chances to demonstrate his or her compliance with the regulations and standards through re-inspection by~~

~~the Commissioner.~~

~~If the applicant fails the third inspection he or she will forfeit the application fee and cannot re-apply for a license for a period of six (6) months following the third inspection. Issuance of the license shall be denied until the applicant demonstrates upon inspection that the animals, premises, facilities, vehicles, equipment, other premises and records are in compliance with all regulations and standards in this chapter.~~

(2) A dog and cat dealer license is not required for:

(a) Import, export, or transport of dogs or cats for non-commercial purposes;

(b) Governmental agencies;

(c) Non-profit organizations with proof of current 501(c)3 status;

(d) Breeder sales of dogs or cats;

(e) Adoption of a dog or cat where only administrative and veterinary care fees are charged for adoption of the animal; or,

(f) Any person buying dogs or cats as an end consumer (i.e. to hold for more than 60 days).

(3) Application for any license under this chapter shall be made on forms provided by the department, which shall be completed in full and may include:

(a) Name of the applicant;

(b) Date of birth of any applicant who is an individual or a partner in a general partnership;

(c) Proof of one of the following for any applicant who is not an individual or a partner in a general partnership:

1. Applicant's registration in its state of incorporation; or,

2. Applicant's business license issued by a local governmental authority;

(d) Contact information for applicant, to include name of person legally responsible for applicant's operations, telephone number, email address, and address of the principal place of business;

(e) Address of any location to be licensed for holding of dogs or cats for commercial or research purposes;

(f) Vehicle identification number of any vehicle to be registered for transport of dogs or cats for commercial or research purposes; and,

(g) Other information as required by the department.

(4) Licensees shall notify the department of any changes to the information or contents of an application within 30 days after the change takes place.

(5) Applicants for licensure shall include with their application payment of an annual license fee as required under the Act for the following categories of dog and cat dealer licenses.

(a) Research Seller. A research seller license is required per person per location where the person holds any dog or cat for sale to a research facility within the state.

(b) Wholesaler. A wholesaler license is required per person per location where a non-breeder holds dogs or cats and sells 25 or more of the animals to incorporated entities, within 60 days of acquiring the animals and in the same calendar year. For enforcement of the Act and this

chapter, sales between non-breeders and incorporated entities are deemed wholesale transactions.

(c) Retailer. A retailer license is required per person per location where a non-breeder holds dogs or cats and sells 25 or more of the animals to individuals, within 60 days of acquiring the animals and in the same calendar year. For enforcement of the Act and this chapter, sales between non-breeders and individuals are deemed retail transactions. The fee for a retailer license is based on the number of dogs or cats sold by the retailer during the previous calendar year (January 1 – December 31). For any applicant who was not licensed in the previous calendar year, the license fee shall be determined based on sales of up to 50 animals.

(d) Transporter. A transporter license is required for any person who transports or boards a dog or cat in commerce for a research facility within the state; or for any non-breeder who sells or offers for sale a dog or cat at a flea market.

(e) Research Facility Registration. A research facility registration is required for any research facility in the state that purchases, boards, or transports dogs or cats for research. There is no fee for research facility registration.

(6) Prior to approval of any application under this rule, an applicant must undergo departmental inspection and demonstrate compliance with current standards set forth under 9 C.F.R. Part 3, Subpart A – Specifications for the Humane Handling, Care, Treatment, and Transportation of Dogs and Cats.

(7) A person shall be ineligible for a dog and cat dealer license if the person or any person in his employ has been convicted of an animal cruelty offense under any state or federal jurisdiction.

(8) Applicants for licensure shall submit the appropriate license fee and annual report to the department on or before July 1 of each year. Any person who fails to comply shall be required to undergo initial inspection and to pay initial license fees under the Act prior to reissuance of the applicant's dog and cat dealer license. All dog and cat dealer licenses shall expire on June 30 following their issuance.

(9) The department may deny any application for licensure that is not completed in accordance with this rule.

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-.15-.04 Duration of License and Termination of License is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.04 ~~Duration of License and Termination of License~~ Reports and Records.

(1) ~~A license issued under this part shall be valid and effective unless:~~ Reports.

(a) ~~The license has been revoked or suspended.~~ In addition to all information required under T.C.A. §44-17-108, a licensee shall report the number of dogs and cats that the licensee sold within 60 days of each animal's acquisition during the previous calendar year.

(b) ~~The license is voluntarily terminated upon request of the licensee, in writing, to the Commissioner.~~ Licensees shall file reports annually with the department upon renewal of their license, and shall have semi-annual report information available for inspection upon request and reasonable notice from the department.

~~(c) The license has expired or been terminated under this part.~~

~~(d) The applicant has failed to pay the application fee and annual license renewal fee as required by 0080-2-15-.02. There will be no refund if a license is terminated prior to its expiration date.~~

(2) ~~Any person who is licensed must file an application for a license renewal and an annual report as required, and pay the required fees, on or before the expiration date of the present license or the license~~

~~shall expire and automatically terminate on its anniversary date. Failure to comply with the reporting requirements, or to pay the required license renewal fees prior to the expiration date of the license, shall result in automatic termination of such license on the anniversary date of the license.~~ Records.

(a) Licensees shall keep and maintain at each licensed location records for each dog or cat purchased, sold, transported, or held for commercial or research purposes. The records shall include:

1. A description sufficient to identify the animal, including known or approximate age, size, color marking, breed estimation, sex, and official identification number, chip implantation, or tattoos;

2. Known vaccination records for the animal, including type of vaccine, accredited veterinarian administering the vaccine, and date the vaccination was last administered to the animal;

3. Name and address of the person from whom the animal was acquired;

4. Date the animal was acquired;

5. Name and address of the person to whom the animal was sold;

6. Date the animal was sold; and,

7. Bill of sale information as required under T.C.A. §44-17-113.

(b) Licensees shall maintain records required under this rule for a period of two years.

~~(3) Any person who seeks the reinstatement of a license that has been automatically terminated must follow the procedure applicable to new applicants for a license.~~

~~(4) Licenses are issued to specific persons for specific premises and do not transfer upon change of ownership, nor are they valid at a different location.~~

~~(5) Any person who has been or is an officer, agent, or employee of a licensee whose license has been suspended or revoked and who was responsible for or participated in the violation upon which the order of suspension or revocation was based will not be licensed within the period during which the order of suspension or revocation is in effect.~~

~~(6) Any person whose license has been suspended for any reason shall not be licensed in his or her own name or in any other manner within the period during which the order of suspension is in effect. No partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, will be licensed during that period. Any person whose license has been suspended for any reason may apply to the Commissioner, in writing, for reinstatement of his or her license.~~

~~(7) Any person whose license has been revoked shall not be licensed in his or her own name or in other manner, nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.~~

~~(8) Any person whose license has been suspended or revoked shall not buy, sell, transport or deliver for transport, any cats or dogs for any commercial purpose during the period of suspension or revocation.~~

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.05 Denial of Initial License Application is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.05 ~~Denial of Initial License Application~~ Animal Identification. [RESERVED]

~~(1) A license will not be issued to any applicant who:~~

~~(a) Has not complied with the requirements of this chapter and has not paid the fees indicated in 0080-2-15-.02.~~

~~(b) Is not in compliance with the regulations and standards as set forth in 9 CFR Part 3.~~

~~(c) Has had a license revoked or whose license is suspended.~~

~~(d) Has been fined, sentenced to jail, or pled nolo contendere under state, local or federal cruelty to animal laws; or~~

~~(e) Has made any false or fraudulent statements, or provided any false or fraudulent records to the Commissioner.~~

~~(2) An applicant whose license application has been denied may request a hearing in accordance with the Uniform Administrative Procedures Act, Tenn. Code Ann. Title 4, Chapter 5, for the purpose of showing why the application for license should not be denied. The denial shall remain in effect until the final legal decision has been rendered. Should the denial be upheld, the applicant may again apply for a license one year from the date of the final order denying the application.~~

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.06 Compliance with Standards is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.06 ~~Compliance with Standards~~ Transport.

~~Each dealer licensed under this chapter shall comply in all respects with the regulations of this chapter and the standards set forth in Part 3 of Title 9 of the Code of Federal Regulations as amended, for the humane, care, treatment, housing, and transportation of animals.~~ (1) For any vehicle a licensee uses to convey dogs or cats for commercial or research purposes, the licensee shall conspicuously post on the vehicle "Dogs and Cats On Board" in print that is at least four inches tall.

(2) Licensees shall comply with all import, export, and movement requirements under chapter 0080-02-12 Dogs and Cats.

(3) Licensees shall comply with current standards for transportation of dogs and cats set forth under 9 C.F.R. Part 3, Subpart A – Specifications for the Humane Handling, Care, Treatment, and Transportation of Dogs and Cats.

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.07 Access and Inspection of Records and Property is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.07 ~~Access and Inspection of Records and Property~~ Inspections.

(1) ~~Each dealer shall furnish to the Commissioner any information concerning the business of the dealer, which he may request in connection with the enforcement of the provisions of the Act, these regulations and standards (9 CFR part 3). This information shall be furnished within a reasonable time and as may be specified in the request for information.~~ The department may enter any location or conveyance during normal business hours where the department has reason to believe that dogs or cats are held for commercial or research purposes. The department may enter such place for purposes of inspecting and sampling dogs and cats as necessary for the prevention of spreading disease; for examination and

copying of records; and for evaluation of sanitation and treatment as necessary to determine compliance with the Act and this chapter.

(2) ~~Each dealer shall during business hours allow the Commissioner:~~ The department may conduct inspections under this chapter as often as the department deems necessary for the prevention of spreading disease.

~~(a) To enter its place of business (including any other facilities, buildings, vehicles, etc. used in the furtherance of the business);~~

~~(b) To examine records required to be kept by the Commissioner and the Act;~~

~~(c) To make copies of the records;~~

~~(d) To inspect and photograph the facilities, property and animals, as the Commissioner considers necessary to enforce the provisions of the Act, the regulations and the standards; and~~

~~(e) To document, by the taking of photographs and other means, conditions and areas of noncompliance.~~

~~(3) The dealer shall extend to the Commissioner or his/her representatives the use of a room, table or other facilities necessary for the proper examination of the records and inspection of the property or animals.~~

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.08 Inspection for Missing Animals is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.08 ~~Inspection for Missing Animals~~ Orders.

(1) ~~Each dealer shall allow, upon request and during business hours, the Commissioner or his/her representatives and officers of law enforcement agencies with general law enforcement authority to enter his or her place of business (including any other facilities, buildings, vehicles, etc. used in the furtherance of the business) to inspect animals and records for the purpose of seeking animals that are missing, under the following conditions;~~ The department may issue an order for the stop movement, testing, treatment, or destruction of any dog or cat within the state that is found to be diseased or moved in violation of the Act or this chapter.

~~(a) The dealer shall be furnished a written description of the missing animal or animals and the names and addresses of owners.~~

~~(b) The officers shall abide by all security measures required to prevent the spread of disease, including the practice of appropriate bio-security measures, or measures to prevent the escape of an animal.~~

(2) An order may be lifted by the department when the dog or cat that is subject to the order is tested, treated, returned, or destroyed as directed by the department at the owner's or possessor's expense. If the dog or cat is not tested, treated, or returned as ordered by the department within 10 days of the order being issued, the department may order the animal confiscated or destroyed in accordance with the Act and this chapter at the owner's expense.

(3) Any licensee aggrieved by an order of the department issued under the Act or this chapter may petition the department for review of the order under the Uniform Administrative Procedures Act. Petitions for review of a departmental order must be submitted to the department in writing within 10 days of the order being issued. If no petition is filed with the department within the 10 day period, the department's order shall become final and will not be subject to review.

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

0080-02-15-.09 Confiscation and Destruction of Animals is amended by deleting the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-02-15-.09 ~~Confiscation and Destruction of Animals~~ Violations.

(1) ~~If an animal being held by a dealer is found by the Commissioner to be suffering as a result of the failure of the dealer to comply with any provision of the regulations or the standards set forth in this chapter, the Commissioner shall make a reasonable effort to notify the dealer of the condition of the animal(s) and request that the condition be corrected and that adequate care be given to alleviate tha animal's suffering or distress, or that the animal(s) be destroyed by euthanasia. In the event that the dealer refuses to comply with this request, the Commissioner may confiscate the animal(s) for care, treatment, or disposal as indicated in paragraph (2) of this section, if, in the opinion of the Commissioner, the circumstances indicate the animal's health is in danger.~~ Requirements of Licensees.

(a) In addition to other requirements of this chapter, licensees shall:

1. Comply with current standards set forth under 9 C.F.R. Part 3, Subpart A – Specifications for the Humane Handling, Care, Treatment, and Transportation of Dogs and Cats, including performance of proper sanitation measures for the control of animal disease, and provision of adequate yarding, housing, holding, exercise, care, and feeding of dogs and cats;

2. Conduct dealer operations only within a permanent structure or building at a location licensed by the department;

3. Maintain areas where dogs or cats are housed so as to be readily accessible for inspection;

4. Maintain records required under this chapter so as to be readily available for inspection;

5. Comply with any order issued by the department for the prevention of animal disease or humane treatment of dogs or cats; and,

6. Give full information as to the source of dogs or cats currently or previously held for commercial or research purposes.

(b) In addition to other requirements of this chapter, licensees shall not:

1. Sell, offer for sale, or move a dog or cat obtained without the consent of its owner;

2. Be convicted of an animal cruelty offense under any state or federal law;

3. Employ a person convicted of an animal cruelty offense under any state or federal law;

4. Provide false or misleading information or records to the department;

5. Interfere with an authorized representative of the department in the performance of his duties; or,

6. Sell, offer for sale, or move any diseased dog or cat for commercial or research purposes without written authorization from the department.

(2) ~~In the event that the Commissioner is unable to locate or notify the dealer, the Commissioner shall contact a law enforcement agency to accompany him to the premises and shall arrange for adequate care when necessary to alleviate the animal's suffering at the dealer's expense. If in the opinion of the Commissioner, the condition of the animal(s) cannot be corrected by temporary care, the Commissioner shall confiscate the animals.~~ A person is responsible for violation of the Act or this chapter when

committed by either the person or his agent.

(3) ~~Confiscated animals may be placed, by sale or donation, with other licensees or locations approved by the Commissioner, which comply with the standards and regulations and can provide proper care, or they may be euthanized. The dealer from whom the animals were confiscated shall bear all costs incurred in performing the placement or euthanasia activities authorized by this section.~~ Each violation of the Act, this chapter, or departmental order issued under this chapter is grounds for issuance of stop movement orders, denial or revocation of any license issued by the department; actions for injunction; confiscation of animals; and imposition of civil penalties or criminal charges against the violator.

(4) When the department has reason to believe that violation of the Act, this chapter, or departmental order unreasonably threatens the health or well-being of a dog or cat, upon notice to the animal's owner that is substantially consistent with T.C.A. §39-14-210, the department may designate its authority to confiscate and care for the animal to any society for prevention of cruelty to animals or law enforcement official.

(5) The department may refer to law enforcement officials for animal cruelty investigation any person who unreasonably fails to provide appropriate care for dogs or cats in his possession.

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Repeal

Chapter 0080-02-01
Health Requirements for Admission and Transportation of Livestock and Poultry

Rule 0080-02-01-.11 Dogs and Cats is repealed in its entirety.

~~0080-02-01-.11 Dogs and Cats.~~

~~(1) Dogs and cats transported into Tennessee for any purpose shall be accompanied by a certificate of veterinary inspection.~~

~~(2) Subparagraph (1) above does not apply to dogs and cats entering Tennessee for less than fifteen (15) days, provided such animals are leashed at all times or otherwise restrained or confined.~~

~~(3) Rabies Vaccination Required – Dogs more than three (3) months of age and cats more than six (6) months of age shall:~~

~~(a) Be vaccinated against rabies not more than (12) months prior to entering the state and be so identified. Where a certificate of veterinary inspection is required, the date of the rabies vaccination shall be indicated thereon; or~~

~~(b) Be vaccinated against rabies not more than thirty-six (36) months prior to entering the state using a vaccine approved for such duration according to the most recent edition of the Compendium of Animal Rabies Prevention and Control published by the Centers for Disease Control. The rabies vaccination certificate, as well as the certificate of veterinary inspection, when required, shall document the date of vaccination, the name of the vaccine and the name of the vaccine's manufacturer; and shall contain a statement and the anme of the vaccine's manufacturer; and shall contain a statement by the issuing veterinarian that such vaccine is approved for a three-year duration of immunity according to the most recent edition of the Compendium of Animal Rabies Prevention and Control.~~

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

Rule 0080-02-01-.18 Primates is repealed in its entirety.

~~0080-02-01-.18 Primates.~~

~~(1) Any person in possession of a primate being imported or moved within the state shall have in their immediate possession the following:~~

~~(a) A Certificate of Veterinary Inspection (CVI) for the primate, issued by an accredited veterinarian within ten days prior to the primate's import or movement. The CVI shall include a statement from the issuing veterinarian, indicating that the veterinarian carefully examined the oral mucosa of the primate and found no evidence of disease lesions or inflammatory processes;~~

~~(b) Proof of negative official tuberculosis testing conducted within the United States or its territories within 30 days prior to the primate's import or movement; and,~~

~~(c) Proof of the primate's individual identification by means of microchip implantation.~~

Authority: T.C.A. §§ 4-3-203 and 44-2-102.

Chapter 0080-02-15
Dog and Cat Dealers

Rule 0080-02-15-.10 Records is repealed in its entirety.

~~0080-02-15-.10 Records.~~

~~(1) Each dealer shall keep and maintain records at each licensed location for each animal purchased, acquired, held, transported, sold or otherwise disposed of at that location. The records shall include the following:~~

~~(a) The name and address of the person from whom each animal was acquired.~~

~~(b) The date each animal was acquired.~~

~~(c) A description of each animal showing age, size, color marking, sex, breed, and vaccination information available. Records shall also include any other significant identification for each animal including an official tag number or tattoo.~~

~~(d) The name and address of the person to whom any animal is sold, given, bartered or to whom otherwise delivered. The record shall show the method of disposition.~~

~~(2) The semi-annual reports required by Tenn. Code Ann. § 44-17-108 shall be submitted to the Commissioner six (6) months after the date the license is issued and at the annual renewal of the license.~~

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

Rule 0080-02-15-.11 Transportation of Dogs and Cats is repealed in its entirety.

~~0080-02-15-.11 Transportation of Cats and Dogs.~~

~~(1) Motor vehicles or other conveyances transporting twenty-five (25) or more cats and/or dogs shall post on the drivers side and rear of the vehicle notification "Dogs and/or Cats On Board," in print not less than four (4) inches in height.~~

Authority: T.C.A. §§ 4-3-203 and 44-17-118.

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Department of Agriculture (board/commission/ other authority) on 11/29/2018 (mm/dd/yyyy), and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 09/07/18

Rulemaking Hearing(s) Conducted on: (add more dates). 10/30/18

Date: 11/29/2018

Signature:

Name of Officer: Dai Templeton

Title of Officer: Commissioner

Subscribed and sworn to before me on: 11/29/2018

Notary Public Signature:

My commission expires on: 07/05/2021

JOYCE M. JACKSON NOTARY PUBLIC STATE OF TENNESSEE DAVIDSON COUNTY

Agency/Board/Commission:

Rule Chapter Number(s):

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III

Herbert H. Slatery III
Attorney General and Reporter

3/29/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/10/19

Effective on: 9/8/19

Tre Hargett

Tre Hargett
Secretary of State

SECRETARY OF STATE
PUBLICATIONS
2019 JUN 10 AM 8:55

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	State Board of Education
SUBJECT:	Career and Technical Education
STATUTORY AUTHORITY:	Tennessee Code Annotated, Sections 49-11-101 through 49-11-109 and 49-1-302
EFFECTIVE DATES:	September 23, 2019 through June 30, 2020
FISCAL IMPACT:	N/A
STAFF RULE ABSTRACT:	This proposed rule change updates language in State Board Rule 0520-01 -07 to include work-based learning language. This update will ensure consistent terminology with state law and the State Board of Education's Work-Based Learning Framework.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

This rule does not affect small businesses.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

This rule does not have a financial impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This proposed rule change updates language in State Board Rule 0520-01-07 to include work-based learning language. This update will ensure consistent terminology with state law and the State Board of Education's Work-Based Learning Framework.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. §§ 49-11-101 through 109 govern career and technical education. Terminology "work-based learning" is contained in T.C.A. § 49-11-109.

T.C.A. § 49-1-302 gives the State Board of Education authority to regulate career and technical education.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The Tennessee Department of Education and State Board of Education are directly affected by this rule and both urge adoption. Local Education Agencies offering work-based learning placements are also directly affected by this rule. No LEAs have contacted the State Board to urge adoption or rejection of this rule.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

N/A

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

N/A

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Angie Sanders
Angela.C.Sanders@tn.gov

Nathan James
Nathan.James@tn.gov

Elizabeth Fiveash
Elizabeth.Fiveash@tn.gov

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Angie Sanders
Angela.C.Sanders@tn.gov

Nathan James
Nathan.James@tn.gov

Elizabeth Fiveash
Elizabeth.Fiveash@tn.gov

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Angie Sanders
710 James Robertson Parkway, 1st Floor
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(615) 253-5707
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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

Department of State
Division of Publications
312 Rosa L. Parks Ave., 8th Floor, Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615-741-2650
Email: publications.information@tn.gov

For Department of State Use Only

Sequence Number: 06-27-19
Rule ID(s): 9200
File Date: 6/25/19
Effective Date: 9/23/19

Proposed Rule(s) Filing Form

Proposed rules are submitted pursuant to Tenn. Code Ann. §§ 4-5-202, 4-5-207, and 4-5-229 in lieu of a rulemaking hearing. It is the intent of the Agency to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within ninety (90) days of the filing of the proposed rule with the Secretary of State. To be effective, the petition must be filed with the Agency and be signed by ten (10) persons who will be affected by the amendments, or submitted by a municipality which will be affected by the amendments, or an association of ten (10) or more members, or any standing committee of the General Assembly. The agency shall forward such petition to the Secretary of State.

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	State Board of Education
Division:	
Contact Person:	Angie Sanders
Address:	1st Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN
Zip:	37243
Phone:	615-253-5707
Email:	Angela.C.Sanders@tn.gov

Revision Type (check all that apply):
X Amendment
___ New
___ Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0520-01-07	Career and Technical Education
Rule Number	**Rule Title**
0520-01-07-.03	Work Experience Agreements
0520-01-07-.04	Coordination and Supervision of Student Cooperative Work Experience
0520-01-07-.05	Summer Employment in Agriculture, Food, and Natural Resources

RULES
OF
THE STATE BOARD OF EDUCATION

CHAPTER 0520-01-07
CAREER AND TECHNICAL EDUCATION

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0520-01-07-.01	Administration	0520-01-07-.05	Summer Employment in Agriculture, Food, and Natural Resources
0520-01-07-.02	Student Organizations		
0520-01-07-.03	Work-based Learning ~~Experience~~ Agreements	0520-01-07-.06	Repealed
0520-01-07-.04	Coordination and Supervision of Student ~~Cooperative~~ Work-based Learning Experience		

0520-01-07-.03 ~~WORK EXPERIENCE~~WORK-BASED LEARNING AGREEMENTS.

For programs ~~including work experience~~ including work-based learning placements, local school systems shall have written agreements with the agencies providing the ~~training~~ work-based learning experience. In addition, the student's parent or guardian shall sign an agreement authorizing participation by the student.

Authority: *T.C.A. §§ 49-1-302 and 49-11-101.* ***Administrative History:*** *Original rule filed March 16, 1992; effective June 29, 1992.*

0520-01-07-.04 COORDINATION AND SUPERVISION OF STUDENT ~~COOPERATIVE WORK~~WORK-BASED LEARNING EXPERIENCE.

(1) ~~Teacher~~ Work-based learning coordinators shall~~will~~ be provided time during the regular school day to coordinate and supervise students involved in ~~on-the-job training through part-time employment~~work-based learning placements.

(2) In any ~~cooperative~~ work-based learning program, a maximum of three (3) credits may be earned in any one (1) year. At least one (1) credit shall~~must~~ be earned through related classroom experience which shall include a minimum of five (5) periods per week of classroom instruction. A minimum of ten (10) hours per week of supervised work experience shall~~will~~ be required for one (1) additional credit, and a minimum of twenty (20) hours per week will be required for two (2) additional credits. All students earning credits for work experience shall~~must~~ be supervised by ~~the~~ a ~~cooperative education teacher~~certified work-based learning coordinator. ~~Cooperative~~ Work-based learning programs shall ~~will~~ adhere to all state and federal child labor laws.

Authority: *T.C.A. §§ 49-1-302 and 49-11-101.* ***Administrative History:*** *Original rule filed March 16, 1992; effective June 29, 1992.*

0520-01-07-.05 SUMMER EMPLOYMENT IN AGRICULTURE, FOOD, AND NATURAL RESOURCES.

To qualify for extended employment, an agriculture, food, and natural resources teacher shall devote a minimum of forty (40), eight (8)-hour working days beyond the two hundred (200)-day contract required by the state for a regular teacher.

Authority: *T.C.A. §§ 49-1-302, 49-11-101 and 49-11-104.* ***Administrative History:*** *Original rule filed March 16, 1992; effective June 29, 1992. Amendment filed September 6, 2007; effective January 28, 2008. Amendments filed September 6, 2013; effective February 28, 2014.*

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Nick Darnell	X				
Mike Edwards	X				
Bob Eby	X				
Gordon Ferguson	X				
Elissa Kim	X				
Lillian Hartgrove	X				
Wendy Tucker	X				
Darrell Cobbins	X				

I certify that this is an accurate and complete copy of proposed rules, lawfully promulgated and adopted by the State Board of Education on 2/8/2019 (*date as mm/dd/yyyy*), and is in compliance with the provisions of T.C.A. § 4-5-222. The Secretary of State is hereby instructed that, in the absence of a petition for proposed rules being filed under the conditions set out herein and in the locations described, he is to treat the proposed rules as being placed on file in his office as rules at the expiration of ninety (90) days of the filing of the proposed rule with the Secretary of State.

Date: 4/23/19

Signature: Angela Sanders

Name of Officer: Angela Sanders

Title of Officer: General Counsel

Subscribed and sworn to before me on: 4/23/19

Notary Public Signature:

My commission expires on: 3-8-21

CASEY ONEAL GRIFFIN
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY
My Commission Expires 03-08-2021

Agency/Board/Commission: State Board of Education

Rule Chapter Number(s): 0520-01-07

All proposed rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

6/17/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/25/19

Effective on: 9/23/19

Tre Hargett
Secretary of State

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G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	State Board of Education
SUBJECT:	Public Records Requests
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 10-7-503
EFFECTIVE DATES:	September 23, 2019 through June 30, 2020
FISCAL IMPACT:	N/A
STAFF RULE ABSTRACT:	Public Chapter 712 of the 110th General Assembly amended T.C.A. § 10-7-503 to require state governmental entities to promulgate rules regarding public records requests. To comply with this law, this new proposed rule converts the State Board's Public Records Policy 1.500 into a rule and aligns the rule with the law and the Office of Open Records Counsel model policy language.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

This rule does not affect small businesses.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

This rule does not have a financial impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

Public Chapter 712 of 2018 amended T.C.A. § 10-7-503 to require state governmental entities to promulgate rules regarding public records requests. To comply with this law, this new rule converts the State Board's Public Records Policy 1.500 into a rule and aligns the rule with the law and the Office of Open Records Counsel model policy language.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 10-7-503 requires state governmental entities to promulgate rules regarding public records requests.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The State Board of Education is directly affected by this rule and urges adoption of the rule.
The citizens of Tennessee who are directly affected by this rule, and the State Board has not received any communication from citizens of the state urging adoption or rejection of this rule.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

N/A

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

N/A

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Angie Sanders
Angela.C.Sanders@tn.gov

Nathan James
Nathan.James@tn.gov

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

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Angela.C.Sanders@tn.gov

Nathan James
Nathan.James@tn.gov

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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710 James Robertson Parkway
Nashville, TN 37243
(615)-532-3528

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A

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Sequence Number: 06-28-19
Rule ID(s): 9201
File Date: 6/25/19
Effective Date: 9/23/19

Proposed Rule(s) Filing Form

Proposed rules are submitted pursuant to Tenn. Code Ann. §§ 4-5-202, 4-5-207, and 4-5-229 in lieu of a rulemaking hearing. It is the intent of the Agency to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within ninety (90) days of the filing of the proposed rule with the Secretary of State. To be effective, the petition must be filed with the Agency and be signed by ten (10) persons who will be affected by the amendments, or submitted by a municipality which will be affected by the amendments, or an association of ten (10) or more members, or any standing committee of the General Assembly. The agency shall forward such petition to the Secretary of State.

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	State Board of Education
Division:	
Contact Person:	Angie Sanders
Address:	1st Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN
Zip:	37243
Phone:	615-253-5707
Email:	Angela.C.Sanders@tn.gov

Revision Type (check all that apply):

___ Amendment
_X_ New
___ Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0520-15-01	Public Records Requests
Rule Number	**Rule Title**
0520-15-01-.01	Public Records Requests Generally
0520-15-01-.02	Definitions
0520-15-01-.03	Making Public Records Requests
0520-15-01-.04	Responding to Public Records Requests
0520-15-01-.05	Records Custodian
0520-15-01-.06	Redaction
0520-15-01-.07	Inspection of Records

0520-15-01-.08	Copies of Records
0520-15-01-.09	Fees and Charges
0520-15-01-.10	Aggregation of Frequent and Multiple Requests

RULES
OF
THE STATE BOARD OF EDUCATION

CHAPTER 0520-15-01
PUBLIC RECORDS REQUESTS

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0520-15-01-.09 Fees and Charges
0520-15-01-.10 Aggregation of Frequent and Multiple Requests

0520-15-01-.01 PUBLIC RECORDS REQUESTS GENERALLY.

(1) In accordance with the Tennessee Public Records Act (TPRA), T.C.A. § 10-7-503, all state, county, and municipal records shall, at all times during business hours, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law. Accordingly, the public records of the State Board are presumed to be open for inspection unless an exemption is otherwise provided by law.

(2) Personnel of the State Board shall provide access and assistance in a timely and efficient manner to persons requesting access to public records. No provisions of this rule shall be used to hinder access to open public records. However, the integrity and organization of public records, as well as the efficient and safe operation of the State Board, shall be protected as provided by current law. Concerns about the provisions or enforcement of this rule should be addressed to the State Board's Public Records Request Coordinator or to the Tennessee Office of Open Records Counsel (OORC).

(3) State Board personnel will respond promptly to public record requests upon proof of Tennessee citizenship by presentation of a validly issued Tennessee driver's license or Tennessee-issued identification.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.02 DEFINITIONS.

(1) Public records: All documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. Public records do not include the device or equipment, including, but not limited to, a cell phone, computer, or other electronic or mechanical device or equipment, that may have been used to create or store a public record or state record.

(2) Public records request coordinator (PRRC): The individual, or individuals, identified in this rule who has, or have, the responsibility to ensure public record requests are routed to the appropriate records custodian and are fulfilled in accordance with the TPRA. The public records request coordinator may also be a records custodian.

(3) Records custodian: The office, official or employee lawfully responsible for the direct custody and care of a public record. The records custodian is not necessarily the original preparer or receiver of the record.

(4) Redacted record: A public record otherwise open for public inspection from which protected or confidential information is removed or obscured prior to release or inspection.

(5) Requestor: A Tennessee citizen requesting access to a public record, whether for inspection or duplication.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.03 MAKING PUBLIC RECORDS REQUESTS.

(1) All public record requests shall be made to the PRRC in order to ensure public record requests made pursuant to the TPRA are routed to the appropriate records custodian and fulfilled in a timely manner.

(a) Requests for inspection shall be made orally or in writing addressed as follows:

Tennessee State Board of Education
Attn: General Counsel
Andrew Johnson Tower, 1st Floor
710 James Robertson Pkwy
Nashville, TN 37243
615-253-5707 (phone)
615-741-0371 (fax)
Angela.c.sanders@tn.gov

(2) Requests for copies or requests for inspection and copies shall be made in writing via fax, email, mail, or hand delivery using the contact information in section (1)(a) above.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.04 RESPONDING TO PUBLIC RECORDS REQUESTS.

(1) The PRRC shall review public record requests and make an initial determination of the following:

(a) If the requestor has provided evidence of Tennessee citizenship;

(b) If the records requested are described with sufficient specificity to identify them; and

(c) If the State Board is the custodian of the records requested.

(2) The PRRC shall acknowledge receipt of the request and take any of the following action(s), as appropriate:

(a) Advise the requestor of this Rule and the elections made by the State Board regarding:

1. Proof of Tennessee Citizenship;

2. Fees (and labor threshold and waivers if applicable);

3. Aggregation of multiple or frequent requests.

(b) Deny the request in writing if an appropriate ground applies, including the basis for the denial, using the Public Records Request Response Form developed by the OORC. Appropriate grounds for denial include, but are not limited to, the following:

1. Requestor is not, or has not presented evidence of being, a Tennessee citizen;

2. Request lacks specificity;

3. Exemption makes the record not subject to disclosure under the TPRA;

4. The State Board is not the custodian of the requested records;

5. The records do not exist.

(c) If appropriate, contact the requestor to see if request can be narrowed.

(d) Forward the records request to the appropriate records custodian and advise the requestor of such action.

(e) If the records are in the custody of a different governmental entity, and the PRRC knows the correct governmental entity, advise the requestor of the correct entity and PRRC for that entity, if known.

(3) The designated PRRC(s) for the State Board is the General Counsel and, in the absence of the General Counsel, either a staff attorney or the Director of Policy and Research. Contact information is available on the State Board's website.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.05 RECORDS CUSTODIAN.

(1) Upon receiving a public records request, the records custodian shall make requested open public records available as promptly as practicable in accordance with T.C.A. § 10-7-503.

(2) If it is not practicable for the records custodian to promptly provide requested records because additional time is necessary to determine whether the requested records exist, to gain access to records, to determine whether the records are open, to redact records, or for other similar reasons, then the records custodian shall notify the PRRC who shall, within seven (7) business days from the records custodian's receipt of the request, send the requestor a completed Public Records Request Response Form developed by the OORC stating the time reasonably necessary to produce the record or information.

(3) If the records custodian determines that a public record request should be denied, he or she shall notify the PRRC, who shall deny the request in writing using the Public Records Request Response Form developed by the OORC and provide the ground(s) for denial in writing, including, but not limited to the following:

(a) Requestor is not, or has not presented evidence of being, a Tennessee citizen;

(b) Request lacks specificity;

(c) Exemption makes the record not subject to disclosure under them TPRA;

(d) The State Board is not the custodian of the requested records; or

(e) The records do not exist.

If the records relate to another governmental entity and the PRRC is aware of the correct governmental entity, the PRRC shall advise the requestor of the correct governmental entity and PRRC for that entity, if known.

(4) If the records custodian reasonably determines production of records should be segmented because the records request is for a large volume of records or additional time is necessary to prepare the records for access, the records custodian shall notify the requestor that production of the records will be in segments and that a records production schedule will be provided as expeditiously as practicable. If appropriate, the records custodian should contact the requestor to see if the request can be narrowed.

(5) If the records custodian discovers records responsive to a records request were omitted, the records custodian shall promptly contact the requestor concerning the omission and produce the records as quickly as practicable.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.06 REDACTION.

(1) If a record contains confidential information or information that is not open for public inspection, the records custodian shall prepare a redacted copy prior to providing access. The records custodian shall coordinate with General Counsel of the State Board for review and redaction of records. The records custodian and the PRRC may also consult with the OORC.

(2) Whenever a redacted record is provided, the records custodian shall provide the requestor with the basis for redaction. The basis given for redaction shall not disclose confidential information. A records custodian is not required to produce a privilege log.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.07 INSPECTION OF RECORDS.

(1) There is no charge for inspection of open public records.

(2) The location for inspection of records within the offices of the State Board shall be specified by the records custodian or PRRC.

(3) A records custodian or PRRC may require an appointment for inspection or may require inspection of records at an alternate location under reasonable circumstances.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.08 COPIES OF RECORDS.

(1) Copies will be available for pickup at State Board's office during regular business hours.

(2) Upon payment for costs of postage, copies will be delivered to the requestor's home address by U.S. Postal Service.

(3) A requestor will not be allowed to make copies of records with personal equipment. If copies are to be downloaded to a storage device, the requestor shall supply their own storage device or the records custodian may charge the actual out-of-pocket costs for storage devices on which electronic copies are provided.

(4) The records custodian shall respond to a public record request for copies in the most economic and efficient manner practicable.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.09 FEES AND CHARGES.

(1) Prior to producing copies of records, the records custodian shall provide requestors with an estimate of the charges (itemized by per page costs, labor, and other) to be assessed, and may require pre-payment of such charges before producing requested records.

(2) When fees for copies and labor do not exceed $10.00, the fees may be waived. Requests for waivers for fees above $10.00 must be presented to the PRRC, who is authorized to determine if such waiver is in the best interest of the State Board and for the public good.

(3) Fees and charges for copies are as follows, but no more than the safe harbor amount authorized by the OORC Schedule of Reasonable Charges, unless a higher charge can be documented:

(a) $0.15 cents per page for letter and legal-sized black and white copies;

(b) $0.50 cents per page for letter and legal-sized color copies.

(c) Labor will be charged when time exceeds four (4) hours.

(d) If an outside vendor is used, the actual costs assessed by the vendor.

(e) Other charges shall be in accordance with the OORC Schedule of Reasonable Charges.

(4) Payment is to be made in cash, money order, or personal check payable to the Tennessee State Board of Education and presented to the State Board General Counsel.

(5) Payment in advance will be required when costs are estimated to exceed $100.00.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

0520-15-01-.10 AGGREGATION OF FREQUENT AND MULTIPLE REQUESTS.

(1) The State Board will aggregate record requests for the purpose of calculating charges for copies or duplicates of public records in accordance with the Reasonable Charges for Frequent and Multiple Request Policy promulgated by the OORC when more than four (4) requests are received within a calendar month, either from a single individual or a group of individuals deemed working in concert.

(2) If it is determined that records requests submitted to the State Board will be aggregated:

(a) Records requests will be aggregated at the agency level.

(b) The PRRC is responsible for making the determination that a group of individuals are working in concert. The PRRC or the records custodian must inform the individuals that they have been deemed to be working in concert and that they have the right to appeal the decision to the OORC.

Authority: *T.C.A. § 10-7-503.* ***Administrative History:***

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Nick Darnell	X				
Mike Edwards	X				
Bob Eby	X				
Gordon Ferguson	X				
Elissa Kim	X				
Lillian Hartgrove	X				
Wendy Tucker	X				
Darrell Cobbins	X				

I certify that this is an accurate and complete copy of proposed rules, lawfully promulgated and adopted by the State Board of Education on 02/08/2019 (*date as mm/dd/yyyy*), and is in compliance with the provisions of T.C.A. § 4-5-222. The Secretary of State is hereby instructed that, in the absence of a petition for proposed rules being filed under the conditions set out herein and in the locations described, he is to treat the proposed rules as being placed on file in his office as rules at the expiration of ninety (90) days of the filing of the proposed rule with the Secretary of State.

CASEY ONEAL GRIFFIN
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY
My Commission Expires 03-08-2021

Date: 5/21/19

Signature: Angie Sanders

Name of Officer: Angie Sanders

Title of Officer: General Counsel

Subscribed and sworn to before me on: 5-21-19

Notary Public Signature: C.

My commission expires on: 3-8-21

Agency/Board/Commission: State Board of Education

Rule Chapter Number(s): 0520-15-01

All proposed rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

6/17/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/25/19

Effective on: 9/23/19

Tre Hargett
Secretary of State

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Alcoholic Beverage Commission
SUBJECT:	Local Option Liquor Rules
EFFECTIVE DATES:	September 24, 2019 through June 30, 2020
FISCAL IMPACT:	None
STAFF RULE ABSTRACT:	This proposed rule would eliminate the language requiring wholesalers to print their TABC license number on their vehicles.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

The proposed rule removes the requirement that wholesalers print or otherwise display their license #'s on their vehicles. The TABC has instituted a new licensing and permitting system which will require that all wholesalers receive new license #'s when the wholesalers renew their licenses at the end of 2018. If this requirement is not removed, then that will require all wholesalers to repaint or reprint their vehicles which will be overly burdensome for all wholesalers, including small business wholesalers. Therefore, this proposed rule is beneficial to all wholesalers, including small business wholesalers. There are approximately 50 licensed wholesalers in the state, but only a small percentage of those are small businesses. This proposed rule has the support of the wholesalers that have discussed this matter with the TABC. There are no state or federal counterparts for which this rule can be effectively compared to. The exemption of small businesses from this rule would be detrimental to small businesses and to all wholesalers.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

The proposed rule would have no impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This proposal would eliminate the language requiring wholesalers to print their TABC license number on their vehicles.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

There are no such federal or state laws.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

TABC licensed wholesalers and the Wine and Spirits Wholesalers of Tennessee are affected by this rule. The Wine and Spirits Wholesalers of Tennessee has expressed support of the adoption of this rule.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

There are no such opinions.

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

There would be no fiscal impact.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Zack Blair, Joshua Stepp, Keith Hollingshead-Cook

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Zack Blair or Joshua Stepp

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Zack Blair or Joshua Stepp: Zack.Blair@tn.gov (615-741-7628); Joshua Stepp (615-741-8916); Joshua.Stepp@tn.gov; 500 James Robertson Parkway, 3rd Floor, Davy Crockett Tower, Nashville, TN 37243

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

There has been no request of additional information made to the TABC at the time of this filing.

Department of State
Division of Publications
312 Rosa L. Parks Ave., 8th Floor, Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615-741-2650
Email: publications.information@tn.gov

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Sequence Number: 06-30-19
Rule ID(s): 9202
File Date: 6/26/19
Effective Date: 9/24/19

Proposed Rule(s) Filing Form

Proposed rules are submitted pursuant to Tenn. Code Ann. §§ 4-5-202, 4-5-207, and 4-5-229 in lieu of a rulemaking hearing. It is the intent of the Agency to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within ninety (90) days of the filing of the proposed rule with the Secretary of State. To be effective, the petition must be filed with the Agency and be signed by ten (10) persons who will be affected by the amendments, or submitted by a municipality which will be affected by the amendments, or an association of ten (10) or more members, or any standing committee of the General Assembly. The agency shall forward such petition to the Secretary of State.

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission: Tennessee Alcoholic Beverage Commission
Division:
Contact Person: Zack Blair; Joshua Stepp
Address: 500 James Robertson Parkway, 3rd Floor, Nashville, TN
Zip: 37243
Phone: Z.Blair (615-741-7628); J.Stepp (615-741-8916)
Email: Zack.Blair@tn.gov; Joshua.Stepp@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 here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0100-03	Local Option Liquor Rules
Rule Number	**Rule Title**
0100-03-.10	Transporting and Delivery of Alcoholic Beverages

Chapter Number	**Chapter Title**
Rule Number	**Rule Title**

RED LINE

0100-03-.10(2)(b)

(b) All trucks and other motor vehicles owned or leased and operated by any Tennessee licenseed wholesaler, and used to transport, haul, deliver, or carry alcoholic beverages, shall have the name and address of such licensee printed on each side and on the rear of said truck or motor vehicle in legible letters of a minimum height as hereinafter prescribed. The name of the licensee shall be in letters not less than four (4) inches in height, the address of such licensee shall appear in letters of not less than two and one half (2 ½) inches in height ~~and the license number shall appear in letters not less than one and one half (1 ½) inches in height~~. The following words, but no others, may be abbreviated: Tennessee (Tenn.), Company (Co.), and Incorporated (Inc.).

Authority: T.C.A. §§ 57-3-104, 57-3-203, and 57-3-403.

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Richard Skiles	X				
Ashleigh Roberts	X				
John A. Jones	X				

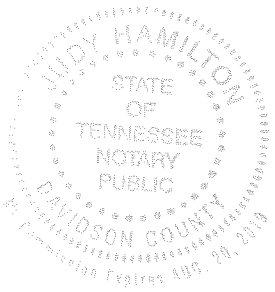
I certify that this is an accurate and complete copy of proposed rules, lawfully promulgated and adopted by the (*board/commission/other authority*) on 12/18/2018 (*date as mm/dd/yyyy*), and is in compliance with the provisions of T.C.A. § 4-5-222. The Secretary of State is hereby instructed that, in the absence of a petition for proposed rules being filed under the conditions set out herein and in the locations described, he is to treat the proposed rules as being placed on file in his office as rules at the expiration of ninety (90) days of the filing of the proposed rule with the Secretary of State.

Date: 12/19/2018

Signature:

Name of Officer: Zack Blair

Title of Officer: Interim Director



Subscribed and sworn to before me on: 12/19/2018

Notary Public Signature:

My commission expires on: 8/28/2019

Agency/Board/Commission:

Rule Chapter Number(s):

All proposed rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

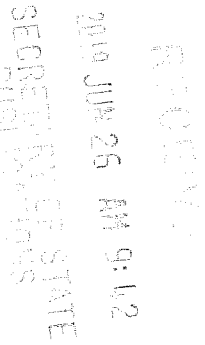
2/1/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/20/19

Effective on: 9/24/19

Tre Hargett
Secretary of State



G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Board of Water Quality, Oil and Gas
DIVISION:	Water Resources
SUBJECT:	Aquatic Resource Alteration
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 69-3-108(b)
EFFECTIVE DATES:	September 11, 2019 through June 30, 2020
FISCAL IMPACT:	This rule is expected to have a neutral effect on state and local government revenues and expenditures, with the exception of some savings to local government applicants who will be required to publish shorter public notices in local newspapers.
STAFF RULE ABSTRACT:	Many of these Aquatic Resource Alteration Permit (ARAP) rules are being amended for the first time since November 8, 2000, and others since May 31 , 2011. ARAPs authorize habitat alterations and water withdrawals and, where required, serve as certifications of compliance with state water quality standards under Section 401 of the Clean Water Act. The revisions clarify that ARAPs are required only for alterations of streams and wetlands, and would remove references to wet weather conveyances because these are now governed by T.C.A. § 69-3-108(q). This rulemaking hearing rule introduces the new term "existing conditions" to reflect actual pre-impact resource values. The rules require compensatory mitigation to ensure no overall net loss of resource values from existing conditions. The new term is intended to ensure that this mitigation is limited to what is necessary to offset the harm actually caused by the permitted activity, and not to compensate for pre-existing degradation. This change is also intended to ensure appropriate mitigation for impacts to high quality waters, including Exceptional Tennessee Waters.

However, this change is primarily to clarify the mitigation requirements from the current version of the rules, which only required mitigation for the loss of resource values associated with the permitted activity.

The current ARAP rules require only that a permit applicant consider avoidance and minimization and submit an alternatives analysis. As amended, for applicants for individual permits, Rule 0400-40-07-.04(5)(b) requires implementation of any practicable alternatives that have less adverse impact on resource values, so long as this does not result in other adverse environmental consequences. This rule is comparable to the Corps of Engineers requirement for Section 404 permits, which are the federal equivalent of ARAPs. This rule change is intended to counterbalance provisions in the water quality standards rules, which would otherwise result in fewer new individual permits having to demonstrate a lack of practicable alternatives to degradation.

The amendments will change the permitting process to include a draft permit and rationale, consistent with other types of permits issued by the Division of Water Resources. This will enhance transparency and improve the public notice process. Currently, the Division publishes only a notice of a complete application, without a draft permit or an explanation of what it intends to do, leaving interested persons (including permit applicants) with little basis to submit meaningful comment. The amendments also conform the permit appeal process to T.C.A. § 69-3-105(i) by clarifying that third parties, not just permit applicants, may appeal permits if they meet specific conditions, and by clarifying those conditions.

Amendments to the mitigation rule, 0400-40-07-.04(7), retain substantial portions of the prior rule while clarifying the methodology to ensure no overall net loss of resource values from existing conditions. This rule prioritizes mitigation as close to the impact site as practicable. The rule also clarifies that mitigation for impacts to Tennessee streams and wetlands must occur in Tennessee.

Finally, the revisions include administrative updates and clean-up edits, including elimination of definitions that are not used in the rules or in permits.

One copy of a document that satisfies T.C.A. § 4-5-222 must accompany the filing.

Rule Chapter 0400-40-07
2018 Amendments
Responses to Comments

Comment Summary

The Board received numerous comments from a wide range of stakeholders. This document summarizes and responds to nearly 150 separate comments. A number of commenters asserted that the rules would be less protective of waters of the state. The Board disagreed, noting that most of the changes referred to by these commenters are simply clarifications of existing rules and that in some cases (notably public notice of draft permits), the rules are actually being strengthened.

Many comments were received regarding the new requirement to select the least damaging practicable alternative. A number of these comments reflected a misunderstanding of the current rules, which did not actually require avoidance and minimization as many commenters asserted. Some comments argued against adding this requirement, but the Board explained this provision is consistent with federal requirements and counterbalances revisions proposed in the Triennial Review rulemaking to the Antidegradation Statement (Rule 0400-40-03-.06) concerning *de minimis* degradation.

Finally, a large number of comments were received concerning compensatory mitigation. These comments ranged from requests for clarification to arguments to implement different policies. Many comments objected to the draft rule's proposal to rely on stream mitigation guidelines. In response, that reference was removed from the rules and specific performance standards for stream mitigation were added. A number of commenters argued that compensatory mitigation should not be based on the existing condition of the stream or wetland prior to the proposed alteration, and that mitigation should instead require restoration to a "pristine" condition. The Board disagreed with this position because mitigation is intended to compensate for the loss of resource values caused by the permitted activity, not prior degradation caused by overall development of an area. However, the Board added a provision requiring at least minimal mitigation even for degraded waters.

GENERAL

Comment 1: *We believe the rule revision process overall should not be pushed ahead until the final submission of the TNH2O document. The final proposed rule should not conflict with the values, Areas of Concern, and Recommendations of the TNH2O report.*

Response: The TNH2O document is a non-regulatory process which will result in recommendations to be implemented over the long term. Other than ARAPs for water withdrawals, which constitute a small subset of this rulemaking process, there is no necessary subject-matter overlap between these rules and TNH2O. Accordingly, there is no reason to delay adoption of these rules pending TNH2O.

Comment 2: *A commenter requested a concise statement of the principal reasons for the Board's action in adopting the rules pursuant to Tenn. Code Ann. § 4-5-205(b).*

Response: This statement is attached as Appendix 1.

Comment 3: *The rule changes under consideration would make it easier for the Tennessee Department of Transportation (TDOT) and real estate developers to obtain permits to divert streams, pave over wetlands, or otherwise alter the state's waterways.*

Response: It is not the intent of the rules to make it either easier or harder to obtain permits, but instead to ensure that the permitting process is transparent, fair, and consistent in implementing the statutory goal of ensuring that the public's rights to unpolluted waters are maintained and that "the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters."

Comment 4: *Several commenters asked that the Board not weaken rules that protect our natural resources.*

Response: The purpose for this rulemaking is primarily to make the rules more clear and transparent, and to update the mitigation rules to be more consistent with Corps Section 404 permitting requirements. The rules are not being weakened, and in some ways are being strengthened, particularly with respect to improving the public notice and comment process.

Comment 5: *Please keep Tennessee's environmental standards stricter and more preservation- conscious than current federal requirements.*

Response: The ARAP rule changes proposed are intended as clarifications and updates of current rules, and it is not the intent or effect of these amendments to weaken the rules from existing requirements.

DEFINITIONS

Comment 6: *Where there are rules in other parts of TDEC's rulebook that cover areas (definitions or interpretations) that are also covered under the ARAP rule, it is important to state a) whether the new definition in this document, for example, is to replace that definition wherever it appears in TDEC rules or only in this case, and b) if a proposed new interpretation is intended to supplant other rules or if those other rules will be used to interpret these rules.*

Response: Rule 0400-40-07-.03 makes it clear that the definitions in the ARAP rules are applied to this rule chapter and to permits issued pursuant to this chapter. These definitions are not intended to apply to the use of these terms in other contexts. Where these rules do not provide a definition, those provided in the Water Quality Control Act apply. If ARAPs require the use of terms that are not defined in the Act or these rules, the permits can establish definitions.

Comment 7: *Per Rule 0400-40-07-.03 Definition, paragraph (3) ARAP. The deletion of the sentence about conditions that may be included in the permit seems odd. While it may not need to be here in the definitions section, surely TDEC is not saying that they will not include conditions in future permits.*

Response: The commenter is correct that these elements are being removed from the definitions because that is not the appropriate place for establishing the provisions that are required to be included in a permit. As required by Tenn. Code Ann. § 69-3-108(g), ARAPs will continue to include conditions necessary to accomplish the purposes of the Act.

Comment 8: *The definition of "resource values" should address all classified uses.*

Response: The TNWQCA does not allow TDEC to issue permits that cause pollution, which the Act defines as impairment of the designated usages of the waters. The Board agrees with the comment, and is expanding the definition of resource values to cover all applicable classified uses.

Comment 9: *Per Rule 0400-40-07-.03 Definitions, paragraph (8) Constructed Wetland. While this is a perfectly acceptable definition, mitigation for damage to wetlands does indeed sometimes result in the construction of a new wetland where the hydrology will support it. What are these constructed mitigation wetlands then called? Should there be a definition for this included here?*

Response: Generally, these are referred to as mitigation wetlands. This definition expressly does not apply to mitigation wetlands, which will be subject to site protection under these rules.

Comment 10: *Per Rule 0400-40-07-.03 Definitions, paragraph (21) Minimal Impacts. The reworking of this definition removes the concept that there could be a project with "no impact," and replaces it with "no appreciable impact" instead. It can certainly be argued that any work within the riparian zone will cause some impact, positive or negative, temporary or permanent. It raises some concerns, however, that the examples which were given, which are current TDEC policy, have been removed.*

Response: Minimal impact activities are those that cause only *de minimis* degradation even without compensatory mitigation. So, for example, the types of activities authorized by general permits would qualify as minimal impacts because those permits cover activities that cause only *de minimis* degradation without mitigation. The list of examples is removed because there is no realistic way to ensure such a list could be complete given the number of different types of activities that could be authorized by ARAPs.

The term "*de minimis*" is often used informally to describe activities that have minimal impacts. Because the definition of *de minimis* degradation includes both small impacts and larger impacts for which in-system mitigation is provided, the term "minimal impact" is a more appropriate term for activities that cause no appreciable permanent loss of resource values and do not require mitigation.

Comment 11: *Per Rule 0400-40-07-.03 Definitions, paragraph (19) Interflow. Delete it because it isn't used anywhere in these rules.*

Response: The commenter is correct and this change will be made.

GENERAL PERMITS

Comment 12: *Please do not delete the sentence, "All General Permits in effect as of the date of this rule shall continue in effect, and are not revoked by these rules."*

Response: This sentence was based on a previous iteration of the rules and a different set of circumstances. Because the provision for general permits has been in the rules for some time, and because the Division has issued all of its current general permits pursuant to the rules, there is no need to retain this sentence. To be clear, however, the statement remains true even though it is being removed from the rule: nothing in this rule amendment is intended to revoke any existing general ARAPs, which shall continue in effect. The existing general ARAPs are listed in the response to Comment 14 below, and incorporated by reference here.

Comment 13: *In reference to the phrase, of no "appreciable permanent loss of resource value." Is this the new standard to separate general from individual permits. If so, given the other proposed changes in this document about how to determine when "de minimis" applies and how impacts can be mitigated so that there is no net loss of resource value, does the use of this statement here grant permission for impacts that require mitigation to be covered under a general permit? We would oppose that.*

Response: The intent of this language is to make it clear that only activities with impacts below the threshold for requiring compensatory mitigation are eligible to be covered by a general ARAP. These are activities that have

only minimal impacts. Compensatory mitigation requires site-specific determinations, which are not currently available through the mechanism of general permits. This is the reason the rule does not use the term "*de minimis*" degradation with respect to habitats alteration, which includes either minimal impact activities or more than minimal impacts offset through in-system mitigation.

Comment 14: *Rule 0400-40-07-.04(2) contains the following wording: "General Permits for habitat alterations may be issued only for activities that do not result in an appreciable permanent loss of resource values. General Permits may be issued for water withdrawals that cause no more than de minimis degradation." This statement should be removed. There is not a qualifier on the extent of permanent loss of resource values. Some could consider some activities that have historically been covered under a general permit as being a permanent loss of resource values for a small segment of a stream. The broad interpretation of this statement could attract litigation. The following sentence says, "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 Tenn. Code Ann. § 69-3-108...". This has been sufficient in the past and should remain sufficient for determining when to issue a general permit.*

Response: General permits cannot authorize more than *de minimis* degradation because they are not subject to site-specific antidegradation review. Although this would be true even without saying so here, the new language will be retained because it makes the requirement more transparent to members of the public, including regulated entities.

General ARAPs result in only *de minimis* degradation, both individually and cumulatively. General ARAPs include provisions that ensure minimal impacts in compliance with this provision, including the following General ARAPs currently in effect: General Permit for Bank Armoring and Vegetative Stabilization; General Permit for Construction and Removal of Minor Road Crossings; General Permit for Construction of Launching Ramps and Public Access Structures, General Permit for Construction of Intake and Outfall Structures; General Permit for Emergency Infrastructure Repair, General Permit for Maintenance Activities; General Permit for Minor Alterations to Wetlands, General Permit for Minor Dredging and Filling; General Permit for Gravel Removal; General Permit for Stream Remediation; General Permit for Surveying and Geotechnical Exploration; General Permit for Utility Line Crossings; General Permit for Minor Stream Grade Stabilization; General Permit for Stream and Wetland Enhancement; and General Permit for Recreational Prospecting.

Comment 15: *Per Rule 0400-40-07-.04 Permits, paragraph (1). The deletion of the footnote at the end of this section makes this section much less understandable. The footnote itself would be better represented by a table that lists the existing general permits and then states which of the three categories (or more than one) apply and what the criteria are which might move a project from a lower to a higher category. It would answer the question of which general permits don't require notification, which require notification, and which require notification and approval and what might move an application from one category up to another. Since these general permits necessarily flow from the authorization in this document, the connection deserves a clear elucidation. This will also greatly help in understanding the next section on general permits.*

Response: As stated in Rule 0400-40-07-.04(2), "The procedures for obtaining coverage under a General Permit shall be specified in the General Permit." The rule language governs the issuance of general permits, while those permits define the applicable requirements. The footnote is deleted because it was the list of general permits that were being retained in the last rulemaking. Because general permits, like any other permits, may change over time it is not advisable to continue to list all of them in the rule. A list of general ARAPs is available online, and can be found by searching for "TDEC general ARAPs."

Comment 16: *Given that the previous list of general permits was dropped from section 1, and neither habitat alteration or water withdrawals were included in that previous list, or are listed on the current list of general permits under ARAPs on the TDEC website, it is curious why language about these two (potentially new?) types of*

general permits are included here. The language about habitat alteration is also notable because it seems to introduce a new standard for a General Permit – no "appreciable permanent loss of resource value." Given that habitat is only one component of a stream assessment, it is hard to imagine an activity that would be so narrow in scope as to only impact habitat, with no impact on hydrology, hydraulics, channel stability, etc. If a new Habitat Alteration General Permit is not anticipated, why include it here? If it is anticipated, the standard being proposed needs to be examined. What does this mean and how is it different from current standards? For that matter, neither in this section or the previous one, is the rationale for distinguishing between general and individual permits stated. While we understand that general permits are designed to cover activities where the impact is considered well understood and acceptable (road crossings, for example, are not always "de minimis," and for a large, wide road, with the use of box culverts can have a considerable impact), such a statement should be made somewhere here, or the reason for having general and individual permits remains invisible.

Response: The Division is evaluating the development of new general permit for water withdrawals, which the rule revision will allow so long as the general permit does not authorize more than *de minimis* degradation as defined in Rule Chapter 0400-04-03. Existing general ARAPs all cover habitat alterations. Limiting conditions in these general permits ensure that their application result in no more than *de minimis* degradation. Please see the response to Comment 13.

PRACTICABLE ALTERNATIVES

Comment 17: *What is a practicable alternative and who decides?*

Response: The term "practicable alternative" is defined in Rule 0400-40-07-.03(23) as "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." This definition is based on the Clean Water Act Section 404 rules. The applicant proposes and evaluates what may be a practicable alternative, but the Division makes the final determination, subject to permit appeal and review by the Board.

Comment 18: *In Rule 0400-40-07-.04(5) it appears there is a policy change reflected in the wording of the new (b). The current wording in (a) requires the applicant to list practicable alternatives. However, the applicant may mitigate the effects of the activities. The new wording in (b) indicates the Department will have sole authority to choose an alternative submitted by the applicant regardless of whether the applicant plans to use mitigation. This removes mitigation as an option if the Department chooses an alternative regardless of the needs of the applicant. The previous policy required the alternatives to be used in the event no net loss of water resource values cannot be achieved through mitigation. We would support keeping the current wording and removing the new (b).*

Response: The commenter is correct that the intent of this rule change is to require an applicant to select the least damaging practicable alternative (including avoidance) rather than to simply mitigate for impacts as allowed by the current ARAP rules. This is consistent with federal requirements under Section 404 of the Clean Water Act, so this requirement already applies to projects for which that federal permit is required. This change is intended to maintain the integrity of the ARAP program, consistent with the Act's purpose of protecting waters of the state. This change also counterbalances contemporaneous changes in the Antidegradation Statement.

Comment 19: *Several commenters expressed concern about moving away from requirements to avoid and minimize impacts rather than merely compensate for them.*

Response: These comments reflect a common misunderstanding of the previous version of the ARAP rules, which did not require avoidance and minimization of impacts, but instead required only that the applicant consider avoidance and minimization. The only time selection of a less damaging practicable alternative was

required by the previous ARAP rules was when the impact could not be offset by mitigation, in which case a permit could not have been issued anyway. The new rules require all applicants for individual permits to analyze practicable alternatives and to select the practicable alternative with the least adverse impact on resource values that does not result in other significant environmental impacts. This requirement applies regardless of whether mitigation is required.

Comment 20: *The term "practicable" in regards to alternatives, as the word has been redefined is problematic as the applicant will always want to choose the lowest cost option as the most "practicable." Pipe culverts will always be cheaper than box culverts, and box culverts will always be cheaper than bridges, but the more expensive option is more protective of the resource.*

Response: The definition of "practicable alternatives" is not proposed to be changed, has been in the ARAP rules for some time, and is based on the Clean Water Act Section 404 rules. If a higher cost option is practicable and would reduce the loss of resource values associated with the proposal, then it must be applied unless the alternative would cause significant adverse environmental impacts. The Division, not the applicant, determines practicability. This determination is subject to a permit appeal.

Comment 21: *Restore the determination of practicable to the Individual Permit language, in Rule 0400-40-07-.04 (5)(a) & (b) Individual Permits. The commenter suggests TDEC restore the concept of an applicant assessing and recommending practicable alternatives to meet the permit requirements. The Chamber believes this change will add costs both to the preparation of applications and that more costly alternatives will be selected by the Department. Using the Department's own definition of "practicable alternative" (paragraph (23) of Rule 0400-40-07-.03) is that "an alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes." The commenter strongly believes that the project applicant has a superior perspective to consider all the factors involved, including cost. Paragraph (5)(a) maintains the requirement that an application must include "all necessary technical information for the Commissioner to make a determination"; therefore, the Department has sufficient authority to require an applicant to submit additional information to ensure that the suggested practicable alternative satisfies the permitting requirements. We believe that restoring the determination of the applicant for providing a practicable alternative is in the best interest of an efficient and effective permitting process.*

Response: This proposed rule change is critical to maintaining the effectiveness of the ARAP permitting program and will be retained in the final rule. This rule change counterbalances existing provisions in the Antidegradation Statement allowing projects causing only *de minimis* degradation to avoid the alternatives review that would otherwise be required for waters with available parameters and Exceptional Tennessee Waters. This requirement already applies to all activities that require a Section 404 permit. On balance, this requirement is not expected to impose significant new requirements on applicants.

While the project applicant should have the first opportunity to demonstrate a lack of less impactful practicable alternatives, the Division should have the authority to make the final determination and to require the applicant to avoid and minimize impacts. The applicant may present information that a higher cost design alternative is not practicable, and the Division will certainly consider that information in making its permit determination. The Board does not dispute that an applicant often has a more informed perspective on costs, and the Division will certainly consider – while reserving the ability to question - the applicant's documentation of practicability. If an applicant disagrees with the Division's determination regarding practicable alternatives, the applicant may appeal the permit to this Board.

The above-referenced authority to require additional information is meaningless absent the requirement to select the least impactful practicable alternative.

Comment 22: *The Division should consider making the following revision:*

"Practicable alternative" is an alternative that is reasonably available and reasonably capable of being done after taking into consideration cost, existing uses and investment, existing technology, and logistics in light of overall project purposes. (In making this determination, the Department shall not be bound by any guidance document created for use in its antidegradation analyses.)"

If TDEC is reluctant to change the above definition as requested due to its desire to maintain a certain consistency of this language with Corps federal definitions, then please consider making these changes and then adding it as a new "practicable alternative" definition that would stand alone and be applied by TDEC only to water withdrawal ARAP's -- which are unrelated to Corps definitions, processes, and standards.

Response: The definition will be retained as proposed to maintain consistency with federal requirements. Regarding water withdrawals, applicants should demonstrate that less damaging practicable alternatives are not available.

Comment 23: *Regarding Rule 0400-40-07-.04(5)(b), we object to the carve-out of any government funded road project from the alternative analysis requirement. Alternative locations of a roadway are a critical consideration of lessening impacts to natural resource values and should not be exempted from an alternatives analyses, including options to "avoid" impacts altogether.*

Response: The Board agrees that applicants for public road projects should analyze alternative road locations to avoid or minimize aquatic impacts and present information to the Division demonstrating that such alternative locations are either not practicable or would result in additional adverse environmental impacts. The proposed language has been deleted.

Comment 24: *"Shall consider" would need to be changed to "must demonstrate why the impact can't be avoided and, if not, how impacts will be minimized" to be compliant with Section 404. The proposed rule is not comparable to Section 404 requirements because it does not require rebutting presumptions for the need to fill a wetland or alter a stream.*

Response: Although it does not speak in terms of presumptions, Rule 0400-40-07-.04(5)(b) requires selection of the practicable alternative causing the minimal adverse impact on resource values. This is a requirement to avoid or minimize impacts, and is derived directly from the Section 404 requirements.

Comment 25: *Although we support TDEC's proposed stronger alternatives analyses and required showing of no practicable alternative before granting individual permits, we ask that TDEC eliminate the sentence from Proposed Rule 0400-40-07-.04(5)(b) stating that alternatives analysis for road projects need not include alternative locations. TDEC should strike the sentence creating an exception for road projects. At the very least, we suggest TDEC clarify the requirement as follows: "For public road projects, a state, county or local government agency does not have to submit alternative endpoint locations as part of its alternatives analysis, but the proposal must demonstrate that it has first avoided or minimized impacts to streams or wetlands through alignment and design alternatives. In addition, nothing in this part shall be interpreted to limit the Commissioner's authority to ensure that public road projects comply with applicable state and federal law."*

Response: See response to Comment 23.

Comment 26: *The commenter recommends retaining the alternatives analysis requirement from the previous version of the rules.*

Response: See response to Comment 21.

Comment 27: *It appears that the "practicable alternative" analysis is NOT required for new Tennessee Department of Transportation (TDOT) road projects. There is no justification for creating an exception for a single permit applicant, particularly one which has already had continuous and geographically widespread impacts on water bodies and water quality.*

Response: See response to Comment 23.

Comment 28: *Rule 0400-40-07-.04(5)(b). Revise the sentence saying the alternatives analysis for road projects does not have to include alternative locations as follows, "For public road projects, a state, county or local government agency does not have to submit alternative locations as part of its alternatives analysis, but the Commissioner may require the project to be moved to an alternative location to avoid or minimize impacts to streams or wetlands." This would clarify that the fact that the alternative locations need not be submitted does not imply that the department will never consider them when a proposed location impacts streams or wetlands.*

Response: See response to Comment 23.

Comment 29: *The statement, "For public road projects commissioned by a state, county or local government, does not need to include alternative locations" should be changed to "...may include alternative locations." TDEC should consider adding a statement to address the fact that TDOT should strive to avoid aquatic impacts wherever possible. Additionally, we feel that it's a bad precedent to identify a specific type of project impact in rule.*

Response: See response to Comment 23.

Comment 30: *Rule 0400-40-07-.04(5)(b), the second sentence says that state, county and local governments don't need to include alternative locations in their alternatives analysis. Please clarify that the Division can raise alternative locations.*

Response: See response to Comment 23.

Comment 31: *Rule 0400-40-07-.04(5)(b). Revise the sentence saying the alternatives analysis for road projects does not have to include alternative locations as follows, "For public road projects, a state, county or local government agency does not have to submit alternative locations as part of its alternatives analysis, but the Commissioner may require the project to be moved to an alternative location to avoid or minimize impacts to streams or wetlands." This would clarify that the fact that the alternative locations need not be submitted does not imply that the department will never consider them when a proposed location impacts streams or wetlands.*

Response: See response to Comment 23.

Comment 32: *The exemption for road projects should explicitly state that location issues cannot be challenged during the ARAP permitting process because TDOT, counties, and cities utilize public processes for siting roads. This would leave open the possibility for using the ARAP process for challenging siting if there had been no previous opportunity to raise siting issues.*

Response: See response to Comment 23. Given that the provision has been stricken, this change will not be made.

Comment 33: *Per Rule 0400-40-07-.04(5)(b). The revisions proposed at this subsection may be the most crucial aspect of this rulemaking. While we understand that for habitat alteration projects there is an interest in conforming to Corps standards (even though ARAP's cover more waters and more activities) and the order of preference to avoid/minimize/mitigate, this strict new permitting standard proposed is a poor fit for water*

withdrawal permitting. It should not be required for withdrawals, either new withdrawals or especially for ongoing renewals, if an applicant can show lack of harm to the water body affected from the proposed or existing project despite some small level of measurable or potential impact.

Response: The Board believes that the same general provisions for alternatives analysis proposed for other alterations should also be applied to new or expanded water withdrawals, including avoidance, minimization, and an exploration of practicable alternatives. For renewals that do not increase existing withdrawal limits, the applicant will not be required to "re-justify" an amount of withdrawal and location that the Division has previously permitted. The Division does retain the authority to revisit withdrawal levels if adverse impacts result from the withdrawal or if background conditions change, such as if there were a significant change in the flow regime of a stream.

Comment 34: *The language proposed in Rule 0400-40-07-.04(5)(b) regarding Individual Permits calls for evaluation of "potentially" practicable alternatives. The word "avoid" should be added to this section – "to avoid and minimize the loss of resource values." If "avoid" is omitted here, it appears that an applicant is never held to the standard of documenting why impacts are unavoidable. Also, if the applicant turns in an alternatives analysis and an in-system mitigation plan, and the in-system plan is unreviewable in the draft permit, challenges remain with respect to reviewing "de minimis" declarations.*

Response: The word "minimize" already includes reduction of the impacts to zero, or avoidance. Nonetheless, for the sake of clarity, the term "avoid " will be added. The Division's determination of *de minimis* degradation is reviewable through a permit appeal.

CUMULATIVE IMPACTS

Comment 35: *Per Rule 0400-40-07-.03(9): definition of "Cumulative Impacts" - Please clarify if actions resulting in "cumulative impacts" are the actions of a single permit applicant. The use of the term "past actions" is currently open to interpretation; we recommend more clearly defining the term "past actions" and how it relates to "common plan of development".*

Response: The wording used is intended to apply to both past actions or a single applicant.

Comment 36: *Per Rule 0400-40-07-.04(6)(c)6:* whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource (p. 15). *We recommend removal or definition of the word "secondary."*

Response: The term "secondary impacts" is already in the current rule, and the Division has not proposed to add or change it. This means impacts that are unintentional or indirect, such as impacts that occur upstream or downstream of the direct impact area as a result of the permitted activity.

Comment 37: *The imperative of considering cumulative impacts is nowhere present in this document. While the definition remains in this definition section, the term is completely absent from the document. As consideration of cumulative impacts is explicit in the Clean Water Act, it would of necessity be required to be part of the consideration in issuing permits for impacts under ARAPs. Necessarily, the impacts of previous degrading activities or general human impacts such as development in the watershed (cumulative impacts) would need to be part of assessing "baseline conditions" as defined here. The TN SQT tool, as written and where applicable, would capture the current conditions, but lacks the tracking function that only TDEC can provide for cumulative impacts. Perhaps even more important, there is no guidance here, or in any referenced documents, that set limits for when cumulative impacts can be said to have met the allowable limits (except for chemical pollution), that would prevent the issuance of an ARAP.*

Response: Rule 0400-40-07-.04(6)(c)6 lists cumulative impacts among those factors the Commissioner should consider when evaluating the loss of resource values for the purpose of determining mitigation. The commenter is correct that there is no explicit requirement for the applicant to provide an analysis of cumulative impacts. Because habitat is a narrative, rather than a numeric water quality criterion, the Board has not attempted to set specific numeric limits in rule for how much of various types of alterations can be allowed in a given watershed or segment. The Stream Mitigation Guidelines are expected to offer some guidance on this subject.

COMPENSATORY MITIGATION

Comment 38: *The rules should express a preference for mitigation banks, which reduce the level of uncertainty associated with permittee responsible mitigation.*

Response: The rules are intended to be neutral with respect to the mitigation provider. However, where proposed habitat alterations also require Section 404 permits, the Corps's preference for mitigation banks would apply through the Corps's permitting process.

Comment 39: *Rule 0400-40-07-.04(7)(c)1. Revise sentence as follows, "When practicable, mitigation for wetland impacts should occur within the same US EPA level III ecoregion as the impacts." The "may be based on" language in the proposal is so weak as to be almost meaningless. This clarifies that the preference for wetland mitigation is that the mitigation be in the same level III ecoregion as the impacts, while still allowing it in the HUC 8 or 12 if the same ecoregion is not practicable.*

Response: The Board finds this revision too restrictive to be universally applied. The intent is to make clear that ecoregion similarity is one of several factors the Division may consider when reviewing mitigation sites, and that in some cases closer proximity to the impact and staying in the same ecoregion is preferable to a site further away in the same HUC 8.

Comment 40: *Mitigation needs to be located as close to the impact as possible.*

Response: The Board agrees with the principle that mitigation should be located close to the impact, and Rule 0400-40-07-.04(7)(a)4 reflects this preference.

Comment 41: *The order of mitigation stated in Rule 0400-40-07-.04(7)(a)4 is contrary to the Federal 2008 Mitigation Rule, where the preferential order of mitigation is Mitigation Banks first, In-lieu-fee programs second, and Permittee-Responsible Mitigation (PRM) third. The State's order of preference places an undue burden upon the applicant to potentially provide two mitigation plans, one to satisfy the Corps of Engineers requirements and one to satisfy the States requirements.*

Response: The rule expresses a preference, but not an absolute requirement. One of the goals of this rulemaking is to avoid situations in which an applicant would be required to mitigate twice for the same impact because of direct conflicts between the ARAP rules and Section 404 requirements. However, the State's policy has been, and remains, to promote compensatory mitigation close to the impact site because when mitigation is provided farther away from the impact site, it is more difficult to ensure no overall net loss of resource values. Moreover, the Corps's rules encourage watershed-based mitigation. In order to balance these two policy goals, which are in tension with each other, the rule is expressed in non-mandatory language but allows the Division to develop a multiplier to be applied to mitigation that is farther from the impact site.

Comment 42: *The text says after the prioritization process that multipliers "may" be used as the benefits move further away from the impact site. This should say "will" or "shall" in order to incentivize mitigation that truly compensates for the damage.*

Response: The Division needs some flexibility to meet the widely varied situations that arise in ARAPs, and to attempt to coordinate with Corps permitting.

Comment 43: *Rule 0400-40-07-.04(7)(a)4. Revise the sentence before the listing of five priorities to read, "Mitigation, whether done by the permittee or another mechanism, should occur as close to the impact..." This would clarify that the location priorities apply to banking and in-lieu fee as well as permittee-responsible mitigation.*

Response: The rule language proposed does not specify permittee-responsible, banking, or in-lieu fee mitigation. Therefore the wording is intended to include all mitigation scenarios.

Comment 44: *Please add the following language to avoid taking of private property:*

(c) Mitigation of Wetlands.

...

2. The ratio of acres required for wetland mitigation must be reasonably related and roughly proportional to the impacts and, in general, should not be less than 2:1 for wetland restoration....

Response: The Board believes the wording in subparagraph (7)(a) of Rule 0400-40-07-.04 ("..the applicant must provide mitigation that results in no overall net loss of resource value from existing conditions.") to be adequate to address the commenter's desire for mitigation to be related and proportional.

Comment 45: *Per Rule 0400-40-07-.04(7)(a)4.* The Division will evaluate resource value compensation through the use of an appropriate quantitative assessment or other defensible scientific method, and where applicable will account for temporal loss of resource values. *This provision should also allow use of a "quantitative assessment tool" to determine baseline conditions and suggest using qualitative tools.*

Response: It is indeed the intent of the Board that the Division both allows and encourages the use of quantitative assessment tools for assessing existing conditions. The Board does not intend to make the use of any specific tool mandatory. Some proposed alterations are easily assessed with much less cost and effort. The Division will address this issue in greater detail in the Stream Mitigation Guidelines.

Comment 46: *The rule states that where applicable the Division will account for temporal loss of resource values. TDEC should demonstrate how this will be done so that temporal loss is factored into the value of the mitigation.*

Response: As stated at the end of part (7)(a)4 of Rule 0400-40-07-.04, the Division will use a multiplier added onto to the mitigation ratios to account for significant temporal losses. Specifics on how a multiplier will be applied will vary with the temporal loss.

Comment 47: *There are two kinds of temporal loss and both should be compensated. The first is the loss of resource values from the time of the destruction to the time of the compensatory mitigation completion. If there is a two year time lag, for example, there should be a charge for that lag with funds directed to other kinds of restoration and enhancement projects. The second temporal loss is the loss of full function from the time of the construction until the project is fully functioning. This is often seen in the time lag to repopulate a stream segment with aquatic species, or in the growth required to create a well-rooted bank and riparian zone. It is only after a number of years (5-10?) that it can be determined whether the ecological functions have been replaced. Rule 0400-40-07-.04(7)(a)4. This is a very important addition, the temporal factor as noted above. Either a multiplier could be applied to the debit and additional credits would be needed to balance, or a flat fee calculated for an average delay based on the nature of the damage and restoration time, say two to five years, would be paid to TDEC and used to fund restoration and enhancement on impaired streams on the 303(d) list.*

Response: The Board proposes that the Division will utilize a multiplier, as the commenter suggests, for any significant temporal losses. See Comment #46 and associated response.

Comment 48: *Per Rule 0400-40-07-.04(7)(a)4. How will the Division "apply a multiplier" based on subparts (i) through (v)? Please provide rationale for applying a multiplier? If a multiplier is to be provided and used on mitigation projects, we suggest including the procedure in the Rule.*

Response: The use of a multiplier to require more mitigation for significant temporal losses is more consistent with the concept of 'no net loss' than charging additional fees or other cost-incentives. This requirement applies only when there is an appreciable permanent loss of resource values such that mitigation is required. When mitigation occurs years after the impact, this lag time further magnifies the loss of resource values. Specifics on how a multiplier will be applied will vary with the temporal loss. The Division plans to provide more specifics in the Stream Mitigation Guidelines.

Comment 49: *Regarding Rule 0400-40-07-.04(5)(c), there is no bar to government joining as a co- applicant or a co-holder of a permit and use this status to facilitate a private for profit activity. This is an open invitation to local governments as well as state agencies to facilitate permits which previously would have been denied. Regulations to allow government to pick economic winners and losers is bad public policy.*

Response: The Board concurs with the commenter. Language will be added specifying that only in the case of a public works project may a government entity propose mitigation after a permit has been issued. The Division retains the authority to judge what constitutes unusual circumstances in this context; the intent is that this only be applied in urgent situations and for legitimate public projects.

Comment 50: *The draft regulation fails to acknowledge the EPA rules governing stream and wetland protection under Clean Water Act Section 404.*

Response: While the Board has endeavored to avoid direct conflicts with federal requirements, the ARAP rules do not substitute for the CWA Section 404 rules, which will apply separately to any projects that require a Section 404 permit in addition to an ARAP.

Comment 51: *The term "appreciable" is used in the definition of "minimal impacts". This term is also used throughout the rule to make similar references. This term is not defined in the rule. We assume this term will be applied using the normal and ordinary meaning as defined in the dictionary. If this term will be used broader than the normal and ordinary meaning, the Department should define the term within the rule and make available for public review*

Response: The commenter is correct. It is the intent of the Board that the Division will apply the term "appreciable" in the ordinary and normally accepted meaning. However, the Board is also adding a definition of "appreciable permanent loss of resource values" due to comments received reflecting a lack of clarity about this threshold.

Comment 52: *We recommend that when an applicant provides reasonable justification, e.g. due to small size and location of the HUC-12, why mitigation within a HUC-12 cannot be found then a multiplier should not be added.*

Response: The Board agrees that there are some scenarios where mitigation outside the HUC 12 would not have a multiplier applied. (For example, if an excellent mitigation site is in close proximity and in the same ecoregion but just outside the HUC 12). The wording used in part (7)(a)4 of Rule 0400-40-07-.04 ("Where appropriate...") allows the Division flexibility in applying multipliers.

Comment 53: *Per Rule 0400-40-07-.04(7)(c)2 - "4:1 for wetland creation and enhancement; and 10:1 for wetland preservation". Rule 0400-40-07-.04(7)(a)3, indicates the order of acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation. If enhancement and preservation are preferred ahead of creation then one would assume the mitigation ratios for these two methods would be better than for creation. Since wetland enhancement already has some wetland characteristics, the chances of success are much greater than creation; likewise, with high quality wetlands that are in much need of protection, one would assume a much better ratio would be provided. It is suggested that a 2:1 enhancement ratio be considered and a 5:1 to 10:1 range be considered for preservation.*

Response: The commenter makes a logical point, but enhancement and preservation, while more likely to be successful, do not necessarily meet the goal of "no net loss" at a low ratio. For example, the Division cannot claim to have met the no net loss standard if it issues a permit that allows an acre of wetland to be filled, and mitigated for by enhancing and/or preserving the same amount of an already existing wetland. For this reason creation is granted a lower ratio and requirements for monitoring the success of the creation are included in the permit. Preservation is generally acceptable as part of an overall mitigation package, but at a higher ratio. The Division considers the conversion of unique or high quality wetland resources when determining how much, and what type, of mitigation should be required in a permit. A high quality mitigation wetland may, for example, be required to compensate for the loss of a high quality impacted wetland, and no downward ratio adjustment should be made in this situation.

Comment 54: *Per Rule 0400-40-07-.04(7)(a)3:* Acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation, or any other measures that are reasonably assured to result in no net loss of resource values from baseline conditions. *We recommend this statement be eliminated or revised to better align with federal rule. Federal rule prefers restoration first, then other methods of mitigation in no particular order:*

Response: With the language as proposed, the rule has laid out a prioritization more specific than the federal rule, but does not conflict with it, since as the commenter points out, the federal rule expresses no priority preference after restoration. This is the intent.

Comment 55: *The goal of the proposed rule changes should focus on providing greater transparency, consistency, and equivalency in the mitigation permitting process. It is the responsibility of the Department to promote a level playing field with respect to all mitigation mechanism providers. Greater oversight should be placed on providers who fail to meet the goals and objects of an approved mitigation plan. Specifically, in-lieu fee (ILF) programs are allowed to pre-sell credits based on a commitment, and often unproven track record, to provide successful mitigation in the future. This not only hurts the environment, it creates an uncertain marketplace holding back responsible and timely economic development and job creation. When advanced mitigation is purchased, but never performed or fails to perform, the Department should review the associated permits and ensure the proper environmental benefits are achieved by another proven provider.*

Response: The Board appreciates the comment, which raises valid issues. However, ILFs are primarily governed under federal rules through the Interagency Review Team, of which the Division is a member. Recent actions by the IRT have facilitated the development of a broader marketplace of third-party mitigation providers in Tennessee. Federal rules require the IRT to secure financial assurances, which should ensure eventual mitigation. The remedy for failed performance of purchased credits, however, generally lies with the ILF provider, not the permittees.

Comment 56: *Per Proposed Rule 0400-40-07-.04(7)(a)1. -- Suggested change:*
The applicant shall provide the Division with a mitigation plan, including <u>but not limited to site selection and control, credit / debit determinations, performance standards, credit release schedule, financial assurance, site</u>

protection, long-term management plan, and monitoring ~~a time schedule for completion of all mitigation measures~~, for approval. To the extent practicable, the applicant shall complete the required mitigation, excluding monitoring, prior to, or simultaneous with, any authorized impacts.

Justification:
It is important all mitigation mechanisms are held to highest performance standards by demonstrating control over critical elements of a valid mitigation plan, as outlined above, and presented to the Division for review. Furthermore, the Division, or other relevant agencies, should hold applicants accountable for any site failures or delays in implementing mitigation projects in a timely and consistent manner.

Response: The commenter raises a good point with respect to site protection. The draft rules had overlooked this requirement, which is routinely applied in ARAPs and is required to ensure that compensatory mitigation sites are protected from later development. Accordingly, the rules will be updated to include an express requirement for permanent protection of compensatory mitigation sites consistent with current practice.

The balance of the measures proposed by the commenter may not be applicable to all mitigation scenarios, so the rule language will not be changed.

Comment 57: *Per Proposed Rule 0400-40-07-.04(7)(a)4(iv) - Suggested change:* projects providing an increase in resource values to degraded streams or wetlands ~~outside~~ adjacent to the HUC-8 in which the impact is located; or ...

Justification:
The proposed change will create greater consistency when determining the service area of a mitigation mechanism. This would follow similar practices used by the U.S. Army Corps of Engineers when permitting mitigation banks or determining the location of a permittee responsible mitigation (PRM). Overall, mitigation mechanism should be given same determination when selecting a service area in order to drive more private investment through the establishment of traditional mitigation banks or choosing the appropriate area for a (PRM). With greater service area certainty, private investment will follow leading to more advanced ecological restoration through the development of mitigation banks, competitive pricing, and a greater supply of credits.

Response: The requested change will not be made. This language is in the current rule, and has not proven to create problems when combined with the Corps's priorities. Specifically, mitigation in an adjacent HUC 8 is a subset of mitigation outside the HUC 8, so the two sets of rules do not conflict.

Comment 58: *Mitigation banks and in lieu fee programs often have several HUC 8 watersheds as a service area; and federal mitigation rule gives preference, in order, to mitigation banks, in lieu fee programs, then permittee responsible mitigation. An applied multiplier to use a bank or in lieu fee program may favor permittee responsible mitigation. If permittee responsible mitigation is favored over banks and in lieu fee programs, then this may discourage mitigation sponsors from developing banks and in-lieu fee programs in Tennessee. In order to keep TDEC's permitting process predictable and ordinary as outlined in the Bill of Rights for Permit Applicants (Tenn. Code Ann. § 69-3-141), we recommend that clarification be provided that TDEC rule is consistent with the preference outlined in the federal mitigation rule.*

Response: While the Board endeavors to avoid any conflicts between state and federal requirements, in order to avoid or minimize appreciable loss of resource values, it is important to keep the mitigation as close as practicable to the site of the proposed impacts. The Division works collaboratively with the Corps and other members of the Interagency Review Team to avoid conflicting requirements, and will continue to do so. Moreover, there is a subset of applications that require ARAPs but do not require Section 404 permits, and in these cases the State's preference for mitigation close to the impact site applies without any potential tension with other rules.

Comment 59: *Per Proposed Rule 0400-40-07-.04(7)(a)5. Suggested change:*
~~All mitigation plans shall include a monitoring and reporting program to document timely achievement of successful mitigation and remedial actions to correct any deficiency.~~

Justification:
This section is unnecessary if the critical elements of a mitigation plan are clearly outlined in the Proposed Rule 0400-40-07-.04(7)(a)1. Applicants should describe their future monitoring events as well as adaptive management (remedial actions) through the mitigation plan submission and approval process. While the Division retains the final authority to determine each critical element of an acceptable mitigation plan, these changes provide an overview of the most important elements and allow an applicant to see them listed in a concise and comprehensive manner.

Response: Monitoring and reporting are critical elements of mitigation and will be retained in the rule as is.

Comment 60: *Per Proposed Rule 0400-40-07-.04(7)(c)1. - Suggested change:*
~~Prioritization of mitigation site selection for wetland impacts may also be based on U.S. EPA Level III ecoregions.~~

Justification:
This section creates confusion with Proposed Rule 0400-40-07-.04(7)(a)4(i) – (7)(a)4(v). All mitigation mechanisms should follow a consistent service territory and be prioritized in manner that minimizes temporal loss when and where available.

Response: There are multiple factors to consider when selecting sites for wetland mitigation, including proximity, geology and ecoregion, and likelihood of success. Wetlands share similarities within watersheds and also within ecoregions. The Board prefers to reserve enough flexibility in the rule to allow for the best mitigation options in each situation.

Comment 61: *Per Proposed Rule 0400-40-07-.04(7)(c)2. - Please confirm whether the ratios listed here are for calculating compensation/impact ratios for impactors or ratios given to mitigation providers for the work they perform on wetland sites.*

Response: These ratios establish the amount of mitigation to be required to offset permitted impacts, depending on the type of mitigation provided. These ratios affect both the permittee and the mitigation provider.

Comment 62: *Mitigation outside of an area that is degraded or removed has no effect whatsoever on water quality and potentially serves to degrade water quality not only the new use area but in a newly developed offset area.*

Response: The rules require, and the Division ensures, that compensatory mitigation results in no overall net loss of resource values. The Division must ensure that an impact does not cause pollution, including downstream impacts. Moreover, the Division recognizes that compensatory mitigation itself is an impact, and imposes measures to ensure these projects have a net positive effect on water resource values.

Comment 63: *One of the proposed rule changes would open the door to disturbance of pristine aquatic ecosystems by developers (known as "exceptional Tennessee waters") as long as they mitigate the damage within a defined nearby area that could potentially be some distance from the impacted aquatic system. This kind of remote mitigation would be inadequate to provide the necessary protection of the system's water quality.*

Response: There are few if any truly pristine (which is usually defined as completely undisturbed by human contact) aquatic ecosystems in TN, and 'pristine' is not part of the definition of Exceptional Tennessee Waters. We also disagree that in-system mitigation is insufficient to compensate for the loss of ETWs. The ARAP rules require consideration of the "conversion of unique or high quality waters as defined in Rule 0400-40-03-.06 to more common systems" as a factor in evaluating a mitigation package. Therefore, an activity that impacts an ETW is going to require more and/or higher quality mitigation to offset the loss of resource values.

Comment 64: *Wetlands filter our water, for drinking water quality, and are home to many unique species. Wetlands should be protected, approval of projects and mitigation should be permitted only when true duplication of habitat can be found within the same habitat/watershed.*

Response: The Board agrees with the commenter, and the language proposed herein is intended to better achieve avoidance, minimization, and mitigation in proximity to the proposed impact.

Comment 65: *Wherever and to the fullest extent possible, TDEC should work to ensure that degradation of streams due to mitigation moving away from the impacts (proximity) is minimized.*

Response: The Board agrees with the commenter and believes the proposed changes strengthen the priorities in favor of proximity.

Comment 66: *Rule 0400-40-07-.04(7)(a) where acceptable mitigation mechanisms are described, it lists PRM, ILF, and mitigation banks but does not specify the hierarchical preference of each mechanism. As such, it is unclear whether the Rule will follow the 2008 Federal Mitigation Rule's hierarchical preference (i.e. mitigation banks, ILF, and then PRM). It seems appropriate to indicate Division preference (or no preference) under this section as it may imply that PRM is the #1 choice since it is listed first.*

Response: These rules do not establish a preference for the type of mitigation provider.

Comment 67: *Per Rule 0400-40-07-.04(7)(a)6:* Mitigation for impacts to Tennessee streams and wetlands shall occur in Tennessee. *We recommend eliminating this wording. Where the goal of TDEC is to assure no net loss of resource value with a watershed prioritization approach, out-of-state mitigation should be allowed regardless of state boundary when proposed mitigation is located within the same watershed or major drainage basin as impacts.*

Response: The commenter makes a valid point. However, the Division has no authority or right of entry outside the bounds of the state of Tennessee, making it difficult to effectively regulate out-of-state sites. Furthermore, the Board and the Division have a responsibility to ensure that no appreciable loss of resource values occurs to waters of the state of Tennessee. If an authorized impact reduces resource values to waters of the state, the offsetting mitigation must be provided in waters of the state.

Comment 68: *Given there is no "scientific" bases for selecting mitigation ratios, language should be added that the mitigation required must be reasonably related and roughly proportional to the resource value lost to assure compliance with the Attorney General guidelines to avoid regulatory takings... Suggested language is underlined.*
Rule 0400-40-07-.04(7)(c) Mitigation of Wetlands.

...

2. The ratio of acres required for wetland mitigation must be reasonably related and roughly proportional to the impacts and, in general, should not be less than 2:1 for wetland restoration; 4:1 for wetland creation and enhancement; and 10:1 for wetland preservation.

*The federal mitigation rule is clear on this issue - Federal compensatory mitigation policy dictates that the amount of mitigation required must be "**roughly proportional with the permitted impacts**, so that it is sufficient*

to offset those lost aquatic resource functions." Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,633 (Apr. 10, 2008) (emphasis added).

Response: The Board believes the wording proposed in subparagraph (7)(a) of Rule 0400-40-07-.04 *"...the applicant must provide mitigation which results in no overall net loss of resource values from existing conditions"* ensures that the mitigation is roughly proportional with permitted impacts. The ratios established in the rule for wetland mitigation are roughly proportional. An applicant has no requirement to provide more mitigation than needed to achieve 'no overall net loss' of resource values. However an applicant may choose to offer a higher level of mitigation than required by rule.

Comment 69: *The expansion of Rule 0400-40-07-.04(7) introduces a completely new process for determining impacts of projects. Under current rules, TDEC was required to determine under its antidegradation guidance whether there was an appreciable impact on the resource, i.e., that resource values would be lost. This determination then triggered the requirement for documentation that all avoidance and minimization options had been explored, and that mitigation would be required. The application would then be reviewed to ascertain compliance with these requirements, including how the mitigation requirement would be met. The expanded language appears to say this very thing, but that sense of clarity is lost with the final phrase, referencing "baseline conditions." Baseline conditions, as defined in the definition section (not adequately), is based on an assessment of the stream (or wetland). The assessment is of precisely a particular stream segment or wetland and is not generalized to a watershed. Therefore the only way that mitigation could meet the standard in this paragraph is if the mitigation is contiguous to the impact area so that a subsequent assessment of the site would score the same as the original assessment. It is clear, however, from other parts of this document, that acceptable compensatory mitigation need not occur contiguously and that TDEC is willing to accept permanent loss of resource value at a particular site in exchange for an increase in resource value at some other, perhaps quite distant, site. While such mitigation arrangements may sometimes be unavoidable, it cannot take the place of a determination that the degradation is NOT "de minimis" and therefore all requirements of projects that cause degradation must apply, including compensatory mitigation and a documented analysis of options to avoid and minimize as well as socio-economic justifications for the project.*

Response: There is no requirement, express or inherent in these rules, that mitigation must be provided "contiguous to the impact area." The use of the term "existing conditions" in the ARAP rules (substituting for "baseline conditions") simply reemphasizes the current rule that mitigation must compensate for the lost resource values associated with the impact. The Board and EPA have both previously approved the use of in-system compensatory mitigation as resulting in only *de minimis* degradation, appropriately encouraging mitigation close to the impact site.

Comment 70: *We recommend that assessments not be limited to quantitative methodology, but also allow for the use of qualitative assessments. Quantitative assessments are not required in the federal mitigation rule, Compensatory Mitigation for Losses of Aquatic Resources (2008.) The federal mitigation rule allows for several types of assessment methods and does not specifically call out quantitative assessments. For more timely and cost effective mitigation decisions, we recommend the use of either a qualitative or quantitative methodology. Such quantitative methodology, like TDEC's Stream Quantification Tool (SQT), can be costly to implement, labor intensive, and result in a more arduous regulatory process. Other states around Tennessee are currently using a qualitative assessment because permitting and mitigation decisions can be made using a much simpler, rapid, method than a qualitative method to collect baseline data and evaluate mitigation site success. There is concern that specifically calling out 'quantitative' assessment in rule will result in only the use of the SQT. If other assessment methods are truly acceptable there is no need to specially call out quantitative assessment.*

Response: There is no intent on the part of the Board to make the specific use of the SQT or other quantitative tool mandatory. The commenter is correct that there are common scenarios where a much less intensive process may be adequate to assess existing conditions. The Board expects that the Division will express a

preference for the use of the SQT or other quantitative tool for the purposes of mitigation banking crediting and debiting in the Stream Mitigation Guidelines.

BASELINE/EXISTING CONDITIONS

Comment 71: *A number of commenters expressed support for assessing mitigation based on baseline conditions. However, some commenters noted that this term is used in the field of mitigation with a different meaning and asked that a different term be used.*

Response: The Board appreciates these comments and will retain the substance of the proposal. However, to avoid confusion with other commonly-accepted uses of the term "baseline conditions," the term "existing conditions" will be used instead.

Comment 72: *The definition of baseline condition in the ARAP regulations grandfathers in existing pollution contrary to the spirit and letter of the Tennessee Water Quality Control Act where all waters are supposed to be held in the public trust, and that Tennesseans have the right to unpolluted waters, and polluted waters are supposed to be abated, reclaimed and prevent future pollution.*

Response: The commenter correctly, though only partially, references the overall mission statement of the TWQCA, and the Board and the Division indeed have this mission. An applicant proposing an alteration on their property, however, does not. The intent behind this definition is to make clear that the applicant's responsibility for mitigation is not to conduct stream restoration to remediate all past degradation regardless of whether it was associated with the development activity at that site. The applicant's responsibility is to show the Division and the public that the alteration they are proposing, along with past activities associated with the same development, will not cause a violation of water quality standards, nor an overall net loss of resource values.

This principle is reflected in the previous version of ARAP Rule 0400-40-07-.04(6)(c), which required the Department to ensure no lost resource values "associated with the proposed impact" and to determine "the lost resource value associated with the proposed impact and the resource value of any proposed mitigation." The rules have never required an ARAP permittee to provide mitigation beyond that required to compensate for the permitted impacts within the development.

Comment 73: *The rules should better define baseline conditions.*

Response: To avoid confusion with other commonly-accepted uses of the term "baseline conditions", the Board will change to the term "*existing* conditions," meaning the habitat and water quality status of the waterbody in question at the time of the application. These existing conditions are those that are present at the outset of a common plan of development. For example, if a developer undertakes minimal impact activities under a general ARAP, but later exceeds that threshold with additional impacts, mitigation would be required for the entire loss of resource values from the outset of the development work at the site.

Comment 74: *The new definition "Baseline conditions," contains the following language: "other defensible scientific method as approved or determined by the Division." We do not object to this language however, we believe any scientific methods used by the Department to make assessments should be made available for public review. The regulated community depends on private environmental consultants and federal agencies such as USDA for technical guidance. Transparency regarding scientific methods used by the Department ensures consistency between the Department and regulated community when making decisions.*

Response: The situations encountered in Individual ARAPs are widely varied, and it is for this reason that the rules are not more specific as to methods. In addition, new methods are constantly being developed, so to name preferred methods specifically in rule would require a rule change every time a new viable method

became available. Under the proposed requirement for a draft permit and a permit rationale to be made available for public review, the regulated community will be able to review any methodologies proposed by an applicant.

Comment 75: *The stream quantification tool is not appropriate for determining baseline conditions in urban streams.*

Response: Urban streams can indeed be problematic. However, we disagree that the SQT is inappropriate for use in urban settings. By adopting a resource value scoring system which assigns mitigation credit based upon functional value lift from the existing conditions, the Division believes that mitigation opportunities in urban settings will be improved. The rules are being revised to reflect that the Division may set a lower limit on the score that can be assigned to a severely impaired stream so that the goal of no overall net loss is assured. In addition, the SQT is not a requirement, and rules provide for other alternative assessment methods to be proposed by an applicant.

Comment 76: *Exceptional Tennessee Waters (ETWs) have a higher baseline resource value.*

Response: The commenter is generally correct. The purpose of using existing conditions is to require mitigation to offset the loss of resource values. This loss is typically greater for ETWs and Outstanding National Resource Waters than for other types of waters because the quality of the impacted resource values is higher. But some ETWs are identified for reasons other than having high resource values, and these would not necessarily have a higher existing condition level.

Comment 77: *Mitigation should be assessed based on the ecoregional reference stream rather than baseline conditions due to urban stream syndrome.*

Response: Mitigation is intended to compensate for the loss of resource values resulting from a permitted impact. However, the Board is modifying Rule 0400-40-07-.04(7)(a) slightly to clarify that the Division can set a lower limit on existing condition values, recognizing that all streams and wetlands provide important resource values even if some of their designated uses have been degraded. The commenter correctly points out that without this lower limit, an applicant could propose a loss of resource value to an urban stream that exhibits extremely low existing condition scores and provide relatively little mitigation elsewhere to compensate.

Comment 78: *Per Rule 0400-40-07-.03(4) definition of "Baseline Conditions", and Rule 0400-40-07-.04(6)(c) "the Commissioner shall determine the loss of resource values from baseline conditions associated with a proposed impact and the increase in resource values .... " – the commenter suggests replacing "quantitative" with "qualitative". Many of the current protocols are qualitative in nature. If the State is requesting a quantitative approach, then it is suggested that some guidance on which approach the Division will accept would be appreciated.*

Response: Please see responses to Comments #70 and #74. There are some situations where a quantitative methodology will be required (consistency in assessing mitigation debits and credits makes this a necessity). However, the Board agrees that there are many common ARAP scenarios where a more qualitative approach will be adequate for permit decisions.

Comment 79: *I oppose the rule changes that propose setting "baseline conditions" when a developer applies for a permit. Any impacts to the stream or wetlands would be judged based on the conditions present at the time the project is proposed, as opposed to more pristine levels. Such an approach would potentially weaken future pollution limits if the baseline is inaccurate.*

Response: Please see response to Comment #77. The Board agrees that the determination of existing conditions must be accurate, and division staff will review these conclusions.

Comment 80: *We urge that TDEC establish processes and maximize use of all available science and resources to optimize the agency and others' ability to conduct accurate resource value calculations. This should ideally include considerations related to ecosystem service values that may be adversely impacted, like recreational uses, one of Tennessee's primary stream-use classifications, identified for the protection of the public's ability to swim, wade and fish. Regarding baseline conditions, if the revised rules for determination of baseline conditions are approved, we encourage TDEC to test the assumption that permittee-determined baseline assessments are equal to or better than the agency's.*

Response: The rules reflect no assumption that permittee-determined assessments are equal to or better than the agency's. The Division is expected to review such assessments and to make its own determination of what the actual baseline condition is.

Comment 81: *The Rule revision states that baseline conditions are the biological, chemical, bacteriological, radiological, and physical conditions of a stream or wetland as measured by a quantitative assessment tool or other defensible scientific method as approved by the Division. As we understand it, the Stream Quantification Tool has not yet been finalized. TDEC should clarify what other methods are permissible for use and are most appropriate for evaluation of streams, especially those in urban settings.*

Response: Please see the response to Comment #74.

Comment 82: T*he introduction of the "baseline condition" definition (0400-40-07-.03) is problematic, as it replaces any consideration of the resource values in a reference stream with those of the stream(s) or wetlands(s) affected by a proposal. Many streams in urban, suburban, and agricultural areas are already listed as impaired for habitat alterations. Many of these alterations have come from legacy impacts (e.g. – land use changes in the watershed) and/or unregulated nonpoint source land management practices (e.g.- livestock or crop production). These are precisely the streams and wetlands under most threat from further degradation by new construction and land use changes.*

Does the new definition of "baseline conditions" suggest that if a stream is already impaired for habitat alteration, that this impairment negates the requirement to even propose mitigation? Does the definition of "significant degradation" (Rule 0400-40-03-.04(29)) and the language under Rule 0400-40-03-.06(2)(c) allow more degradation to a particular urban stream so long as the offset is proposed in the same HUC 8 watershed? In addition, would any entity covered by a Municipal Separate Storm Sewer System permit become unaccountable for existing or new habitat alterations that fall under its jurisdiction simply because the alterations already exit? Urban watersheds provide substantial health, recreation, and aesthetic values to Tennesseans, and any changes to TDEC rules should promote their restoration and enhancement rather than allow additional degradation that is not adequately compensated for nearby.

Response: The Board understands and agrees that urban streams are more likely to be degraded and under threat due to development, which is true regardless of what requirements these rules establish. However, the ARAP permitting program is not the proper vehicle with which to achieve restoration of urban streams: that would effectively require the permittee to compensate for the damage caused by all of us.

Moreover, the Board must reiterate that this is a clarification, and not a substantive change, of the previous rules. Specifically, although the previous rules defined the term "background conditions" in relation to reference streams, that definition was not used again in the rules or applied to determinations of mitigation requirements, so it had no effect whatsoever on permitting.

This introduction of existing conditions was never intended to imply that mitigation would not be required for urban streams. In response to comments on this issue, Rule 0400-40-07-.04(7)(a) is revised to reflect the intent that all streams and wetlands have value and will require at least a minimal level of mitigation for activities causing an appreciable permanent loss of resource values notwithstanding prior degradation.

The definition of "significant degradation" does not require mitigation in the same HUC 8, which is only required for "*de minimis* degradation."

The Municipal Separate Storm Sewer System permit is an NPDES permit authorizing the discharge of pollutants. It does not satisfy ARAP permitting requirements for habitat alterations.

Comment 83: *Because multipliers are being suggested in terms of proximity and temporal loss to ensure proper compensation, we believe there is also a role for multipliers on the debit side as well. 303(d) streams, especially those suffering from "urban stream syndrome" should have multipliers that partially dis-incentivize further degradation, because the loss itself may be minimal due to previous degradation. We know that urbanized streams can be improved, but the straight scoring on resource loss of an additional project may be minimal. This is the potential downside of baseline resource value scoring, using the SQT or other means. Under the current ratio system, the applicant is charged on the number of feet of stream impacted, regardless of its condition. Adding a multiplier would still result in a lower mitigation cost than the ratio system, but not so low that no benefits could be provided.*

Response: The Board agrees with the principle that adequate mitigation should be provided, even to compensate for impacts to a degraded stream. Instead of applying a multiplier as proposed by the commenter, the rules are being further revised to allow the Division to apply minimum existing condition values. The rules have always required mitigation to offset the lost resource values associated with the proposed impact, and although ratios are currently applied, less mitigation is required for lower value streams than for higher value streams.

Comment 84: *The changes make attaining compensatory mitigation easier and cheaper by instituting the use of an untested Stream Quantification Tool for both assessing damage as well as compensating "lift." In describing the use of the tool, it introduces the concept of measuring the damage against the current "baseline conditions" of the resource. Unfortunately the SQT guidance document which was put out for comment earlier in the year and the published TDEC response to the comments, suggested that the tool would not be used for this purpose and that many types of streams could not be accurately represented with the tool. The ARAP document contains no mention of these identified problems or how TDEC intends to address them in using this tool. The streams that are most likely to suffer due to this shift of policy and incomplete thinking are headwaters streams and urbanized streams already on the 303(d) list for impairments. Because their "baseline conditions" under the SQT will score relatively low, the expected compensatory mitigation will be less than under current policy, resulting in a loss to resources. There might be ways to fix this problem of less compensation either by the use of multipliers (mentioned in the document but not fully developed), or in the Stream Mitigation document which has not yet been released, but as written, this ARAP document simply suggest a lowered expectation for compensatory mitigation.*

Response: The ARAP rules do not specifically reference or require use of the SQT. Although it is true that degraded streams will score lower than high quality streams, that outcome is entirely consistent with the long-standing requirement to compensate for the loss of resource values associated with the proposed impacts. The rules are being modified to allow for a "floor" of existing conditions.

Comment 85: *Per Rule 0400-40-07-.03 Definitions paragraph (4) Baseline Conditions. This is problematic for two reasons. The first is that in replacing the previous "Background Condition" definition, it drops the idea of using a "reference stream" instead of the actual stream when the stream has already been degraded. This suggests a*

policy shift to accept degraded streams as "normal," rather than as a priority to restore. The second problem is that the definition leaves open how the Department or the applicant will determine baseline conditions.

Response: In the previous rules, the term "background conditions" was defined, but never used. Therefore, that term had no regulatory effect. As explained previously, there is no policy shift here, just an attempt to be clearer and more transparent.

REFERENCE TO GUIDANCE DOCUMENTS

Comment 86: *Rule 0400-40-07-.04(7)(b). To avoid the potential for a future change in the guidelines document changing the rules without going through the process of amending the rules, make this reference to a version of a particular date, rather than to the most recent version.*

Response: The proposed reference to the Stream Mitigation Guidelines has been eliminated. Instead, several key performance standards were added to the rule. The Division is still expected to proceed with preparation and public notice of a guidance document, to reflect the Division's interpretation of the stream mitigation requirements.

Comment 87: *These rules create new unreviewable powers in TDEC staff through the incorporation of guidance documents.*

Response: The comment is incorrect that use of guidance documents creates unreviewable powers. ARAPs, like other permits, are subject to statutory permit appeal in which the petitioner has the opportunity to demonstrate that the permit does not comply with the statute or the rules. Such an appeal could challenge the application of guidance documents to a specific permit decision. Nonetheless, the proposed rule reference to the Stream Mitigation Guidelines has been eliminated.

Comment 88: *Several comments were received objecting to the draft rule's reference to as-yet-published Stream Mitigation Guidelines.*

Response: The reference to the Stream Mitigation Guidelines has been removed from the rule.

DRAFT PERMITS AND PUBLIC NOTICE

Comment 89: *The proposal to provide a draft permit is a device to cut off antidegradation review. The draft permit idea coming out of this is in fact a device for cutting off anti-degradation reviews, because once you find you've got de minimis and you don't have to have anti-degradation, you just stop the internal process for that as part of the permit. Once you have draft permit, the TN Supreme Court has said that the only route of appeal is to challenge the permit. The permit is issued, it goes into effect and the activity goes on notwithstanding any appeal. Since even the fastest appeals of permits that may raise anti-degradation would take at least 6 months, many projects will have done damage to the waters that are at issue and that will be irretrievable. So, the remedy of antidegradation as something that could really go to the board and be decided adversely to the permit applicant and degradation disallowed has really disappeared as a practical matter under these regulations*

Response: The purpose of a providing a draft permit is to ensure a greater level of transparency for both members of the public and the permit applicant. Moreover, the Antidegradation Statement - both before and after the proposed amendments - combines the public notice and comment period for the purposes of antidegradation and permit review. That is not a change to the rules.

Comment 90: *Under the Proposed Rule 0400-40-07-.04(4)(c), ETW waters which would previously have triggered antidegradation review and an opportunity for public participation in the antidegradation determination need not be identified as such.*

Response: These are rules for public notice of ARAPs, not the Antidegradation Statement, which provides that the antidegradation status should be included in the public notice.

Comment 91: *If Rule 0400-40-03-.06(1)(c) is intended to be a mandatory and universal requirement it belongs in the list of notice requirements in Rule 0400-40-07-.04(4)(c). As written, the public notice posted online will not include this information.*

Response: See response to Comment 90. However, it is the intent that the antidegradation status be included in the public notice that is posted online, as provided for under the Antidegradation Statement.

Comment 92: *Per Rule 0400-40-07-.04(4)(b). We support the proposed changes and improvements about using draft permits, explanatory rationales, and mitigation discussions, so long as these features do not materially slow down the TDEC permitting process for ARAPs or cause Division staff to be unable to meet their duties under the "bill of rights for permit applicants" statute in Tennessee.*

Response: The time requirements that the Division must meet in permitting reviews will remain the same under these rule changes. Nothing in these proposed changes will affect the Division's ability to comply with the bill of rights for permit applicants because no additional steps are being added to the process.

Comment 93: *Per Rule 0400-40-07-.04(4)(d). We support the elimination of the newspaper publication of notice by the applicant as burdensome for many small applicants and redundant given modern forms of electronic notification and communication (and given retention of the site signage requirement).*

Response: The Board has retained a newspaper notice requirement to better ensure that local residents, who may not be on the Division's notification lists, are provided notice.

Comment 94: *We support removing many of the requirements for public notice in Rule 0400-40-07-.04(4)(c). Making the public aware of more information on the Department's website through part (4)(c)5 of Rule 0400-40-07-.04 will remove burdensome requirements in the public notice process*

Response: Thank you for your comment – please see previous response to Comment #93. It is the intent of these rule revisions to provide for a more efficient and transparent process. A number of the requirements in subparagraph (4)(c) of Rule 0400-40-07-.04 were removed from the public notice document because they will be incorporated into the draft permit instead.

Comment 95: *Per Rule 0400-40-07-.04(4)(f). We support the change proposed that would encourage interested persons requesting public hearings to do so as soon as possible in the process.*

Response: Thank you for your comment. The Board is aware aware that sometimes, members of the public deliberately wait out the clock before requesting a public hearing for the purpose of delaying permit issuance, which is why this change is being made.

Comment 96: *To reduce the timely discovery of proposed activities which will, by definition, cause "appreciable permanent loss of resource values" in a community the revised rules eliminate the requirement that notices of a completed application be summarized in a Public Notice published in a local paper at the applicant's expense. (Revised ARAP Rule 0400-40-07-.04(4)(d)2.)*

All that is left is email notice to those who have previously requested such notice. In your response to comments please tell us how many subscribers there are for notices of ARAP permits. The email notices are required by Tenn. Code Ann. § 4-29-120 (Tennessee Governmental Entity Review Law).

Response: See response to Comment 93.

Comment 97: *The tiny 8½ by 14 inch signs which TDEC provides to applicants are a farce. To make sure that they are useless the proposed regulations no longer require that they be "legible" which suggests readable but only "visible." There is no requirement that a sign be readable. There is no requirement that the proof of posting photos show the sign as it would be seen from an actually accessible vantage point from which it is safe for an observer to occupy given the traffic conditions, nearby construction or other factors which could make stopping to actually read or photograph the sign unsafe or infeasible.*

Response: The Division provides blue signs that are significantly larger than 8½ by 14 inches. These signs are modeled on land use notice signs commonly used by municipalities for local zoning issues. While a person driving by on a busy street may not be able to read the words on the sign at 40 mph, most people understand that the sign indicates a proposed development of some sort and can figure out how to find a way to read the sign if they want to learn more. Obviously, sites vary significantly in their visibility and safety of access. Often these factors are offsetting – a busier site will result in more people seeing the sign, while a less well-travelled site will often be safer to access. But, it is important that the signs be posted at the site to fulfill their intended function of notifying local residents who may not be on the Division's email notice list.

Comment 98: *Only 30 calendar days for comments is provided, a very short time for agencies which should review hundreds of permit applications each year if TDEC is to have the benefit of input from TWRA, U.S. Fish and Wildlife which administers the Endangered Species Act and TVA. Local government environmental and stormwater managers will have only a few days to review a permit that may be as much as 100 pages long for major projects which may affect large acreages and have several streams and wetland impacts.*

Response: These rules seek to balance competing priorities: achieving timely permit processing as required by the bill of rights for permit applicants while ensuring effective public notice. Thirty days is a very common permit comment period for the Department, but the Division also may allow more time for complicated projects. Moreover, when a proposed project is known to be of particular importance to a specific government agency, the Division will often have communicated with that agency prior to the formal public comment period to determine how to address those concerns in the draft permit, especially if threatened or endangered species are potentially present.

Comment 99: *The draft regulations do not require a permit application to be posted to the Water Resources Permits dataviewer at any point. The regulations should require posting of the application and other documents and email and hard copy communications no later than the working day following receipt of the permit application fee. TDEC is rightly proud of the "Waterlog" and it should be made widely known as a timely source of detailed information which is proposed to be omitted from the email notices of permit applications as well as complaints, inspections, etc.*

Response: The Division's intent is to post permit applications to Waterlog in a timely manner. The Division does not have the resources to ensure that applications will be posted within a day, especially mail hard copies. The Board appreciates the comment about the effectiveness of Waterlog, and expects that the Division will continue to publicize the availability of this resource.

Comment 100: *In all permitting scenarios (general and individual), we urge that TDEC maintain the greatest level of transparency and provide satisfactory opportunities for comment through the permitting process. This should include providing full disclosure about potentially impacted waters (the scope of the project, location, purpose of*

the proposed activity, the watershed, and description of the condition of the impacted waters), and antidegradation protection and mitigation, at opportune times (prior to final determinations) in order that issues related to comments can be considered before permits are issued.

Response: The Board agrees that transparency and opportunity to comment is important. The list of items to be included in a separate public notice of an individual ARAP is trimmed down in these rules because equivalent information will be included in the new draft permit and rationale. As a result, the public will actually be given more, and better quality, information about exactly what is being proposed and how the Division derived the proposed conditions of the permit.

For general permits, the opportunity for public notice and comment is provided in the issuance of the general permit. Although the Division also posts information about requests for coverage under general permits in Waterlog, no public notice is required.

Comment 101: *The proposed language under 0400-40-07-.04 suggests that only in those cases where "appreciable permanent loss" will occur will the draft permit put on public notice to explain how the mitigation is sufficient to achieve no net loss. The proposed language does not appear to support that TDEC's, or the permit applicant's, proffered in-system mitigation plan is subject to review as part of a draft permit issuance declaring "de minimis" impact. All proposed mitigation options and rationale should be subject to public review.*

Response: Public notice is required for all new or expanded individual ARAPs, regardless of whether mitigation is required. If mitigation is required, the rationale will explain how both the "debits" and the "credits" are determined to demonstrate that there will be no overall net loss of resource values. There are limited situations for urgent public projects where this may not be possible, so the public notice will include information defining how much mitigation will be required. If an in-system mitigation plan is proposed prior to the public notice, it will be discussed in the rationale and the draft permit. However, in order to retain the ability to meaningfully respond to comments, this can be changed between the draft permit and the final permit without additional public notice as expressly authorized by Tenn. Code Ann. § 69-3-105(i).

Comment 102: *Per Rule 0400-40-07-.04(4)(a)2: ....For activities that are projected to have only minimal impacts to ~~state waters~~ streams or wetlands, which can be readily addressed, the Commissioner may utilize a twenty (20) day public notice period. We recommend clarifying "minimal impacts" as they relate to Individual ARAPs. Minimal impacts are normally associated with General ARAP conditions. TDOT also recommends that government agencies providing infrastructure facilities to the public be allowed to use the 20 day public notice periods. This will save the citizens of TN time and money.*

Response: This is a long-standing provision of the rules that has rarely been used. This provision should be applied where an activity is so small that it does not require mitigation, yet it does not fit into any of the existing general permits.

Members of the public often have a great interest in public infrastructure projects, and these projects sometimes cause significant impacts. The 20-day public notice process is intended to be used rarely and to apply only to truly minimal impacts. However, some public infrastructure projects that do not require mitigation may appropriately have a 20-day notice period.

Comment 103: *Rule 0400-40-07-.04(4)(a)2. This part allows ("may") the Commissioner to have a 20 rather than 30 day public notice. Where and how in the application process does the applicant learn about this option and apply for it?*

Response: If a permit writer believes that the abbreviated public notice process may be appropriate for a particular proposal, the permit writer will discuss the issue with the permit applicant. Again, this notice period is not intended to be used commonly.

Comment 104: *Per Rule 0400-40-07-.04(4)(f): .....* 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. *We support elimination of the requirement for publication in newspaper. We recommend removing the referenced sentence.*

Response: The express requirement to provide a separate newspaper notice for the public hearing was removed from the rules. However, the rule provides that the notice of hearing shall be distributed at least as widely as the original public notice.

Comment 105: *In paragraph (2) of Rule 0400-40-07-.04 (General Permits) and paragraph (4) of Rule 0400-40-07-.04 (Public Notice and Participation), it is unclear to us whether activities covered under Aquatic Resource Alteration General Permits now require a public-notice period as part of the permitting process, or whether the public-notice requirement still applies only to activities that require coverage under an ARAP Individual Permit. Could clarification be made of these sections?*

Response: Rule 0400-40-07-.04(2) establishes the procedures for providing public notice and comment for issuance of general permits. The reference to subparagraph (4)(c) of Rule 0400-40-07-.04 only identifies what information needs to be included in the public notice of the general permit. The "location of the state waters" for a general permit would be statewide, or a smaller area if the general permit has limited geographically applicability. This public notice requirement applies only to the general permit itself, and not to applications for coverage under the general permit.

Rule 0400-40-07-.04(4)(a) begins, "An ARAP individual permit or a § 401 certification requires the issuance of a public notice." Accordingly, the requirements in Rule 0400-40-07-.04(4) do not apply to applications for coverage under a general permit.

WATER WITHDRAWALS

Comment 106: *Rule 0400-40-07-.04(5)(d). I understand that the intent of the first sentence is to allow for general permits for minor withdrawals. Therefore I would revise it to read, "Unless authorized by a general permit, an individual permit is required for water withdrawals which will or will likely result in alteration of the properties of the source stream."*

Response: Paragraph (5) of Rule 0400-40-07-.04 concerns only individual permits. The last phrase of this provision limits it to withdrawals that result in greater than *de minimis* degradation, so general permits are not an option in this case. To be clear, water withdrawals that are subject to general permit coverage do not also need to obtain an individual permit.

Comment 107: *In many ways the ARAP rules do not fit well with how TDEC could best process the infrequent but highly important applications it receives for water withdrawal permits due to a withdrawal having an actual or potential impact on surface water quality by removal of a portion of stream flow. For example, having ARAP definitions or terms match what is used by the Corps in Section 404 permitting may be helpful in TDEC Section 401 water quality certifications and even in TDEC's independent ARAP permitting of physical alterations in state streams and wetlands. However, use of the federal language may not relate to separate water withdrawal-only ARAP's and can lead to unintended negative consequences for those applicants.*

Response: This comment illustrates that the impacts to resource values caused by water withdrawals are measured differently than physical habitat alterations for which mitigation can offset impacts. Water

withdrawals can affect resource values for long segments of rivers or streams. As stated in the rule, protection of resource values will be accomplished through maintenance of flow levels below which no withdrawal may occur together with maximum withdrawal rates.

Water withdrawals are akin to NPDES permits, in that assimilative capacity can effectively be quantified and regulated through a permit. Because these regulated water withdrawals do not result in the same type of resource loss as wetland fills or stream alterations, compensatory mitigation is not required for water withdrawals.

Comment 108: *Per Rule 0400-40-07-.03(4): We strongly support the revision proposed to use "Baseline Conditions" rather than more amorphous "Background Conditions" as the realistic reflection of the condition of a stream or wetland at the time that a project is proposed. It should also be clarified that (1) for an ongoing water withdrawal coming up for 5-year ARAP renewal, the "baseline" includes the permittee's existing water withdrawal, and only if withdrawal rate changes are proposed by the renewal applicant will that be considered a "new or increased" water withdrawal; and (2) in addition to citing the TDEC quantitative assessment tool for measuring the conditions of the resource or another "defensible scientific method" approved by TDEC, the Division should clarify that methods used by existing permittees and approved by the Division in the past may be among the other methods deemed approved going forward for use in renewals of the same water withdrawal permits. Wetland and habitat measurements and resource scoring tools are not the only context for determining "baseline conditions" in ARAP permitting because ARAPs include regulated water withdrawals and not just habitat-altering development projects.*

Response: The Board agrees with the commenter in principal. However, the methods proposed in a specific ARAP situation to assess existing conditions may not necessarily be deemed appropriate just because that method was utilized and approved in the past. New methods and better information may dictate a different approach moving forward.

Comment 109: *Per Rule 0400-40-07-.04(2). We strongly support the Division's efforts to create and adopt a reasonable General Permit for new water withdrawals that rise to the level of requiring an ARAP but involve no more than de minimis degradation. At the same time, we reserve the right to comment on the details of any such draft General Permit whenever it appears for public review.*

Response: The Board appreciates the comment. Any general permit would be subject to public notice and comment and anyone may submit comments.

Comment 110: *Subparagraph (5)(d) of Rule 0400-40-07-.04. I'm concerned about the exemption for water withdrawals that result in no more than de minimis degradation not needing a permit. As we talked about earlier, de minimis still needs a permit. The statute requires activities that result in alterations; it's still going to be an alteration even if its de minimis. So it's taking it out of the anti-degradation realm into the permitting realm which I think is a problem.*

Response: This addition is being made in light of the new provision in Rule 0400-40-07-.04(2) allowing for general permits for water withdrawals that cause no more than *de minimis* degradation. In either case, a new or expanded water withdrawal would require a permit: the distinction is whether that is an individual permit or a general permit.

Comment 111: P*er Rule 0400-40-07-.04(4)(a)3. We strongly support this proposed amendment: for a "no change" water withdrawal ARAP renewal, one that requests simply a continuation of the previously permitted activity on the same terms, no new public notice should be necessary or required. It should also be clarified that in such "no change" permit renewals, since no new terms are proposed, there is nothing that can be appealed by any party except for any new terms that TDEC might add or change (or deny) on its own initiative*

in the renewed permit. Likewise, a "no change" water withdrawal ARAP renewal is not a "new or increased" water withdrawal proposal. Thus, it should not be subjected to or required to meet antidegradation analysis if the original permitted withdrawal satisfied such analysis, even if the ongoing conditioned water withdrawal to be renewed and continued is at a level that the Division would otherwise deem to be above de minimis degradation.

Response: The Board agrees that the renewal of a previously authorized water withdrawal does not represent a new or increased withdrawal, and therefore no new antidegradation analysis would be required. If there is no public comment period, then no one other than the permittee would have standing to appeal the permit renewal pursuant to Tenn. Code Ann. § 69-3-105(i).

Comment 112: *Per Rule 0400-40-07-.04(5)(d). We support retention of the water withdrawal provisions stated here and the addition of monitoring and reporting requirements to ARAP's, when applied consistently, as the Division has already been doing for many permits.*

Response: Thank you for your comment.

Comment 113: *The Rule states that a [individual] permit is required for water withdrawals which will or likely will result in alteration of the properties of the stream and more than de minimis degradation. This suggests that there are rivers and streams where withdrawals would not have a discernible impact and individual permits would not be required. What is the threshold for assuming impacts? How does TDEC account for multiple withdrawals on a single stretch of stream or in a river system? Is this based on minimum flow conditions for each stream? It also states that monitoring and reporting requirements may be established to ensure and document compliance with permit conditions. If they are not required, how will the permit be enforced?*

Response: The threshold for evaluating impacts for water withdrawals is a numeric comparison of the rate of withdrawal to the rate of flow in a river or stream. A single water withdrawal will be considered *de minimis* if it removes less than five percent of the 7Q10 flow of the stream. Multiple authorized withdrawals are considered *de minimis* if they use 10 percent or less of the 7Q10 flow.

The Division may issue a permit with no monitoring and reporting where other assurances exist. This typically involves a nonadjustable pump rate and intake design where the permit limits of minimum instream flow and rate of withdrawal cannot physically be non-compliant without structural modification.

Comment 114: *Under the "General Permits" proposed language, we note that the standards for what constitutes de minimis degradation for water withdrawals is also unclear. Does this mean a substantial water withdrawal in one location that is offset by increasing discharges in another location constitutes a "de minimis" impact and could, therefore, be covered by a General Permit? The same question is asked for other types of habitat alterations – does a submitted in-system mitigation plan equate to "de minimis" and then allow an activity to be covered under a general permit?*

Response: The rule was clarified to refer back to the definition of *de minimis* degradation for water withdrawals and the water quality standards. Proposed impacts cannot use mitigation to become eligible for an ARAP general permit. Mitigation requires an individual ARAP.

Comment 115: *Per Rule 0400-40-07-.04(7). Mitigation in these rules seems to relate almost entirely to habitat/stream/wetland physical alterations. We believe that TDEC should consider adding mitigation methods whereby a proposed new or increased ARAP water withdrawer can have its degradation status reduced to de minimis up front by use of off-setting gains to the resource in other ways, even if a water withdrawal under a properly conditioned permit typically does not result in appreciable permanent loss of resource values. Other than reducing a proposed withdrawal to 5% or less of the stream's 7Q10 low flow (a very strict standard for what*

is de minimis), or adding new compensating water flows to the stream from some other source, typically no realistic avenue exists for water withdrawers to use up-front mitigation for this purpose as done by ARAP applicants proposing habitat alterations.

Response: The water quality standards apply different definitions of *de minimis* degradation for water withdrawals and habitat alterations because the former can be easily evaluated numerically. The case law affirms the same numeric limitations for NPDES permits for discharges, so the standard is well-supported as constituting *de minimis* degradation. The addition of water upstream could result in *de minimis* degradation as defined in those rules.

Comment 116: *The modification of Rule 0400-40-07-.04(7) implies that there is a water withdrawal rate that would have a "de minimis" impact and would therefore be covered under a General Permit, hinted at in paragraph (2) of Rule 0400-40-07-.04. Obviously, this rate would be dependent on the size of the stream and the time of the year, with the possible exception of the Tennessee and the Cumberland Rivers. In any case, the state has an interest in monitoring withdrawals in order to ensure adequate drinking water in drought years, so all withdrawals above a certain volume level should require at least notification.*

Response: The Division is contemplating the development of a general permit for water withdrawals that cause no more than *de minimis* degradation, which is a term defined in the Board's water quality standards as a percentage of the 7Q10 low flow of a stream. Accordingly, the upper threshold for the general permit will be based on the size the stream and drought conditions.

In addition, any permit for water withdrawals would need to contain the necessary provisions and conditions to be protective of all types of waters under all hydrologic circumstances, including drought.

At present, the division believes that there are certain withdrawals such as individual residential landscape irrigation from large lakes that should not require notification. In other cases, such as long term water supply withdrawals that are nonetheless *de minimis*, notification would be required.

Comment 117: *Rule 0400-40-07-.04(5)(d) on water withdrawals. Please make the following changes:*

An Individual Permit is required for water withdrawals which will or will likely result in alteration of the properties <u>of a stream or wetland</u> and will result in more than de minimis degradation.

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 <u>of a stream or wetland</u>, <u>shall file an SS-7037 (September 2017) RDA 1693 14</u> application with the Division which includes the following minimum information:*
   (i) proposed withdrawal rates and volumes;
   (ii) proposed withdrawal schedule; and
   (iii) flow data of the affected stream (if free flowing).

2. *Where a permit for water withdrawal is required, the Commissioner shall establish permit conditions which are protective of the resource values <u>of the affected stream or wetland.</u> 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 affected stream. Monitoring and reporting requirements may be established to ensure and document compliance with permit conditions.*

Response: The rule has been modified as requested, except that it does not refer to a specific application form. Although application forms do not change frequently, the Division needs to be able to use new forms without amending the rules.

Comment 118: *Rule 0400-40-07-.04(9)(d)3. This looks like language that was copied and pasted from a provision addressing permit appeals. My suggestion is to delete part (9)(d)3 and just have the two options of (9)(d)1 and 2. Although an oral comment should be a basis for someone to be aggrieved, as provided by (9)(c)2, I don't think it is advisable for the basis of the appeal to be an oral statement so I wouldn't include something like (9)(c)2 in (9)(d)3. Since the department shouldn't be making changes except in relation to a comment, I don't think it is necessary to allow an appeal to be made on the basis of a change made after the public hearing.*

Response: We agree that the provision in Rule 0400-40-07-.04(9)(c)2 should be eliminated and the rule is changed accordingly, and additional changes are made to further define appeal requirements. It is very difficult to track "other direct communication," and an interested member of the public could qualify under subparagraph (9)(c) by sending a simple email or brief letter to the permit writer expressing concerns about the project. The provision in (9)(d)3 of Rule 0400-40-07-.04 is based on the statutory permit appeal provision in Tenn. Code Ann. § 69-3-105(i), which authorizes an appeal based on material changes between the draft and final permit. This provision is important if, for example, the Division makes a change in response to a comment by one party, but a different party objects to it.

Comment 119: *Per Rule 0400-40-07-.04(9), we request that TDEC alter subparagraph (b) here to read as follows:*

"For permit modifications, and for permit renewals, only those terms that were the subject of the modification, or that were changed (or were proposed for change but denied) in the permit renewal compared to the preceding permit, may be appealed."

This clarification and refinement would further serve to allow "no change" ARAP permit renewals, such as for ongoing compliant water withdrawals, to proceed forward quickly, smoothly, and fairly without undue use of Division resources to "reinvent the wheel" in each such circumstance. At the same time TDEC would retain flexibility to adapt the terms and conditions in renewal permits to changed circumstances if and when necessary, and parties would retain the right to contest such changes.

Response: The Board agrees that for habitat alteration ARAPs, only terms that are changed from the prior permit should be appealable. This is especially true given that in most cases, the alteration will have already occurred during the original 5-year term and all that remains is mitigation and monitoring. Under these rules, there is no public comment period for a no-change renewal of a habitat alteration ARAP. Therefore, third parties would not have standing to appeal. The Board does not agree that a permittee should be allowed to appeal the original mitigation provisions in a renewal permit.

Accordingly, the Board will add language to the rule limiting appeals of permit renewals for habitat alterations to conditions that have been changed from the preceding permit.

Comment 120: *Per Rule 0400-40-07-.04(8)(b). Renewal of permits is not required for one-time alterations such as construction, as long as the alterations, mitigation, and monitoring are completed within the time limit established by the permit. Any permittee that has not completed the alteration authorized by the permit, or the mitigation and monitoring required by the permit must apply for renewal at least ninety (90) day prior to the expiration date.*

This issue of re-applying for a permit for the mitigation and monitoring would only apply in the instance of PRM. If the permit that was issued to impact the stream or wetland has expired then, likewise, the mitigation permit has expired. This scenario, in essence, requires the applicant to go through the permit process again, including public notice expense, and also requires the resources of the Division staff to be used for a permit action that was

previously approved. Typically permits are valid for a period of five (5) years, but almost every mitigation project takes longer than five (5) years to complete the construction and monitoring. The Division should consider, in the instance of PRM that the permit duration be extended beyond five (5) years or for the anticipated length of the required mitigation monitoring. This would make the permit process more streamlined and less burdensome on both the applicant and the State.

Response: The proposed change cannot be made because Tenn. Code Ann. § 69-3-108(g) limits the permit term to five years. However, we recognize that for ARAPs, the authorized impact typically will have already taken place during the first five-year term and all that remains to be regulated is mitigation and monitoring. This is why the rules allow no-change renewals without public notice.

Comment 121: *An ARAP is not required for mitigation monitoring actions. We recommend that the ARAP life be extended to include the mitigation monitoring period or that an ARAP extension process be developed to specifically to address post-construction mitigation monitoring.*

Response: See response to Comment 120.

Comment 122: *There is no reason that the "permit evaluation criteria "should be revised to delete: ~~"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."~~ This invites and allows modifications which go undisclosed contrary to the transparency expected of a state agency and allows potentially harmful permit modifications as permit writers allow modifications which may only appear in the Waterlog based upon a simple but unreviewable assertion that a modification is "less restrictive".*

Response: The referenced statement was contained in Rule 0400-40-07-.04(6)(b), a section addressing modification, suspension, or revocation for cause. The deleted language does not make sense in that context. Rule 0400-40-07-.04(4)(a)3 addresses public notice for renewals and modifications. The following sentence will be added to the end of that rule for clarification, "Otherwise, a renewal or modification would require public notice."

Comment 123: *Per Rule 0400-40-07-.04(1)(a): ....A person must file an application for an Individual Permit or for a § 401 Water Quality Certification with the Division, in accordance with paragraphs (3) and (5) of this rule, to implement any activity requiring an ARAP 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.~~ (p. 10). We recommend that the last sentence remain in rule. Removal of this sentence has the potential to impact an excessive number of ARAPs already issued for TDOT projects that are currently under construction.*

Response: See response to Comment 12. Current general permits remain in effect, notwithstanding this amendment.

JURISDICTIONAL WATERS

Comment 124: *The Chamber supports the change in terminology from "waters of the state" to the more specific phrase "stream or wetland" to more accurately represent the scope of the aquatic resource alteration regulatory framework. The terms stream or wetland have a common understanding and will lead to a better understanding of when parties should pursue the ARAP permitting process. Likewise, the Chamber supports the removal of the references to "wet weather conveyances" instead relying on the Tennessee statute in Tenn. Code Ann. § 69-3-108(q) to serve as the governing text for these limited drainage features.*

Response: Thank you for your comment. Given that alterations of wet weather conveyances are permitted by statute, the Board agrees that the new wording is more accurate.

Comment 125: *Provide Clarification on the Exception under Rule 0400-40-07-.04(3) Section 401 Water Quality Certification. This portion of the rule has been substantially rewritten to clarify the 401 certification process. The final sentence describes activity that will not require an ARAP and reads as follows.*

"If the proposed activity does not require an ARAP, the applicant for a federal license or permit may obtain a § 401 certification by submitting a copy of the federal application to the Division and a request for a § 401 certification."

We recommend providing a footnote to provide examples of activities, described in the previous sentence, that would qualify for the exception from an ARAP. It should be noted that the purpose of the 401 certification is for the State to certify that the proposed federal activity does not violate state water quality standards. Since wet weather conveyances have no established uses, certification appears to be a formality, and we would recommend that the rule be amended to state that an approved wet weather conveyance hydrologic determination either expressly granted or waived in accordance with the procedures in this chapter constitutes a certification and/or waiver of a requirement to obtain such certification under the Clean Water Act, 33 U.S.C. 1341(a).

Response: It is not practicable to specifically list activities that would qualify under this clause because the Corps periodically revises its nationwide permits, and then rule revisions might be required to update Tennessee's list of activities. Also, unforeseen situations could arise that require a Section 401 certification.

The State will retain the specific authority to make Section 401 certifications. Wet weather conveyances must be altered in accordance with the requirements of Tenn. Code Ann. § 69-3-108(q). If not, the alterations could result in violation of Tennessee's water quality standards downstream of wet weather conveyances.

Comment 126: *It is unclear whether the rules intend to exclude jurisdictional waters other than streams or wetlands from the requirement to obtain an ARAP.*

Response: Tenn. Code Ann. § 69-3-108(q) establishes that ARAPs are not required for wet weather conveyances. The intent is to conform the rules to the statute. The definition of "stream" includes any surface water that is not a wet weather conveyance or a wetland, which would include lakes, reservoirs, ponds, springs, seeps, and other surface waters. The ARAP rules do not apply to groundwater, which is regulated through other mechanisms such as underground injection control or state operating permits.

Tennessee does not define "jurisdictional waters," which is a term more applicable to the Clean Water Act. There is a possibility that waters may be jurisdictional under the Clean Water Act such that a Section 404 permit is required, but are wet weather conveyances not subject to ARAP requirements.

Comment 127: *Per Rule 0400-40-07-.01(1), we strongly support the clarifications being made here, including the "stream or wetland" applicability reference, and the "resource value" references subject to the definition thereof appearing later*

Response: Thank you for your comment.

Comment 128: *Per Rule 0400-40-07-.04(4)(c). The location of the state waters impacted by the proposed activity. Section (4)(a)2. Replaces "state waters" with "streams or wetlands". Should this reference to "state waters" be changed to read "streams or wetlands" to be consistent?*

Response: The proposed change will be made.

Comment 129: *Per Rule 0400-40-07-.04(6)(c)1. "Direct loss of stream length, water, or wetland area due to the proposed activity" - to be consistent should "water" be deleted and just use reference to stream or wetland?*

Response: The use of the word 'water' in this sentence was intended to refer to loss of flow, or natural water volume. The Board will revise the language to "flow" make this intent more clear.

Comment 130: *After reviewing the document, it is unclear to me whether or not the purpose of replacing waters of the state with stream or wetlands if that intent was to not include jurisdictional waters that aren't a stream or wetland. So I'm wondering if an impact to a jurisdictional water that isn't a stream or wetland would require a permit and if so, what that mitigation would require.*

Response: The intent of the language change is to exclude wet weather conveyances, as provided for by the General Assembly in adopting Tenn. Code Ann. § 69-3-108(q), and to clarify that ARAPs are not required for alterations to groundwater. See Response to Comment 126.

Comment 131: *Since the stream definition which is included says it's not a wet weather conveyance, the definition of wet weather conveyance should not have been deleted, though it certainly could be updated to match current definitions.*

Response: The term "wet weather conveyance" is defined in the Water Quality Control Act, so it does not necessarily have to be included in this rule chapter. However, we will add the definition of "wet weather conveyance" back to the rules to ensure ease of reference.

Comment 132: *Rule 0400-40-07-.01(1), please add the following sentence at the end of the paragraph:*
Persons who wish to conduct an activity that may impact a wet weather conveyance shall only do so in accordance with the conditions stated in *Tenn. Code Ann. §* 69-3-108(q).

This clarifies the intent (as I understand it) of changing "waters of the state" to "stream or wetland."

Rule 0400-40-07-.01(3) Delete the sentence proposed to be added at the end, "Alterations of wet..."
It's not needed with the above change to .01(1), which is worded in a stronger fashion and in a better place.

Response: The Board agrees that it would be more clear to specify that compliance with Tenn. Code Ann. § 69-3-108(q) is required for alterations of wet weather conveyances and will amend the rules accordingly. Specifically, Rule 0400-40-07-.01(3) will be changed.

OTHER

Comment 133: *Rule 0400-40-07-.04(5)(c). Revise the last sentence as follows, "In the case of emergency permits or other situations compelling measures be taken in a very short time, a permit may be issued to a state, county or local government agency that specifies the amount of mitigation required and an implementation timeframe and the agency may submit a specific mitigation plan after the permit is issued, and the agency shall comply with the plan as approved by the Commissioner." This limits the applicability of this procedure more than "unusual circumstances" and it revises the sentence structure to follow the sequence of the actions it describes. It also specifies that there is still an approval step for the plan, the Division does not have to accept whatever is submitted.*

Response: The Board agrees that more precise wording is advisable, and will revise the language.

Comment 134: *Per Rule 0400-40-07-.04(6)(c)5. Direct loss of stream canopy due to the proposed activity: How would the loss of stream canopy be determined and/or regulated? How would tree clearing be regulated if no permit was required (i.e. a landowner or developer was avoiding any impact to the stream or wetland other than clearing trees outside of the regulated stream or wetland)? Propose deleting this item.*

Response: Tree clearing alone is generally not regulated by the Division unless it violates the conditions of the NPDES Construction Stormwater Permit as it applies to buffer zones, or unless the streamside canopy removal or resulting bank destabilization causes an appreciable permanent loss of resource values. The Board will retain this language as an example of one of many factors potentially affecting water quality that the Commissioner is allowed to consider as part of a permit review. This language is not intended to imply that the Board is authorizing the Division to exercise regulatory authority over the cutting of individual trees by landowners, or over normal silvicultural activities.

Comment 135: *Per Paragraph (3) of Rule 0400-40-07-.02 - The wording change relative to silviculture BMPs currently reads: "BMPs and a point source discharge results in water pollution...". The new wording removes the reference to point source discharge. We believe the terminology requiring a point source discharge should remain in the rule. Tenn. Code Ann. § 69-3-133 is unique because it allows the Department to issue a stop work order where timber harvesting operations take place. It is our understanding a stop work order of this nature is only available for silviculture activities. We believe Tenn. Code Ann. § 69-3-120(g) limits the Department to regulatory actions on agriculture and forestry operations only if a point source of pollution exists.*

Response: The intent of the change proposed is to make clear that the Division may issue a stop work order whether or not a point source discharge has been documented if pollution of waters is occurring, as expressly authorized by Tenn. Code Ann. § 69-3-133, which provides, "When certain silvicultural activities have polluted waters of the state as a result of an operator's failure or refusal to use forestry best management practices, the commissioner of environment and conservation may issue a stop work order to the operator."

Comment 136: *Per Rule 0400-40-07-.04(6)(c)4):* diminishment in species composition in any stream, stream or wetland, or state waters due to the proposed activity; *Species composition can fluctuate naturally making this an unreliable measure when evaluating a permit application or other permit action. Diminishment of species composition would be difficult, if not impossible, to determine and therefore we recommend it be removed or clearly defined.*

Response: The Board agrees that species composition can fluctuate via natural conditions or activities outside the control of the applicant, hence the inclusion of the wording "...due to the proposed activity." Should enforcement actions arise based upon this clause, the burden of proof that diminishment was due to the applicant's activity would fall upon the Division.

Comment 137: *Per Rule 0400-40-07-.04(6)(c)11: whether the ~~state waters~~ stream or wetland is listed on the § 303(d) list ... We recommend removing "or wetland", since wetlands are not routinely included on the 303(d) list.*

Response: The commenter is correct that wetlands are not often included on the 303(d) list. However, this does not preclude the possibility that the Division would include wetland listings in the future, and so the language will be retained, and modified to include actual impairment that is not 303(d) listed.

Comment 138: *There is another, less urgent, concern about the changes that were not proposed, specifically around defining activities that might fall under the two categories described as not needing permits – those where the activity is so "de minimis" that no permit or notification is required, and those where no permit is required, but notification is required. Given the punitive fee structure that TDEC has adopted for small restoration and enhancement projects where the impact is not only "de minimis" but actually positive, it would clearly be in the public interest to encourage more such projects. One way to do so would be to create a*

category, with descriptions, of such restoration and enhancement projects that would be exempt from permitting. While we believe that notification is appropriate with sufficient information to assure TDEC that there is no potential for damage to the resource, it seems inappropriate to require a permit designed to regulate damages to an activity that enhances rather than damages a resource.

Response: The Division has issued an ARAP general permit that covers small- to medium-scale enhancement projects. Revegetating streambanks is expressly exempted from the permit requirement by statute. Activities with more significant impacts, even if the intent is to achieve an overall positive impact, require site-specific consideration and thus an individual permit.

Comment 139: *Per Rule 0400-40-07-.01(3) - The change from "may result" to "results" "in alterations...of properties..." is very significant on two levels and may well weaken permitting authority. The first level is that it may put the burden of proof on TDEC rather than the applicant to prove there will be alterations that change properties of the waters of the state. The second level, which could be positive if applied to enhancement and restoration projects, is that it would remove permitting requirements for projects that don't cause alterations of resource properties. The phrase "may result" allows more flexibility while maintaining TDEC's regulatory authority to provide oversight of any activity that has the potential to cause a change in properties.*

Response: This change is not intended to substantively change permitting requirements or to shift burdens of proof. The Water Quality Control Act provides that it is unlawful to "carry out any of the following activities, except in accordance with the conditions of a valid permit: (1) the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state." Thus, the statutory permit requirement hinges upon an actual alteration, not a potential alteration, of such properties, which is the reason for the language change. The purpose of restoration and enhancement projects is to alter such properties (albeit for the better) and ARAPs will continue to be required for such activities.

Comment 140: *There is no justification for requiring the public notice for a draft ARAP to include the applicant's address and phone number. Particularly when an applicant is an individual seeking a permit, this requirement has the potential for negative outcomes concerning privacy.*

Response: The Board agrees with the comment and will change the rule accordingly. However, applicants should be aware that their contact information is required to be included in an application and remains public record even if it is not included in the formal public notice document.

Comment 141. *Since most all waters of the State are also waters of the U.S., I am confused regarding how changes to the rules are not contrary to CWA Section 404(b)(1) guidelines requiring that avoidance must be considered first, minimization second and only then, mitigation.*

Response. These rules do not supersede or substitute for the 404(b) rules. If a proposal affects waters of the United States and is otherwise subject to the Section 404 permit requirement, then the applicant must obtain that permit from the U.S. Army Corps of Engineers in accordance with the 404(b) rules. Tennessee rules do not alter or affect that requirement.

Comment 142. *The draft regulation fails to acknowledge the EPA rules governing stream and wetland protection under Clean Water Act Section 404.*

Response. These rules do not alter or affect requirements imposed separately under Section 404 of the Clean Water Act or the 404(b) rules promulgated thereunder.

Comment 143. *Please clarify how the changes in the proposed regulations can be reconciled with the obligations and procedures in the General Wetland Banking Memorandum of Agreement dated June 12, 1995 (the "1995*

MOA"), as well as in the prior agreement it references, the "Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning determination of mitigation under the Clean Water Act, Section 404 (b)(1) Guidelines, 1990."

Response. The "1995 MOA" was supplanted with the promulgation of the 2008 mitigation rules. Those rules established the Interagency Review Team (IRT) which oversees third party mitigation banking. As to the MOA between the Army and EPA it is not clear that it is still in effect, and even if it is, it only applies to the relationship between those parties which signed it of which TDEC was not a signatory.

Comment 144. *Under the proposed rule language, potential "new" habitat alterations requested by permit can also come in many forms, from the building of an impoundment to the straightening, fill, or other alteration of a stream channel. In applying the new rule language, could TDEC determine that a new proposed impoundment, causing "habitat alteration," results in "de minimis" degradation so long as some other stream channels somewhere in the HUC 8 watershed are restored or enhanced?*

Response. Regardless of the type of habitat alteration, the Division cannot issue a permit if the impact's appreciable and permanent resource value loss cannot be offset through compensatory mitigation. Many impoundments are simply not eligible for permitting because they would cause permanent resource loss that cannot be compensated for through traditional compensatory mitigation. While it is possible that on-site mitigation could be provided to offset the loss of resource values caused by an impoundment, it is difficult to foresee a situation in which off-site mitigation for an impoundment would be permitted, much less count as *de minimis* degradation.

Comment 145. *Because TDEC proposes to rely so heavily on mitigation throughout the proposed rules (including those for ARAPs), any such reliance must be demonstrated to be effective. Commenters would support a thorough and objective survey of the effectiveness and longevity of mitigation measures already approved throughout the State, taking into account all the factors relevant thereto, including the potential for "remedy failure" and financial assurance therefor. Commenters would be ready to assist TDEC in scoping and implementing such a survey.*

Response. This comment does not address a specific rule, or proposed rule change. The Board appreciates the recommendation of a study of mitigation.

Rule Chapter 0400-40-07
2018 Amendments – Appendix 1
Tenn. Code Ann. § 4-5-205(b) Concise Statement of Principal Reasons for Rulemaking

Rule 0400-40-07-.01 General. This rule is amended to refer to "streams or wetlands" instead of "waters of the state" in light of Tenn. Code Ann. § 69-3-108(q).

Rule 0400-40-07-.02 Exemptions. This rule is amended to fix grammatical errors and to more closely track the provisions for silvicultural activities provided by Tenn. Code Ann. § 69-3-133.

Rule 0400-40-07-.03 Definitions. This rule is amended principally to eliminate terms that are defined, but not used later in the rules. For example, the term "background conditions" was previously included in this section, but was never used again in the rest of the chapter.

Rule 0400-40-07-.04 Permits.

(1)Application for a Permit. This paragraph is amended for clarity. The amendments also eliminate the joint public notice with the U.S. Army Corps of Engineers, because that process had not been fully implemented and did not comport with the Corps's public notice and comment procedures.

(2) General Permits. This paragraph is amended to make it clear that general permits can only be issued for activities that result in minimal impacts, such that no compensatory mitigation is required and site-specific review under the Antidegradation Statement is not required for permit applicants to obtain coverage. "Minimal impacts" was effectively the threshold for general permits previously, and this amendment simply makes that requirement more transparent. All general ARAPs in effect as of the adoption of this rule remain in effect, and comply with this requirement. In addition, the rule is revised to allow for general permits for water withdrawals requiring ARAP coverage, but which fall within the definition of *de minimis* degradation in Rule Chapter 0400-40-03.

(3) Section 401 Water Quality Certification. This paragraph was redrafted to more clearly state a streamlined process for obtaining a Section 401 certification, particularly for activities that do not otherwise require ARAP coverage.

(4) Public Notice and Participation. In the past, the ARAP rules have only required public notice of a complete permit application. Unlike nearly all other permits issued by TDEC, the rules did not require public notice of a draft permit. The amendments improve the public notice process for both permit applicants and members of the public alike by requiring the Division to publish a draft permit and a rationale for its proposed action. A number of specific pieces of information are eliminated from the public notice requirement because the draft permit will include this information. As a result, people participating in the public comment period will know what the Division proposes to require, not just what the applicant requested. This process is a significant improvement for transparency and public process, and will not interfere with the Division's ability to comply with the bill of rights for permit applicants.

(5) Individual Permits. The primary change to this paragraph is to require applicants for individual permits to not only submit an alternatives analysis, but to select the practicable alternative with the least adverse impacts on water quality, so long as that alternative does not have significant adverse environmental impacts. This rule is consistent with federal requirements for Clean Water Act Section 404 permits, and offsets the reduction in comparable requirements under the Antidegradation Statement for activities that result in only *de minimis* degradation.

(6) Permit Evaluation Criteria. This paragraph is revised to delete a misplaced public notice requirement for permit renewals (which is, more appropriately, addressed in section (8)) and to eliminate a prohibition on changing permits "for activities that have been completed." The latter provision was unclear regarding whether it applied to permitted impacts, or permitted mitigation and monitoring, and prevented the Division from making appropriate modifications to mitigation requirements in light of additional information that arises after permit issuance. Additional amendments reflect the wet weather conveyance statute (Tenn. Code Ann. § 69-3-108(q)) and clarify that compensatory mitigation is only required to offset the loss of resource values actually caused by the permit applicant/permittee.

(7) Mitigation. This paragraph is rewritten to improve clarity and transparency. This section provides key performance standards for compensatory mitigation for impacts to both streams and wetlands. The prior version of the rules provided that mitigation should offset the loss of resource values associated with the proposed activity. The amendments more clearly establish that compensatory mitigation must ensure no net loss of resource values from existing conditions, which are the resource values of the impact site at the time of a permit application. Also, although it was the Division's practice to require a notice of land use restriction or similar protection at mitigation sites, the rules did not expressly require such restrictions, and the rules are amended to make this logical requirement clearer.

(8) Duration and Renewal of Permits. Other than for water withdrawals, ARAPs typically authorize one-time impacts. When these impacts result in an appreciable permanent loss of resource values, individual ARAPs require mitigation and monitoring. When such requirements are provided by the permittee, the length of time required for mitigation and monitoring often exceed the five-year limit on permit terms established by Tenn. Code Ann. § 69-3-108(g)(2). The prior version of the rule did not clearly provide a mechanism for renewal of ARAPs.

(9) Permit Appeals. This paragraph is amended to conform to Tenn. Code Ann. § 69-3-105(i), which allows for third party appeals. The prior version of the rule did not comply with this provision, because it only allowed appeals by permittees and applicants for permits. The Division has not enforced that limitation because it is inconsistent with statutory requirements. However, the rule clarifies the specific preconditions to appeal applicable to third-party petitioners.

(10) Alteration of Wet Weather Conveyances. This paragraph is deleted because alterations of wet weather conveyances are now governed entirely by Tenn. Code Ann. § 69-3-108(q).

Rule Chapter 0400-40-07
2018 Amendments
Revisions made by the Board of Water Quality, Oil and Gas

(1) To the first sentence in part (4)(d)2 of Rule 0400-40-07-.04 the Board voted to continue to require the applicant to give notice to interested persons by publishing the approved public notice in a local newspaper.

(2) The Board voted to delete the second sentence to subparagraph (5)(b) of Rule 0400-40-07-.04. As proposed the sentence read prior to deletion: "For public road projects commissioned by a state, county, or local government, this alternatives analysis does not need to include alternative road locations but must include other measures to avoid and minimize impacts to resource values."

(3) The Board voted to add "flow and" between "improve" and "classified" in the second sentence of subparagraph (7)(b) of Rule 0400-40-07-.04 so that, as amended, the sentence shall read as follows: "All mitigation watercourses must maintain or improve flow and classified uses after mitigation is complete."

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

(1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

Aquatic Resource Alteration Permits (ARAPs) are most often required by real estate developers, large companies, the Tennessee Department of Transportation, homeowners, mining companies, and municipalities. TDEC does not specifically ask whether permit applicants qualify as small businesses, so it is difficult to precisely estimate how many small businesses will be affected by this rulemaking. Currently, there are approximately 2,400 ARAP files that are active or for which complete applications have been received. Based on a review of a sample of this list, somewhere between 50% to 60% of applications appear to involve small businesses.

(2) The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

The changes in the ARAP rules will not require either more, or less, reporting or recordkeeping than the previous version of the rules. The primary rule change that will affect compliance costs for permit applicants is the reduction in the amount of information required to be published in a public notice in a local newspaper. That abbreviated public notice will identify the location and the proposed activity, while referring interested persons to a website for additional information and providing the contact information for the permit writer. The cost of publishing notices varies significantly depending on the newspaper, and is generally more expensive in larger communities. In large markets, the cost of the advertisement can range from $3,000 to $6,000. We estimate the current total cost of newspaper notices for ARAPs to exceed $100,000 annually for all applicants. We anticipate that the notices may be approximately half as long as under the prior rules, with a proportionate cost savings.

(3) A statement of the probable effect on impacted small businesses and consumers.

Overall, the rulemaking is expected to have a modest positive effect on small businesses by reducing the requirement for newspaper notices.

This rulemaking is being conducted in conjunction with a parallel rulemaking for water quality standards. Those rules are being amended in a manner that will reduce the frequency with which individual permit applicants must demonstrate a lack of practicable alternatives. In order to maintain that requirement, and to be more consistent with federal requirements for Section 404 permits, these rules will require applicants for individual permits to demonstrate a lack of practicable alternatives rather than simply analyze alternatives. The changes to the two rule chapters, on balance, are expected to have a neutral impact on small businesses.

These rules are not expected to affect consumers.

(4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

TDEC seeks to reduce the burden of obtaining ARAPs by issuing a number of general permits for a common set of minimal impact activities. Applicants may seek coverage under these general permits through a relatively simple application, and do not need to undergo public notice and comment for each proposed activity, making it faster and less costly to obtain permit coverage than the individual permit process. Currently, there are 15 such general ARAPs which cover the majority of permittees. These rules clarify the requirements for general permits and authorize for a new general permit for *de minimis* water withdrawals.

(5) A comparison of the proposed rule with any federal or state counterparts.

The most comparable rules are the U.S. Army Corps of Engineers and EPA rules for federal Clean Water Act Section 404 permits. Overall, the ARAP rules are comparable to, although less prescriptive than, these federal rules.

(6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Tenn. Code Ann. § 69-3-108(b) requires all persons to obtain and comply with ARAPs prior to altering the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Therefore, the Board lacks the authority to exempt small businesses from the provisions of this rulemaking.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

This rulemaking will have a modest impact on local governments, who are among the entities who are required to obtain ARAP coverage.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

Many of these Aquatic Resource Alteration Permit (ARAP) rules are being amended for the first time since November 8, 2000, and others since May 31, 2011. ARAPs authorize habitat alterations and water withdrawals and, where required, serve as certifications of compliance with state water quality standards under Section 401 of the Clean Water Act.

The revisions clarify that ARAPs are required only for alterations of streams and wetlands, and would remove references to wet weather conveyances because these are now governed by T.C.A. § 69-3-108(q).

This rulemaking introduces the new term "existing conditions" to reflect actual pre-impact resource values. The rules require compensatory mitigation to ensure no overall net loss of resource values from existing conditions. The new term is intended to ensure that this mitigation is limited to what is necessary to offset the harm actually caused by the permitted activity, and not to compensate for pre-existing degradation. This change is also intended to ensure appropriate mitigation for impacts to high quality waters, including Exceptional Tennessee Waters. However, this change is primarily to clarify the mitigation requirements from the current version of the rules, which only required mitigation for the loss of resource values associated with the permitted activity.

The current ARAP rules require only that a permit applicant consider avoidance and minimization and submit an alternatives analysis. As amended, for applicants for individual permits, Rule 0400-40-07-.04(5)(b) requires implementation of any practicable alternatives that have less adverse impact on resource values, so long as this does not result in other adverse environmental consequences. This rule is comparable to the Corps of Engineers requirement for Section 404 permits, which are the federal equivalent of ARAPs. This rule change is intended to counterbalance provisions in the water quality standards rules, which would otherwise result in fewer new individual permits having to demonstrate a lack of practicable alternatives to degradation.

The amendments will change the permitting process to include a draft permit and rationale, consistent with other types of permits issued by the Division of Water Resources. This will enhance transparency and improve the public notice process. Currently, the Division publishes only a notice of a complete application, without a draft permit or an explanation of what it intends to do, leaving interested persons (including permit applicants) with little basis to submit meaningful comment. The amendments also conform the permit appeal process to T.C.A. § 69-3-105(i) by clarifying that third parties, not just permit applicants, may appeal permits if they meet specific conditions, and by clarifying those conditions.

Amendments to the mitigation rule, 0400-40-07-.04(7), retain substantial portions of the prior rule while clarifying the methodology to ensure no overall net loss of resource values from existing conditions. This rule prioritizes mitigation as close to the impact site as practicable. The rule also clarifies that mitigation for impacts to Tennessee streams and wetlands must occur in Tennessee.

Finally, the revisions include administrative updates and clean-up edits, including elimination of definitions that are not used in the rules or in permits.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

This rulemaking is promulgated pursuant to T.C.A. § 69-3-108(b) related to permitting requirements.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The people most directly affected by this rule are the permittees, who consist of property developers, TDOT, mining companies, individual property owners, and local government. Overall, the regulated community supports adoption of the proposed rules in tandem with revisions to the Antidegradation Statement in another rulemaking.

A number of environmental nongovernmental organizations submitted comments expressing concerns related to this rulemaking. The Board considered these comments, and made a number of changes from the draft rules in response. In particular, the Board changed a proposed provision that would have exempted public road projects from evaluating alternative site selection, restored a requirement for publishing notices in newspapers, added a requirement to ensure at least minimal protection for degraded waters, and specified performance standards for stream mitigation. Nonetheless, even with these changes some NGOs may still oppose the rule amendments.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

This rulemaking is not affected by any opinions of the attorney general and reporter or any judicial ruling.

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

This rule is expected to have a neutral effect on state and local government revenues and expenditures, with the exception of some savings to local government applicants who will be required to publish shorter public notices in local newspapers.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Jonathon Burr
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(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Mallorie Kerby
Assistant General Counsel
Office of General Counsel

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Office of General Counsel
Tennessee Department of Environment and Conservation
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, Tennessee 37243
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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

The Board of Water Quality, Oil and Gas is not aware of any requests.

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Sequence Number: 06-17-19
Rule ID(s): 9042
File Date: 6/13/19
Effective Date: 9/11/19

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Board of Water Quality, Oil and Gas
Division:	Water Resources
Contact Person:	Jonathon Burr
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Revision Type (check all that apply):
X Amendment
___ New
___ Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. 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

Place substance of rules and other info here. Please be sure to include a detailed explanation of the changes being made to the listed rule(s). Statutory authority must be given for each rule change. For information on formatting rules go to http://sos-tn-gov-files.s3.amazonaws.com/forms/Rulemaking%20Guidelines_September2016.pdf.

Chapter 0400-40-07
Aquatic Resource Alteration

Amendments

Rule 0400-40-07-.01 General is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.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~~ stream or wetland shall consider avoidance and minimization of such impacts. If impacts to ~~the waters~~ a stream or wetland will ~~occur~~ result in an appreciable permanent loss of resource values, mitigation as set forth in paragraph (7) of Rule 0400-40-07-.04 must be ~~proposed~~ provided to ~~offset any lost resource value~~ ensure no overall net loss of resource values.

(2) ~~The Federal~~ Section 401 of 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~~ 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~~ results in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the ~~State~~ 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. State permits for these activities are ~~either § 401 Water Quality Certifications or~~ Aquatic Resource Alteration Permits, which also serve as § 401 certifications where required. Alterations of wet weather conveyances are governed by, and must be conducted in compliance with, T.C.A. § 69-3-108(q).

(4) This Chapter prescribes the procedures ~~peculiar~~ applicable to ~~these permits~~ Aquatic Resource Alteration 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~~ Permits issued pursuant to this chapter do not authorize activities ~~which do not~~ that require a National Pollutant Discharge Elimination System (NPDES) ~~permit or which do not result from the operation of a treatment system~~ permit, a state operating permit, or an underground injection control permit.

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

Paragraphs (3) and (4) of Rule 0400-40-07-.02 Exemptions are amended by deleting them in their entirety and substituting instead the following:

(3) The Department of Agriculture provides guidance for development of best management practices ~~(BMP's)~~ (BMPs) for agriculture and forestry. One of the primary goals of these ~~BMP's~~ BMPs is the prevention of soil erosion and discharge of silt and sedimentation to streams. These ~~BMP's~~ BMPs should be followed. If silvicultural activities ~~fail~~ have polluted waters of the state as a result of a failure to use ~~BMP's and a point source discharge results in water pollution~~ BMPs, the Commissioner is authorized to issue a stop work order under ~~P.Ch. 680 of the Acts of 2000~~ T.C.A. § 69-3-133.

(4) Existing water withdrawals on July 25, 2000, which do not adversely alter or ~~effect~~ affect 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.

Rule 0400-40-07-.03 Definitions is amended by deleting it in its entirety and substituting instead the following:

As used in this ~~Chapter~~ chapter and in any ARAP ~~permit issued, including General Permits~~ issued pursuant to this chapter, 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".~~

(3) "Appreciable permanent loss of resource values" means a reduction in resource values that is expected to continue without fundamental change and is large enough to be observed and measured as resulting in more than minimal adverse effects.

(4) "Aquatic Resource Alteration Permit" or "ARAP" means a permit issued 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~~ state that 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)~~(5) "Best ~~Management Practices~~ management practices" or "BMPs" 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~~ state. ~~BMP's~~ BMPs include methods, measures, practices, and design and performance standards.

~~(7)~~(6) "Certification" means an Aquatic Resource Alteration Permit under the ~~Tennessee Water Quality Control~~ Act ~~of 1977~~, ~~as~~ when required by § 401 of the ~~Federal~~ 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~~ 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)~~(7) "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)~~(8) "Constructed ~~Wetland~~ wetland" means a wetland 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)~~(9) "Cumulative ~~Impacts~~ impacts" means the impact on ~~the environment~~ resource values 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)~~(10)"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)~~(11)"Ditch" means a man-made excavation for the purpose of conveying water. Ditches do not include streams, modified streams, or canals.

(12) "Division" means the Division of Water Resources within the Tennessee Department of Environment and Conservation.

~~(16)~~(13)"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)~~(14)"Emergency" means a situation where life, public health, the environment, or substantive improvements to real property is in immediate danger.

~~(19)~~(15)"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.~~

(16) "Existing conditions" means the biological, chemical, bacteriological, radiological, and physical conditions of a stream or wetland at the time the project is proposed as measured by a quantitative assessment tool or other defensible scientific method as approved or determined by the Division.

~~(21)~~(17)"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)~~(18)"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.~~

(19) "HUC" means the hydrologic unit code assigned by the United States Geological Survey.

~~(25)~~(20)"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)~~(21)"In the ~~Dry~~ 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)~~(22)"Minimal ~~Impacts~~ impacts" means an activity for which the scope is very limited in area, the impact is very short in duration, and that has no appreciable 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)~~(23) "Mitigation" means ~~compensating for impacts in regulated areas~~ the restoration, creation, enhancement, and/or preservation of aquatic resources to compensate for unavoidable impacts 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)~~(24) "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)~~(25) "Resource ~~Values~~ values" are the ~~benefits~~ physical, chemical, and biological properties of ~~provided by~~ the water resource that help maintain classified uses. These ~~benefits~~ properties may 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~~ and wildlife;

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

(f) provide and support recreational and navigational uses; and

(g) provide both safe quality and adequate ~~quality and~~ quantity of ~~drinking~~ water for domestic water supply and other applicable classified uses.

~~(37)~~(26) "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)~~(27) "Sedimentation" or "Siltation" ~~means~~ mean the process by which sediment is deposited in or by the waters of the ~~State~~ 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)~~(28)"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)~~(29)"Stream" means a surface water that is not a wet weather conveyance. For purposes of this chapter, and permits issued pursuant to this chapter, a wetland is not a stream. See definition of wetland.

~~(42)~~(30)"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)~~(31)~~"Wetlands"~~ "Wetland" means ~~those areas~~ an area that ~~are~~ is inundated or saturated by surface or ~~ground water~~ groundwater at a frequency and duration sufficient to support, and that under normal circumstances ~~do~~ does 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)~~(32)"Wet ~~Weather Conveyances~~ 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~~ groundwater 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.

Rule 0400-40-07-.04 Permits is amended by deleting it in its entirety and substituting instead the following:

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. When a § 401 certification is required, the ARAP also serves as the § 401 certification. There are ~~three (3)~~ two (2) types of ~~permits~~ ARAPs: 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~~ that requires the applicant to 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~~ that requires the applicant to notify the Commissioner of the planned activity and receive ~~approval~~ a notice of coverage from the Commissioner prior to implementing the activity in accordance with the terms and conditions of the General Permit. ARAP applications shall be submitted on forms approved by the Commissioner, and include all of the information requested therein. 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~~ notice or approval, but must implement the planned activity in accordance with the terms and conditions of the General Permit. Persons who desire to implement an activity pursuant to a General Permit which requires ~~Notice or Notice~~ 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~~ Division, in accordance with paragraphs (3) and (5) of this rule, to implement any activity requiring an ARAP 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.~~[4]

~~(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~~ Permits.

The Commissioner may ~~use~~ issue 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. General Permits for habitat alterations may be issued only for activities that do not result in an appreciable permanent loss of resource values. General Permits may be issued for water withdrawals that cause no more than de minimis degradation. 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 and will be published along with a copy of the draft General Permit and a rationale explaining the basis for the permit. ~~TDEC~~ The Division will distribute the public notice to interested persons who have requested ~~TDEC~~ the Division notify them of ARAP applications and by posting on the ~~TDEC~~ Tennessee Department of Environment and Conservation's (TDEC's) website. Interested persons may submit written comments on the draft 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. The procedures for obtaining coverage under a General Permit shall be specified in the General Permit.

(3) ~~§~~ Section 401 Water Quality Certification.

~~(a) General.~~

~~Any person who plans to engage in any of the activities outlined in § 404 of the Federal Clean~~

[4] ~~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.~~

~~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 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.~~

An applicant for a federal license or permit to conduct an activity which may result in a discharge to the navigable waters must first obtain a § 401 certification from the Division. If the proposed activity requires an ARAP, that permit serves as the § 401 certification and is subject to the application and public notice procedures for obtaining ARAP coverage established by this chapter. Coverage under a General Permit, obtained either through a notice of coverage or automatic coverage under a General Permit for which no prior notice to the Division is required, constitutes a § 401 certification. If the proposed activity does not require an ARAP, the applicant for a federal license or permit may obtain a § 401 certification by submitting a copy of the federal application to the Division and a request for a § 401 certification.

(4) Public Notice and Participation.

(a) An ARAP Individual Permit or a § 401 Certification requires the issuance of ~~Public Notice~~ public notice seeking public participation and comment on the planned activity. However, ~~Public Notice~~ public notice is not required for an activity authorized by General Permit ~~since Public Notice~~ because 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~~ Division'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~~ for an activity that does not require an ARAP shall be a public notice issued by the ~~Department~~ Division. Such notice will describe the ~~activity,~~ activity and 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~~ streams or wetlands, 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 or renewal 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 or renewed without public notice. Otherwise, a renewal or modification requires 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~~ public notice seeking public participation and comment on the activity will be given, along with a draft permit and a rationale explaining the basis for the draft permit, including the basis for determining whether a proposed activity will result in an appreciable permanent loss of resource values. Except as provided in subparagraph (5)(c) of this rule, if an activity will result in an appreciable permanent loss of resource values, the draft permit shall include requirements for mitigation and the rationale shall explain the basis for determining that the mitigation is sufficient to result in no overall net loss of resource values from existing conditions.

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

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

2. Name, ~~and~~ address, telephone number, and electronic mail address of ~~TDEC~~ the Division contact person;

3. A brief description of the proposed activity;

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

~~5.~~4. The location of the ~~state waters~~ streams or wetlands 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.);~~

5. The Division website at which additional information about the permit application can be found;

~~10.~~6. The procedure to submit comments on the proposed activity;

~~11.~~7. The procedure for requesting a public hearing; and

~~12.~~8. A brief description of the procedure for the Commissioner to make a final determination to issue a permit.

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

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

2. The Applicant shall distribute the approved ~~Public Notice~~ 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~~ readily visible from the public road. Also, the sign shall be maintained for at least ~~thirty (30)~~ days following distribution of the approved ~~Public Notice~~ 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 as soon as possible, but 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) The applicant shall submit an alternatives analysis evaluating a range of potentially practicable alternatives to avoid and minimize the loss of resource values consistent with the overall purpose of the proposed activity. No Individual Permit shall be granted if there is a practicable alternative to the proposed activity that would have less adverse impact on resource values, so long as the alternative does not have other significant adverse environmental consequences.

~~(b)~~(c) ~~An~~ The 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~~ sufficient to result in 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~~ In the case of emergency permits or other situations compelling that measures be taken in a short time, a state, county, or local government applicant for a public works project may propose a specific mitigation plan after an Individual Permit has been issued, provided that the permit shall specify the amount of mitigation required and an implementation timeline. In this case, the permittee shall comply with the mitigation plan approved by the Division.

~~(c)~~(d) An Individual Permit is required for water withdrawals which will or will likely result in alteration of the properties of the ~~source~~ affected stream or wetland and will result in more than de minimis degradation as defined in Rule 0400-40-03-.04(4).

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~~ a stream or wetland, shall file an application with the ~~Department~~ Division which includes the following minimum information:

   (i) ~~proposed~~ Proposed withdrawal rates and volumes;

   (ii) ~~proposed~~ Proposed withdrawal schedule; and

   (iii) ~~flow~~ 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 values of the affected stream or wetland. 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. Monitoring and reporting requirements may be established to ensure and document compliance with permit conditions.

(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~~ rules 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~~ Violation of any terms or conditions of the permit;

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

3. ~~causing~~ Causing a condition of pollution;

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

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

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

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

(c) ~~The Act requires that no~~ No activity may be authorized by the Commissioner unless any ~~lost~~ appreciable permanent loss of resource ~~value~~ values associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource ~~value~~ values from existing conditions. 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~~ loss of resource ~~value~~ values from existing conditions associated with a proposed impact and the increase in resource ~~value~~ values of any proposed mitigation and shall consider the following factors:

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

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

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

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

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

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

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

8. ~~hydrologic~~ Hydrologic modifications resulting from the proposed activity;

9. ~~the~~ 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~~ riparian buffers;

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

11. ~~whether~~ Whether the ~~state waters~~ stream or wetland is listed on the § 303(d) list or otherwise has unavailable parameters; 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~~ Division as having contaminated sediments; and whether the activity will adversely affect species formally listed in State and ~~Federal~~ federal lists of threatened or endangered species; and

12. ~~any~~ 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.~~

(a) If an applicant proposes an activity in a stream or wetland that would result in an appreciable permanent loss of resource values, the applicant must provide mitigation which results in no overall net loss of resource values from existing conditions. Because all streams and wetlands serve important functions, the determination of existing conditions shall ensure at least minimal protection for all streams and wetlands notwithstanding prior degradation.

1. The applicant shall provide the Division with a mitigation plan, including a time schedule for completion of all mitigation measures, for approval. To the extent practicable, the applicant shall complete any required mitigation, excluding monitoring, prior to, or simultaneous with, any authorized impacts. All mitigation shall include a permanent restriction on the use of the mitigation site in a form approved by the Division, including but not limited to a recorded notice of land use restrictions, conservation easement, or other equivalent mechanism.

2. Acceptable mitigation mechanisms include any combination of permittee-responsible mitigation, in-lieu fee programs, mitigation banks, or other mechanisms that are reasonably assured to result in no overall net loss of resource values from existing conditions.

3. Acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation, or any other measures that are reasonably assured to result in no net loss of resource values from existing conditions.

4. The Division will evaluate resource value compensation through the use of an appropriate quantitative assessment or other defensible scientific method, and where applicable will account for temporal loss of resource values. The Division will use a watershed prioritization approach to evaluate proposed mitigation sites. Mitigation should occur as close to the impact location as practicable, prioritized as follows:

   (i) projects providing an increase in resource values to degraded streams or wetlands on site or within the immediate impact area;

   (ii) projects providing an increase in resource values to degraded streams or wetlands within the HUC-12 in which the impact is located;

   (iii) projects providing an increase in resource values to degraded streams or wetlands within the HUC-8 in which the impact is located;

   (iv) projects providing an increase in resource values to degraded streams or wetlands outside the HUC-8 in which the impact is located; or

   (v) a combination of any of the above activities.

   Where appropriate, the Division may apply a multiplier based on items (i) through (v) of this part.

5. All mitigation plans shall include a monitoring and reporting program to document timely achievement of successful mitigation and remedial actions to correct any deficiency.

6. Mitigation for impacts to Tennessee streams and wetlands shall occur in Tennessee.

(b) Mitigation of streams.

Mitigation for impacts to streams must be developed in a scientifically defensible manner approved by the Division that demonstrates a sufficient increase in resource values to compensate for permitted impacts. At a minimum, all new or relocated streams must include a vegetated riparian zone, demonstrate lateral and vertical channel stability, and have a natural channel bottom. All mitigation watercourses must maintain or improve flow and classified uses

after mitigation is complete.

(c) Mitigation of Wetlands.

1. Prioritization of mitigation site selection for wetland impacts may also be based on U.S. EPA Level III ecoregions.

2. The ratio of acres required for wetland mitigation should not be less than 2:1 for wetland restoration; 4:1 for wetland creation and enhancement; and 10:1 for wetland preservation. Applicants 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 values and functions of the affected wetland, anticipated resource value of the proposed mitigation, temporal loss, and the likelihood of success of the proposed mitigation.

(8) Duration and ~~Re-issuance~~ Renewal of Permits.

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

(b) ~~Re-issuance~~ Renewal of permits is not required for one-time alterations such as construction, as long as the alterations, mitigation, and monitoring are completed within the time limit established by permit. Any permittee that has not completed the alteration authorized by the permit, or the mitigation and monitoring required by the permit, must apply for renewal at least ninety (90) days prior to the expiration date.

(c) For ~~on-going~~ ongoing alterations, such as water withdrawals, any permittee who wishes to continue the permitted activity after the expiration date of the permit must make application for renewal at least ninety (90) days prior to its expiration date. If an application for permit renewal does not fall within subparagraph (4)(a)3 of this rule, ~~(d) The~~ the Commissioner shall follow the procedures for public notice and participation detailed in paragraph (4) of this rule, regarding each application for ~~re-issuance~~ renewal of ~~a~~ the permit.

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

~~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.~~

(a) Permittees, applicants for permits, and aggrieved persons meeting the criteria of subparagraph (9)(c) of this rule who disagree with the denial, issuance, terms, or conditions of a permit may seek review of the Commissioner's decision by the Board of Water Quality, Oil and Gas pursuant to T.C.A. § 69-3-105(i) and § 69-3-110.

(b) For permit modifications, only those terms that were the subject of the modification may be appealed. For permit renewals, only those terms that were changed in the permit renewal compared to the preceding permit may be appealed.

(c) To be entitled to a review of the Commissioner's permit decision, aggrieved persons shall:

1. have submitted a written comment during the public comment period on the permit;

2. given testimony at a formal public hearing on the permit; or

3. attended a public hearing as evidenced by completion of a Department of Environment and Conservation Record of Attendance Card or other method as determined by the Division.

(d) The basis for the appeal for aggrieved persons may only include issues which:

1. were provided to the Commissioner in writing during the public comment period;

2. were provided in testimony at a formal public hearing on the permit; or

3. arise from any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment.

(e) All petitions for permit appeals shall be filed with the Board of Water Quality, Oil and Gas within 30 days after the date that public notice of the permit issuance, denial, or modification is given by way of posting the notice on the Division's website. All petitioners shall specify the basis for their appeal, and state a claim for relief based on an alleged violation of the Act or the rules promulgated thereunder. Aggrieved persons shall specify facts sufficient to establish that they have satisfied the criteria of subparagraphs (9)(c) and (9)(d) of this rule and otherwise have standing to appeal.

(f) 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.

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Dr. Gary G. Bible (Oil and Gas Industry)	X				
Elaine Boyd (Commissioner's Designee, Department of Environment and Conservation)	X				
James W. Cameron III (Small Generator of Water Pollution representing Automotive Interests)	X				
Jill E. Davis (Municipalities)	X				
Mayor Kevin Davis (Counties)	X				
Derek Gernt (Oil or Gas Property Owner)	X				
C. Monty Halcomb (Environmental Interests)				X	
Charlie R. Johnson (Public-at-large)				X	
Judy Manners (Commissioner's Designee, Department of Health)	X				
John McClurkan (Commissioner's Designee, Department of Agriculture)	X				
Frank McGinley (Agricultural Interests)	X				
D. Anthony Robinson (Manufacturing Industry)	X				

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Board of Water Quality, Oil and Gas on 10/16/2018, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 05/03/18

Rulemaking Hearing(s) Conducted on: (add more dates). 06/27/18

Date: October 17, 2018

Signature: James W. Cameron III

Name of Officer: James W. Cameron III

Title of Officer: Chairman

CAROL L. GRICE STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY, TENN.

Subscribed and sworn to before me on: October 17, 2018

Notary Public Signature: Carol L. Grice

My commission expires on: March 3, 2020

Agency/Board/Commission: Board of Water Quality, Oil and Gas

Rule Chapter Number(s): 0400-40-07

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III

Herbert H. Slatery III
Attorney General and Reporter

6/10/2019
Date

Department of State Use Only

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Filed with the Department of State on: 6/13/19

Effective on: 9/11/19

Tre Hargett

Tre Hargett
Secretary of State

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Board of Water Quality, Oil and Gas
DIVISION:	Water Resources
SUBJECT:	General Water Quality Criteria, Use Classifications for Surface Waters
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 69-3-105(a), Section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), and 40 C.F.R. § 131.20
EFFECTIVE DATES:	September 11, 2019 through June 30, 2020
FISCAL IMPACT:	This rulemaking is not expected to affect state or local revenues. With respect to expenditures, there may be a small increase in costs for treatment to remove ammonia at four state-owned facilities and fourteen local government facilities. All of these facilities already have strict ammonia limits and the treatment equipment required to remove ammonia, so the expected impact would be a modest increase in operating expenses.
STAFF RULE ABSTRACT:	This rulemaking hearing rule updates Rule Chapters 0400-40-03 (General Water Quality Criteria) and 0400-40-04 (Use Classifications for Surf ace Waters). Pursuant to the federal Clean Water Act, states are required to review their water quality standards at least once every three years, including a review of EPA's new recommended water quality criteria. EPA recently published extensive changes to its criteria. The Board made all revisions required by EPA to be consistent with applicable requirements of the Clean Water Act and EPA rules. At the request of the regulated community and other stakeholders, the Board retained the current human health criteria rather than adopt EPA's updated recommended criteria at this time. TDEC and several other Region 4 states have postponed adoption of these recommended criteria for further evaluation. In addition, in response to comments, the Board chose to retain the current narrative

nutrient criterion for fish and aquatic life rather than adopt a revised criterion as had been proposed.

The rules also make revisions to the Antidegradation Statement as applied to aquatic resource alterations, including a clarification that, consistent with EPA rules and Tennessee's long-standing application of the Antidegradation Statement, antidegradation review only applies to new or expanded impacts to waters. In addition, changes were made to provisions on waters with unavailable parameters, waters with available parameters, Exceptional Tennessee Waters, and Outstanding National Resource Waters to provide more consistency with EPA's antidegradation rule (updated in 2015) and the Corps of Engineers standards for Section 404 permits.

Additional definitions were added to improve transparency and avoid ambiguity. They include definitions of terms previously used but undefined and new terms added in this rulemaking. The rules also update the public notice process to streamline the notice and comment period for discharge permits.

Tennessee Department of Environment and Conservation

2018 Triennial Review of Water Quality Standards

Summary of Public Comments and Departmental Responses

(Note: This document contains responses to comments submitted in both 2016 and 2018. Similar comments have been combined and may have been summarized for response.)

Comment Summary

As is typical for the Triennial Review of water quality standards, the Board received a large volume of comments from a wide variety of stakeholders reflecting divergent views. This document summarizes and responds to nearly 250 distinct comments from dozens of commenters. A number of general comments were received asserting that the rules should not be either strengthened or weakened. The Board responded that the revisions were not intended to do either, but instead were made to address current science, reflect changing laws, and provide clarification of existing rules.

Because it has review and approval authority, EPA commented extensively on the draft rules. In response, the Board made all revisions required by EPA to be consistent with applicable requirements of the Clean Water Act and EPA rules.

The draft rules had proposed a number of updates to water quality criteria based on EPA's recent revisions to its national criteria recommendations. Members of the regulated community objected strenuously to the proposal to adopt new human health criteria, while other commenters objected to the continued use of a higher risk factor than EPA's for carcinogens. In response, the Board reverted to the prior human health criteria and agreed to review the matter further before making a final decision. Similarly, the Board had proposed to clarify the narrative nutrient criterion for fish and aquatic life, but received numerous objections, and reverted to the prior nutrient provision.

A large number of comments were received concerning the Antidegradation Statement and specific definitions applied in that rule. Many of these comments expressed disagreement with the existing rules, particularly with respect to *de minimis* degradation. Some commenters objected to the new provision prohibiting significant degradation of waters with unavailable parameters for habitat, but the Board explained that this provision was consistent with long-standing EPA antidegradation guidance. Other comments objected to the new definition of "in-system" mitigation as covering too large an area. The Board explained that use of the eight-digit hydrologic unit code (HUC-8) would allow the use of mitigation banks and small in-lieu fee programs and is consistent with the Department's watershed planning scale. Some NGOs asserted that limiting the application of the Antidegradation Statement to new or increased activities would "grandfather in existing pollution" and fail to "restore" water quality. The Board explained that under federal law, antidegradation review is only required for new or expanded activities, and that the purpose of antidegradation review is to maintain existing water quality.

Moreover, the Department may not (and does not) issue or renew permits for activities that cause pollution, regardless of whether antidegradation review is required.

General Comments Not Related to a Specific Rule Change

Comment 1. ***Tennessee should not make any criteria less stringent.***

Response. The Board's goal is to revise criteria as appropriate to make the criteria either (1) more appropriately protective based on the most current science, (2) more consistent with changing laws, or (3) more clear based on staff experiences with implementation.

The Board's goal is never to simply make criteria more or less stringent.

Comment 2. ***Tennessee should not make any criteria more stringent.***

Response. Please see the previous response.

Comment 3. ***TDEC's application of criteria for water quality assessments should be appealable to the Tennessee Board of Water Quality, Oil and Gas.***

Response. The Board promulgates criteria and provides guidance on how the criteria should be interpreted and applied in water quality assessments. The Water Quality Control Act (Act) specifically gives the responsibility for water quality assessment to the Commissioner. Revision of the Act would be required to make the change envisioned by the commenter. Although assessment decisions cannot be appealed, permit provisions or any enforcement actions based on assessment results can be appealed.

Appealable or not, TDEC is always happy to explain and defend assessment decisions. In certain circumstances, EPA can be asked to provide its expertise to help mediate disputes over assessments.

Comment 4. ***More stringent criteria are an unfunded mandate to municipal dischargers.***

Response. Discharges to surface water can only occur with a valid permit which, according to the Act, contains:

> ***The most stringent effluent limitations and schedules of compliance, either promulgated by the board, required to implement any applicable water quality standards, necessary to comply with an areawide waste treatment plan, or necessary to comply with other state or federal laws or regulations;***

TDEC always encourages alternatives to discharge.

Comment 5. ***TDEC should provide a written justification for every change that has been proposed.***

Response. In general, TDEC proposes revisions after considering (1) EPA revisions to national criteria, (2) clarifications to make criteria more understandable, (3) court decisions, and (4) changes needed to address implementation issues. The proposals may also be in response to comments about specific provisions.

Comment 6. ***A commenter is concerned about habitat loss in a Nashville area stream.***

Response. TDEC shares that commenter's concern about habitat loss in urban streams, but this comment is not related to water quality standards.

Comment 7. ***Several comments were received concerning statements made in the preamble of the rulemaking hearing notice. Commenters question the statements that the current rules are unworkable and are more stringent than federal law and requested clarification and examples***.

Response. The preamble of the rulemaking hearing is not part of the rules, and has no bearing on how the rules are to be applied. The referenced comments addressed specific situations regarding aquatic resource alteration permits (ARAPs) undergoing antidegradation review, and explained some of the reasons for changing the procedures as described in the two paragraphs that follow. The primary reason for stating that the procedure was not workable concerned antidegradation review for ARAPs in waters with unavailable parameters for habitat. Unlike for waters with available parameters and Exceptional Tennessee Waters (where the applicant could demonstrate a lack of practicable alternatives and demonstrate economic or social necessity), an applicant could not obtain a permit for a habitat alteration causing more than a minimal impact in a habitat-impaired waterbody unless in-system mitigation was provided. This resulted in greater protection being applied to lower quality waters, which is precisely the opposite of what federal antidegradation law requires.

These requirements for habitat-impaired waters were particularly difficult for TDOT because it has less flexibility in avoiding specific impact sites and, due to implementation of federal procurement policies, less ability to secure in-system mitigation sites.

Comment 8. ***Criteria should be based on quantifiable measurements rather than the vague changes proposed by TDEC.***

Response. The Board certainly understands the commenter's preference for quantifiable measurements like numeric criteria, but for many parameters, the Board has considered it preferable to promulgate narrative criteria to maintain flexibility in interpreting and applying these standards in waterbodies statewide, which reflect a tremendous range of ambient conditions.

Comment 9. ***TDEC should conduct an economic impact study prior to making criteria more stringent.***

Response. The Board of Water Quality, Oil and Gas has the statutory responsibility to set water quality standards at levels appropriate to protect specific uses, so criteria are designed to protect human health, aquatic life, and other uses based on the toxicity, cancer potency, or other harmful impacts of these substances. EPA considers these same factors when researching and setting national criteria.

Economics can be considered at other points in the implementation of control strategies, such as in establishing compliance schedules. As previously stated, there are alternatives to discharging to surface waters.

Comment 10. ***Once TDEC is ready to publish a set of criteria revisions based on comments received, the changes should be put out for public review a second time.***

Response. The revisions in this rulemaking process will not be subject to another comment period. These are within the scope of the noticed rulemaking and are being made in response to comments.

Comment 11. ***Tennessee should not adopt any criteria that are lower than current detection levels.***

Response. This comment has been made many times in the history of water quality standards and the Board's response has consistently been:

1. Detection levels change due to improved technology and analytical techniques get better over time. It is in the public's interest to promote ambitious detection levels and to not use inappropriately high detection levels that can mask pollution issues.

2. Permittees get the benefit of dilution when permit limits are derived. But even if permit limits should be below appropriate method detection levels, the permittee need only demonstrate that levels are undetected to be in compliance.

The commenter should also be mindful that for carcinogens, which have some of the lowest criteria, Tennessee's numbers are promulgated an order of magnitude higher than EPA's, due to the different risk level we use.

Comment 12. ***Tennessee should delay moving forward with these criteria so as not to get ahead of the TNH2O process.***

Response. These rules will not be delayed pending the TNH2O project. That process is very important to the department but it is not a regulatory planning process. The review of water quality standards has statutory time constraints.

Comment 13. ***A commenter requested a concise statement of the principal reasons for the Board's action in adopting the rules pursuant to T.C.A. § 4-5-205(b).***

Response: A concise statement is provided as Attachment 1.

Comment 14. ***These proposed regulations do not address how the State intends to fulfill its obligations to "abate existing pollution of the waters of Tennessee, [and] to reclaim polluted waters" so that all Tennesseans' right to "unpolluted waters" may be realized. In particular, Tennessee is significantly behind in its duties to address nutrient pollution. TDEC has not developed numeric nutrient criteria.***

Response. While it is true that the Board has not promulgated numeric nutrient criteria, the Department has been proactive in developing cost-effective measures to reduce nutrient discharges.

Moreover, the comment overlooks the fact that to a great extent, the pollution that existed at the time the Act was enacted has already been abated: water quality across the state has improved as a result of implementing a robust water quality permitting program statewide in partnership with the regulated community. Many of the water quality challenges that remain involve nonpoint source activities that are not subject to regulation by the Department, but are the subject of voluntary watershed-based approaches.

Comment 15. ***The state has developed just five nutrient related TMDLs and has not implemented the resulting wasteload allocations in NPDES permits. Accordingly, if the public trust created by TNWQCA is to be fulfilled, commenters believe that Tennessee needs a robust system for the conduct of TMDLs, including for which water bodies "third party TMDLs" should be employed. TDEC should also provide for the composition and authority of stakeholder and technical advisory committees for those water bodies for which the third party TMDL mechanism is employed.***

Response. The Board appreciates the comment. However, these rules do not address the process for development of TMDLs.

Comment 16. We believe TDEC could provide more certainty to the regulated community and the public by making and publicizing a compendium of what has been determined to be maximum extent practicable for MS4 permits, and how to make sure that regulated parties understand what those responsibilities entail. We would be willing to work with TDEC and regulated parties to put together such a program.

Response. This comment does not concern the current rulemaking. However, please note that in 2018, the Tennessee General Assembly required the Board to issue rules concerning maximum extent practicable for post construction stormwater, which will happen before new

MS4 permits are modified or renewed. This rulemaking is expected to involve rule chapters concerning permits rather than water quality standards.

Comment 17. ***TDEC will cost the regulated community time and money to try to interpret these vague rule changes. This will divert resources from other activities.***

Response. The Board appreciates this comment. One of the primary goals of the public review process is to address concerns. This response to comments document provides answers to questions about interpretation of these revisions, which we hope will assist all citizens in their understanding. Even following this process, TDEC staff are always available to assist.

Comment 18. ***The commenter wishes to speak to the Tennessee Board of Water Quality, Oil and Gas to express their concerns directly at the rulemaking hearing in October.***

Response. The commenter should be aware that as the comment period has passed, the Board is under no legal obligation to hear additional comments. The Board, at its discretion, may allow members of the public to address them at this meeting, and typically does so.

Comment 19. ***A commenter complained about Davidson County construction sites not stopping runoff.***

Response. This comment does not address the current rulemaking. The commenter may contact the Metro Stormwater Program, which oversees stormwater management at construction sites in Davidson County.

Comments Related to a Specific Rule Change

0400-40-03-.01 The Tennessee Board of Water Quality, Oil, and Gas

Comment 20. TDEC has proposed to replace the word "pollution" with "pollutants." This makes the meaning narrower that the intent of the federal Clean Water Act.

Response. That was not the intent and the original wording has been restored.

0400-40-03-.02 General Considerations

Comment 21. ***Tennessee should make no revisions to the current wet weather conveyance rules.***

Response. TDEC has not proposed any revisions to this provision other than stylistic changes.

Comment 22. ***TDEC should clarify that the Best Available Technologies (BAT) requirement in subparagraph 4 refers to industries rather than POTWs.***

Response. The commenter is correct that BAT requirements apply only to non-POTWs. The rule will be amended to refer to the applicable level of technology, which for POTWs is secondary treatment rather than BAT.

Comment 23. ***Tennessee should add an EPA guidance document to the list of guidance documents identified in Rule 0400-40-03-.02(9). The specific document is the 2001 "Streamlined Water–effects Ratio Procedure for Dischargers of Copper" (EPA-822-R-01-001).***

Response. The Board agrees and will add this reference.

Comment 24. ***Tennessee should identify the Biotic Ligand Model (BLM) for copper as an additional site-specific criteria development method in Rule 0400-40-03-.02(9).***

Response. EPA has advised that this is acceptable. We will add this provision to Rule 0400-40-03-.02(9)(b). The commenter should note that this method would be bound by the provisions of this subparagraph, including that any criterion recalculated by this method would need to be promulgated as a revision to the rule and subsequently approved by EPA before being used for federal Clean Water Act purposes.

Comment 25. ***Tennessee has proposed to add the phrase "for metals" to Rule 0400-40-03-.02(9) in regard to site-specific criteria development. It is correct that the Water-effects Ratio (WER) is limited to metals, but the Resident Species and Recalculation methods can be used for any fish and aquatic life toxicant, not just metals.***

Response. The Board agrees and will move this phrase to Rule 0400-40-03-.02(9)(a) to make this clarification. The Board will add the phrase "for other toxics" to the first sentence in subparagraph (b).

Comment 26. ***The proposed new recreational criterion for ammonia is more stringent because of its toxicity to larval mussels. The rule should allow site-specific or alternate criteria to be calculated in waterbodies where mussels are absent.***

Response. With the exception of Alabama, no state has more mussel species with special status than Tennessee. However, this criterion doesn't just protect rare and endangered mussels. The 2013 ammonia criteria recommendations take into account the latest freshwater toxicity information for ammonia, including toxicity studies for sensitive unionid mussels and

gill-breathing snails. https://www.epa.gov/sites/production/files/2015-08/documents/fact_sheet_aquatic-life-ambient-water-quality-criteria-for-ammonia-freshwater-2013.pdf and https://www.epa.gov/sites/production/files/2015-08/documents/aquatic-life-ambient-water-quality-criteria-for-ammonia-freshwater-2013.pdf

Freshwater snails are ubiquitous in Tennessee waters. According to EPA guidance, the presence of freshwater mussels can be defined in terms of the existence of live mussels, mussel tracks, recently dead mussels' shells, unweathered shells, suitable habitat, and/or historical presence data. https://www.epa.gov/sites/production/files/2015-08/documents/tsd_for_conducting_and_reviewing_freshwater_mussel_occurrence_surveys_for_the_development_of_site-specific_wqc_for_ammonia.pdf

As a toxicant that is not a metal, theoretically, the Resident Species or Recalculation methods could be employed to develop a site-specific criterion for ammonia. However, as it is unlikely that there are any Tennessee waters without either mussel or freshwater snail species, it would be the very rarest of streams that might qualify and the burden of proof would be on the applicant to demonstrate a site-specific study was appropriate.

Comment 27. ***TDEC should move the reference to the EPA guidance document EPA-823-B96-007 currently in subparagraph (9) to subparagraph (8) where it more appropriately belongs.***

Response. The Board agrees and will move the reference to EPA's The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit from a Dissolved Criterion to subparagraph (8) about metals translation.

0400-40-03-.03(1) Domestic Water Supply

Comment 28. ***In 0400-40-03-.03(1)(j), TDEC proposes new numeric criteria. TDEC should clarify that these criteria only apply to waters at the point of a water supply intake.***

Response. Rule 0400-40-03-.03(1) states, "The criteria for the use of Domestic Water Supply are the following:." All waters classified by the Board for this use must meet these criteria, not just those waters at the immediate point of intake.

Comment 29. ***In 0400-40-03-.03(1)(k), TDEC proposes a new criterion designed to make the interference of nutrients with water treatment processes to be the loss of use support under the Domestic Water Supply classification. This is inappropriate as it is normal for these treatment facilities to have to deal with changing water quality conditions.***

Response. TDEC does not concede that protection of domestic water supplies from the impacts of nutrients is inappropriate or that this is a new provision. From the very first set of

water quality standards in Tennessee, it has been considered imperative to prevent alterations of water quality from creating problems, or adding expenses, for water treatment facilities. We cannot recommend the approach advocated by the commenter as it will invite EPA disapproval of this provision and might lead to federal promulgation of numeric water quality criteria.

However, impact of pollutants to treatment facilities is already prohibited under the previously promulgated subparagraph I in the red-lined version:

> *Other Pollutants - The waters shall not contain other pollutants in quantities that may be detrimental to public health or impair the usefulness of the water as a source of domestic water supply.* (Underlining added by TDEC for emphasis)

To avoid duplication or confusion that this is a new provision, the proposed addition will not be recommended.

Comment 30. ***The new, narrative nutrient criterion for domestic water supply protection is vague and could shut down certain wastewater treatment plants upstream of lakes used as a water source.***

Response. The commenter is directed to the response to Comment 29 about revising the proposal. In reference to concerns about the vagueness of the wording, the commenter is reminded there are two types of criteria. Numeric criteria are specific numbers to not be exceeded. Narrative criteria are verbal descriptions of the water quality necessary to protect the use. The commenter is correct that Tennessee's current narrative criterion is worded in a way that it can be implemented with some flexibility.

Both the Board and TDEC share the commenter's interest in finding objective ways to interpret this criterion in wadeable streams. We certainly understand that some commenters might prefer numeric criteria, but until we have them, TDEC is committed to finding the best way to interpret existing criteria and appreciate the commenter's guidance.

Regarding the intent of any criterion, it is always to protect the public's reasonable uses of a waterbody and never to "shut down" a discharger. Dischargers must treat their effluent to a degree that both protects the uses of the receiving stream plus downstream waters, and adheres to the Antidegradation Statement.

Comment 31. ***Nutrients are never the primary causal factor in interfering with water treatment.***

Response. The Board understands the nature of this comment, but do not agree that it merits disregarding the role of nutrients. Whether interfering directly, such as the role of nitrates in "blue baby syndrome," or indirectly due to algae blooms causing high pH, taste and odor issues, or disinfection byproducts, nutrients are the cause, not the symptom. These other conditions are response variables.

Comment 32. ***Percy Priest Reservoir in Middle Tennessee is a naturally eutrophic lake used for water supply and most of the nutrients impacting that use come from unregulated sources. Controls should not be targeted to dischargers that comprise a small amount of the total loading.***

Response. Although this is a permitting issue rather than a water quality standards question, the commenter is correct that water quality standards identify the level of a pollutant that interferes with the uses of a waterbody and doesn't differentiate whether or not the sources are currently regulated. Changing which sources are regulated in the Water Quality Control Act would require legislative action and is not a water quality standards issue.

However, the impairment and resulting unavailable conditions of a waterbody - whether caused by unregulated sources or even natural sources - doesn't argue for an increase in permitted discharges. The Antidegradation Statement does not allow TDEC to authorize additional degradation in a waterbody at or exceeding a criterion, regardless of source.

The commenter is directed towards the Draft Tennessee Nutrient Reduction Framework for more information regarding the strategy for implementing nutrient limits in discharge permits. https://www.tn.gov/content/dam/tn/environment/water/tmdl-program/wr-ws_tennessee-draft-nutrient-reduction-framework_030315.pdf.

0400-40-03-.03(3) Fish and Aquatic Life

Comment 33. ***Tennessee should change its statewide dissolved oxygen (DO) criterion [0400-40-03-.03(3)(a)], so that the minimum level would be 4 mg/L rather than 5 mg/L, and the 5 mg/L would be applied as an average level. This is the DO criterion in other Region 4 states.***

Response. EPA's current criteria for DO can be found in the Quality Criteria for Water 1986 (EPA 440/5-86-001). In that document, EPA recommends a minimum of 5.0 mg/L for DO where early life stages of warm water species are found. TDEC believes that all waters contain early life stages and therefore, the 5.0 mg/L minimum is the appropriate criterion for the State. However, we have also been open to the possibility that in some limited areas, dissolved oxygen levels may be naturally lower, or appropriately higher, such as the Blue Ridge ecoregion.

Following the Ecoregion Project study that began in 1995, TDEC approached EPA with the idea of lowering the DO criterion for wadeable streams in two specific subecoregions: 73a (Mississippi Delta) and 71i (Inner Nashville Basin). EPA approved the former, but not the latter. Regarding subecoregion 71i, EPA said that TDEC had not provided an adequate scientific basis that the lower dissolved oxygen levels documented in the highly impacted Inner Nashville Basin were due to natural conditions rather than pollution. TDEC agreed with EPA that the lack of unaltered streams in this relatively small subecoregion made it difficult to differentiate between natural conditions and anthropogenic impacts. The new criterion for the Mississippi Delta was incorporated into rule [0400-40-03-.03(3)(a)(3)] and approved by EPA.

Regarding the DO criteria of other states, TDEC believes that the other Region 4 states likely adopted their criteria prior to the 1986 revisions, and that similar provisions would not be approved by EPA today.

Comment 34. ***Under the dissolved oxygen criteria [0400-40-03-.03(3)(a)(4)], substantial and frequent diel fluctuations in oxygen levels are said to be "undesirable" if caused by anthropogenic sources. This is improper as, absent a violation of the appropriate minimum DO criterion, TDEC cannot show harm to the stream simply because oxygen levels fluctuate.***

Response. Rapid and dramatic dissolved oxygen fluctuations are a strong indicator of organic enrichment. But the commenter is correct that, if viewed in isolation, these fluctuations are not proof of harm. That is why the word "undesirable" was used in the rule rather than "prohibited." The Board cannot think of a scenario in which these rapid fluctuations would be desirable.

TDEC will continue to use this existing, EPA approved provision the same way TDEC always has, as part of a weight of evidence approach to determine if streams are impacted by nutrients.

Comment 35. ***How will the substantial and frequent diel fluctuations in oxygen levels provision be interpreted?***

Response. When dissolved oxygen levels are found to be unnaturally elevated, beyond what would be expected at corresponding water temperatures or levels documented in appropriate reference streams, that stream will be targeted for continuous monitoring. As often happens in wadeable streams, elevated oxygen levels caused by photosynthesis during the daytime can be accompanied by very low levels at night. Excursions below the oxygen criterion would be the condition of pollution.

If diel variations are substantial, but without violation of the criterion, staff would look for other evidence of harm - such as excessive algae, or alterations of biological populations - consistent with our weight of evidence approach for nutrients.

Comment 36. ***Comparing diel oxygen fluctuations in test streams to reference conditions is inappropriate as there is no correlation with harm.***

Response. Reference streams are least impacted waters within a geographically similar region in order to document an attainable condition. The Board does not concede this comparison is inappropriate and in fact, Tennessee's existing biointegrity, habitat, and nutrient numeric interpretations of the narrative criteria are based on reference conditions. The commenter is reminded that basing clean water goals on the reference condition was encouraged by EPA and the Tennessee criteria based on it have been approved for many years. We do not see any compelling reason that other comparisons shouldn't be made,

especially when cited in the rules. This would be used as a part of TDEC's weight of evidence approach.

Comment 37. ***Regarding diel oxygen fluctuations, TDEC should define "substantially different."***

Response. Where words are not defined in Rules, the common understanding of the meaning is used, which is what is considered appropriate in this instance. Certainly, there are statistical methods for establishing similarity.

Comment 38. ***TDEC is proposing replacing the word "diurnal" with "diel." Why not just say "daily."***

Response. Daily can be interpreted to mean every day. Diel means a 24-hour period of night and day.

Comment 39. ***Regarding Rule 0400-40-03-.03(3)(a)2. and 4., it seems inconsistent to use "identified" in this sentence and "designated" in item (a)2. Whichever word is used, it should be made clear that the identification/designation is that done by rule chapter 0400-40-04. My suggestion is to make the reference in (a)2. and then use the same word in (a)4.***

Response. The Board agrees that these terms should agree and note that the term "identify" also appears in Rule 0400-40-03-.03(3)(a)1. We will change the term in subparagraph 2 from "designated" to "identified."

Comment 40. ***TDEC should not adopt EPA's revised chronic criteria for selenium.***

Response. The Board does not agree. EPA's new approach incorporates the latest science and comes after a review and reconsideration process that took several years. Additionally, the new criteria take into consideration the differences in selenium toxicity between streams and lakes. The Board will adopt the criteria as proposed.

Comment 41. ***TDEC proposes in its chronic criteria for selenium to treat reservoirs just the same as lakes. They are different and the criterion should recognize these differences.***

Response. TDEC recommended values from EPA's 2016 Freshwater Aquatic Life Criteria for Selenium. In Section 3.2.4 starting on page 82, EPA grouped waterbodies as either lotic (flowing) or lentic (still) and recommended water column values for each.

As noted by the commenter, Tennessee has both lakes and reservoirs. As EPA did not differentiate between lakes and reservoirs in their guidance (both are considered lentic), the State is unable to do so either. It should be noted that other types of waterbodies in Tennessee would also be considered lentic, such as ponds or wetlands.

Comment 42. ***In December 2010, TDEC released a report entitled "Mercury Air Deposition and Selenium Levels in Tennessee Fish and Surface Water" wherein 33 waterbodies across the state were monitored for mercury concentrations and selenium levels. This study concluded, in part, that no waterbodies were impaired by selenium within the state.***

Response. The commenter should be aware that the study in question was based on the targeting of sampling to areas where air deposition models suggested these pollutants might be concentrated. As the sampling was not probabilistic in design, the study results cannot be extrapolated to the rest of the state. However, we agree that TDEC has not assessed any streams in Tennessee as impaired by selenium.

Comment 43. ***Although the State found essentially no problems with selenium in their 2010 study, the rules propose to significantly lower and restructure the chronic criteria. The commenter sees these sweeping changes as unnecessary and urges the Department to exercise its option to develop site-specific criteria, as allowed by EPA. Site-specific criteria would allow for flexibility in application and recognition of the substantial variety in aquatic systems.***

Response. The ability to conduct site-specific studies for appropriate metals is already found in the rule and the current proposal would not change that. Any site-specific study would be bound by the provisions of Rule 0400-40-03-.02(9).

It would not be a reasonable expectation that TDEC would perform such resource intensive site-specific studies across the state.

Comment 44. ***The toxicity studies used by EPA to develop the national criteria for selenium contained fish species not found in the coalfields of Tennessee.***

Response. The Board understands this comment, but points out that one of the most sensitive fish species in EPA's tests was the bluegill sunfish, which is ubiquitous in Tennessee waters, including the coalfields. TDEC's 2010 study also found rockbass to be significant accumulators of selenium.

Comment 45. ***The commenter disagrees with the process used by EPA to back-calculate a water concentration number for selenium from the fish tissue criteria previously established.***

Response. The proposed rule allows fish tissue to be used to confirm or refute impairment. But as stated in other responses, a water concentration number is needed to calculate permit limits and assess water quality.

Comment 46. ***TDEC should make it clear that the numeric acute and chronic criteria for selenium are applicable for all purposes under the Act.***

Response. TDEC must have a way to assess streams for selenium, even if fish are not present, which is why water concentration criteria are needed. The selenium footnote has been revised by the Board as suggested by the commenter and is clear that exceedances of the numeric water criteria are violations and that the role of fish tissue data would be as an optional method to confirm use impairment. The numeric criteria in the table would be applicable to setting permit limits or any other use under the Act.

Comment 47. ***Tennessee should actually list the current EPA fish tissue based selenium national criteria in the selenium footnote.***

Response. The Board prefers to reference guidance rather than adopt the actual numbers, but will specify the precise document being referenced. The water concentration selenium criteria are already in rule, which are applicable.

Comment 48. ***Tennessee should adopt EPA's new fish tissue based selenium criterion in the place of a water column based concentrations.***

Response. Tennessee's current selenium criteria for aquatic life protection are based on water concentration (5 ug/L chronic and 20 ug/L acute) and have almost never been violated in Tennessee streams or lakes. (The acute criterion has never been exceeded.)

The commenter is correct that EPA has recommended a revised approach based on both water and fish tissue concentration. The water concentration criteria are dependent on whether the waterbody is a lake or a stream and were derived from the tissue concentration targets using an approach developed by EPA and USGS. EPA's new acute criterion is based on a formula that requires analysis of parameters not usually monitored in Tennessee streams.

It would add significant analytical expense to change to a fish tissue-only based selenium criterion at a time when monitoring resources are already stressed. Crews would have to be sent to a stream to collect and transport fish, plus the extra samples would have to be analyzed. Multiplying this level of effort and expense at all the monitoring sites in the state would make this approach unworkable.

For this reason, and because the existing chronic criteria are so seldom exceeded, the Board does not want to abandon a criterion primarily based on water concentrations, especially since the EPA-recommended water concentrations are derived from the fish tissue targets. The Board adopts EPA's recommended chronic criteria of 1.3 for lakes and 3.1 for streams. A

footnote is added that provides that criteria exceedances may be confirmed by fish tissue results, but that this confirmation is not required to assess streams.

The Board retains the current acute criterion of 20 rather than adopting the formula proposed by EPA. The existing acute criterion has never been documented to have been exceeded in Tennessee waters. We see no reason to complicate TDEC's existing assessment strategy. EPA has already signaled agreement with this approach. On page 100 of the document *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016,* EPA says:

> *It is unnecessary to have an additional acute water column criterion element because the intermittent exposure criterion element will be more stringent than an acute criterion element. Further, as noted in this document, there have been few if any acute exposure, water column-only selenium aquatic toxicity events documented in the literature.*

Comment 49. ***The reference to EPA's national criteria guidance for fish tissue concentrations of selenium appears to be an impermissible delegation. This could be addressed by referring to the guidance as of a specific date.***

Response. A reference is added to EPA's Final Criterion: *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater (June 30, 2016).*

Comment 50. ***The footnote for selenium should note that the optional confirmation of impairment with fish tissue results is for "listing purposes."***

Response. The Board agrees, but prefers the phrase "water quality assessment" to "listing." The paragraph is revised to read as follows:

> The numeric water criteria for selenium are applicable for all purposes, but for water quality assessment, fish tissue values may be used to confirm or refute impacts to aquatic life in accordance with and using the values from EPA's Final Criterion: Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater (June 30, 2016). However, a lack of fish tissue data or the absence of fish from a waterbody will not prevent it from being assessed as impaired if the numeric water concentration criteria are exceeded. Fish tissue concentration alone may be used to establish use impairment.

Comment 51. ***Tennessee should adopt the Biotic Ligand Model (BLM) to replace the current copper criterion. This is the approach recommended by EPA.***

Response. The commenter is correct that EPA has recommended adoption of the BLM in place of the historic hardness-based criterion. The BLM greatly expands the number of parameters potentially altering the toxicity of copper that factor into the determination of the criterion.

According to EPA's 2007 copper criteria document:

> The BLM requires ten input parameters to calculate a freshwater copper criterion (a saltwater BLM is not yet available): temperature, pH, dissolved organic carbon (DOC), calcium, magnesium, sodium, potassium, sulfate, chloride, and alkalinity. The BLM is used to derive the criteria rather than as a post-derivation adjustment as was the case with the hardness-based criteria. This allows the BLM-based criteria to be customized to the particular water under consideration.

As was stated in the last triennial review in response to comments, the following concerns remain regarding the potential adoption of the BLM:

- Resources. In order to run the model, additional ambient data are needed. Many of these parameters, such as calcium and magnesium, are not commonly monitored. Additionally, samples would have to be filtered, probably in the field, in order to determine dissolved organic carbon levels. Filtering of samples, particularly where particulate material or algae levels are high is a very time-consuming activity.

- Impact on water quality assessment. Obviously, criteria are not just used to set permit limits. They are also used to assess ambient water quality in Tennessee streams. Currently, TDEC only needs hardness and suspended solids levels to determine whether or not copper concentrations violate criteria. If the Board adopted the BLM, a suite of additional parameters would be needed to apply the criterion to ambient data. This would have impacts on both resources (lab costs) and efficiency (assessment staff time).

For all these reasons, the existing criteria for copper will be retained.

Comment 52. ***TDEC has stated that EPA published "national criteria" for nutrients. They are not criteria as Congress never voted on them. These numbers are just suggestions.***

Response. It is accurate that these numbers are science-based guidance, but note that Congress also called them criteria in Section 304(a) of the Clean Water Act.

> SEC. 304. (a)(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after the date of enactment of this title (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge...(underlining added)

EPA's national criteria for nutrient can be found at this link: https://www.epa.gov/nutrient-policy-data/ecoregional-criteria.

Comment 53. ***TDEC's criteria for nutrients have been frustrating to municipalities because it has created a "moving target."***

Response. It is true that TDEC initially proposed numeric nutrient criteria, which may be preferable to some. But the approach we settled on, and have been applying for many years,

was regional total phosphorus and NO2+NO3 concentration goals based on reference conditions, supplemented by biological and habitat studies, plus other stream observations. This approach was subsequently promulgated by the Board and approved by EPA.

We should also note that an evolution of water quality standards was envisioned and encouraged by Congress when they established that criteria and classifications should be reviewed no less often than every three years to incorporate new science, implementation experiences, and new technologies. We agree with this approach.

Comment 54. ***TDEC has misapplied the criteria for nutrients on a specific stream of interest to the commenter.***

Response. This is a water quality assessment comment rather than a water quality standards comment. There is a different process for addressing assessment concerns.

Comment 55. ***TDEC should not propose a nutrient water quality criterion for any parameter for which there is already a different numeric criterion in the rule.***

Response. The nutrient criterion is narrative and would not override an existing numeric criterion for a different, but related parameter, provided that the criteria were for protection of the same use. For example, the narrative nutrient criterion does not override numeric criteria for dissolved oxygen.

Comment 56. ***The commenter believes that TDEC does not consider algae in assessment decisions, choosing instead to utilize only chemical and benthic data.***

Response. The commenter is not correct. TDEC uses a weight of evidence approach that includes many kinds of data and observations, including algae.

Comment 57. ***TDEC should identify how it assesses streams for algae or aquatic plant impacts.***

Response. This is a water quality assessment question rather than a standards comment. The commenter is referred to the standard operating procedure documents on TDEC's publications page: https://www.tn.gov/environment/program-areas/wr-water-resources/water-quality/water-quality-reports---publications.html.

Comment 58. ***TDEC cites comparisons of nutrient concentrations to reference conditions as a method to evaluate streams. What if a stream or lake has no appropriate reference condition due to size or other characteristics?***

Response. The commenter makes a good point: some waterbodies (such as mainstem rivers) have no easily identifiable reference stream or condition. TDEC's weight of evidence

approach to assessment of nutrients depends on appropriate comparisons. Certainly, EPA's national numeric nutrient criteria could be used as guidance where Tennessee's ecoregional reference stream goals did not appropriately apply.

Comment 59. ***TDEC's draft Nutrient Reduction Framework states that excessive algae is the problem from nutrients. The criteria should match this approach rather than identify other issues associated with nutrients.***

Response. Tennessee's clean water goals are established in Rule 0400-40-03-.03 for the various classified uses. The draft Nutrient Reduction Framework is a guidance document that interprets the rule and identifies a process for determining the best approach for developing control strategies for nutrients.

Comment 60. ***The proposed criterion for nutrients in Rule 0400-40-03-.03(3)(k) contains numerous subjective and undefined terms.***

Response. There are two kinds of criteria. Narrative criteria - like the language for nutrients cited by the commenter - are verbal descriptions of the level of quality needed to support the use. It is simply the nature of narrative criteria that they are designed to be less specific and provide flexibility in interpretation. The more specific alternative would be the other option, numeric criteria, which are specific not-to-be-exceeded concentrations of individual parameters.

TDEC has tried to make interpretation of narrative criterion as objective as possible. TDEC has accomplished this by use of eco-regional reference streams as the reference condition for evaluation of the parameters of nutrients, habitat, and biointegrity. Additionally, TDEC has developed or is in the process of developing methods for periphyton and diatom surveys.

Comment 61. ***According to a USGS study cited by the commenter, habitat loss correlates more strongly to biological impairment than do nutrient levels. TDEC's emphasis on nutrients ignores the real source of water quality impacts.***

Response. The Board appreciates this observation, and agrees that severe habitat alteration has an impact on biological quality of streams and our assessments reflect that. For example, channelized streams can be so inhospitable to life that even algae have no place to grow. However, even if a nutrient impact is not apparent in the immediate channelized stream due to poor habitat, harm may be conveyed downstream.

It is common for impacted streams to be impaired by more than one pollutant, and even by more than one type of habitat alteration. The Board is required by statute to identify all the pollutants impacting classified uses, not just the worst ones.

The commenter should be aware that in TDEC's landmark 2001 study of the regional reference condition in Tennessee, the 90^{th} percentile of the nutrient data was shown to correlate very well to stream impairment. This approach was suggested and approved by EPA.

We are familiar with the USGS publication in question, Circular 1437: *Understanding the Influence of Nutrients on Stream Ecosystems in Agricultural Landscapes*. The watersheds in this study were targeted on the basis of very high levels of agricultural activities and none were in Tennessee. Both in Tennessee and other states, streams in intensively utilized agricultural areas are significantly physically altered, so we have no doubt habitat was a limiting factor in biointegrity.

Our review identified additional important USGS conclusions from the study such as where the authors note that:

- Excessive nutrients in the U.S. cause over 2.2 billion dollars in damage to recreational uses and domestic water supply treatment costs.

- Algal and invertebrate communities were altered in the study streams by increasing nutrient concentrations, but at times correlations were masked by the lowering of water column nutrient concentrations due to uptake by excessive algae. In some streams, nutrient levels were so excessive that it was no longer the limiting factor to algae growth.

- In some of the streams, color and sediment levels prevented light transmission and impacted algae levels, thus additionally masking correlations.

There was nothing in the USGS study to suggest that nutrient levels shouldn't be monitored and appropriately controlled. In fact, USGS recommended that a combination of biological surveys of fish, algae, and macroinvertebrates be used to assess streams for nutrients and identified reference condition as an appropriate method of evaluation. This is the approach advocated by TDEC and established in rule.

EPA would not approve an approach that minimized the State's ability to recognize the role of nutrients in causing the condition of impairment in Tennessee streams.

Comment 62. ***TDEC should reconsider the proposed revisions to the existing nutrient criterion as they establish new and improper ways to assess streams for nutrient impairment.***

Response. The existing narrative criterion for nutrients establishes that waterbodies should not be organically enriched to the point that aquatic life or other uses are impacted, or that the concentrations negatively impact downstream waters. As stated previously, TDEC follows a weight of evidence approach in assessing streams for nutrient impairment, an approach suggested and approved by EPA.

TDEC has stated that its interpretation of this provision is that impacts to uses should be measured in many different ways including, but not limited to: nutrient concentrations, alteration of instream biota, excessive algae or rooted/floating plants, low dissolved oxygen levels, fish kills, atypically wide diel oxygen swings, and eutrophication of lakes.

TDEC's goal in proposing these revisions was to add clarifying language that summarizes the breadth of TDEC's approach in one place. TDEC does not agree that the proposed language signals new approaches. There will be more elaboration on this subject in subsequent specific responses.

Because of the public concern and confusion about the new language and the fact that all of these provisions are already mandated in other parts of the rule, TDEC will withdraw this suggestion. The proposed rule language will stay as it is currently.

Comment 63. ***The proposed rule references "harmful algal blooms." TDEC should say what it means by harmful. TDEC should define "detrimental" "strong stratification" and "excessive eutrophication." TDEC should identify what level of eutrophication is harmful in the various kinds of lakes. What does TCEC mean by "over time."***

Response. Please see Comment 62 and the revision of the proposed rule.

Comment 64. ***TDEC should make it clear that a combination of the listed potential effects of nutrients is not required in order for a stream to be considered impaired by nutrients.***

Response. Please see Comment 62 and the revision of the proposed rule.

Comment 65. ***TDEC should not assess streams as impacted by nutrients on the basis of strong lake stratification or substantial diel dissolved oxygen swings.***

Response. Please see Comment 62 and the revision of the proposed rule.

Prohibitions against substantial diel oxygen swings or strong lake stratification are already established in other criteria, specifically Rules 0400-40-03-.03(3)(a)(4), 0400-40-03-.03(3)(k) and 0400-40-03-.03(4)(h).

Comment 66. ***The word "range" might be a better word than "swings" to describe diel oxygen fluctuations.***

Response. Please see Comment 62 and the revision of the proposed rule.

Perhaps, but the word "swings" already appears in rule and has been previously approved by EPA. Since there is little evidence this word choice is causing confusion, TDEC will not recommend changing it.

Comment 67. ***Why do the proposed nutrient criteria revisions refer to supersaturation of oxygen?***

Response. Please see Comment 62 and the revision of the proposed rule.

As stated in previous responses, supersaturation of oxygen is evidence of elevated algae concentrations.

Comment 68. ***TDEC should not assess streams as impacted by nutrients on the basis of a nutrient tolerance index for macroinvertebrates.***

Response. Please see Comment 62 and the revision of the proposed rule.

The Board will delete this proposed language in the nutrient criterion because of public confusion that it is a new provision. The use of biointegrity measures such as the existing Tennessee Macrobenthic Index (TMI) - which has contained a nutrient tolerance index (NUTOL) for over ten years - is promulgated in a different criterion [Rule 0400-40-03-.03(3)(m)].

Comment 69. ***TDEC should explain the NUTOL index in the Rule.***

Response. The TDEC standard operating procedure for biological surveys referenced in the rule explains the NUTOL index, and is the more appropriate location for explanatory language. This standard operating procedure has been reviewed and approved by EPA and can be found at https://www.tn.gov/environment/program-areas/wr-water-resources/water-quality/water-quality-reports---publications.html.

Comment 70. ***Would TDEC use a nutrient tolerance index alone to assess a stream as impacted by nutrients?***

Response. Please see the Comment 62 and the revision of the proposed rule.

Typically not, but the commenter should be aware that a weight of evidence approach does not preclude making a decision based on only one factor if that evidence is compelling.

Comment 71. ***TDEC developed its nutrient tolerance index as a manipulation to justify earlier assessment decisions. It has never been reviewed by the public.***

Response. Please see Comment 62 and the revision of the proposed rule.

TDEC's nutrient tolerant index (NUTOL) is based on an index already in use in Kentucky. TDEC incorporated it after TDEC found that the original Tennessee Macroinvertebrate Index was not sensitive to nutrient impacts. This modification was made over ten years ago and has given TDEC a biological tool to appropriately assess streams for nutrient impacts. This approach was suggested, encouraged, funded, and approved by EPA and removing it would risk federal disapproval. That is an approach TDEC cannot recommend.

Comment 72. ***TDEC changed its Tennessee Macroinvertebrate Index (TMI) metrics so that genera previously considered EPT clean water indicators were no longer counted towards this metric. This is a manipulation by TDEC to make streams score worse than they should.***

Response. The commenter is correct that several TMI metrics have changed over time. This was due to taxonomic changes and new research. In the example cited by the commenter, the caddisfly genera *Cheumatopsyche* was found present in huge numbers below significant nutrient sources. As net makers that catch algae, this very nutrient tolerant animal artificially bloated TMI scores, especially the "percentage EPT" and "percent clingers" indices, effectively masking nutrient impacts. TDEC made the change to no longer consider *Cheumatopsyche* a clean water indicator over ten years ago.

Like any other water quality standard, biointegrity criteria are designed to evolve over time as our understanding increases. TDEC's macroinvertebrate SOPs have been approved by EPA and EPA participated in the development and review of TDEC's water quality assessment methodologies. TDEC will continue to make adjustments in the future as informed by science and our research.

Comment 73. ***TDEC should not assess streams as impacted by nutrients on the basis of downstream impacts from an upstream source.***

Response. Please see Comment 62 and the revision of the proposed rule.

The need for water quality to protect downstream uses is well established in the Act, the State's existing rules, the federal Clean Water Act, and various court decisions. Further, the language in question is already promulgated in Rule 0400-40-03-.03(3)(k) and was approved by EPA.

The likely result of removal of this provision would be EPA disapproval and federal promulgation of nutrient criteria for Tennessee, an approach TDEC cannot recommend.

Comment 74. ***TDEC should not assess streams as impacted by nutrients unless excessive algae is documented. The existing criterion should be revised to reflect this and previous assessments of nutrient impairment based on this provision should be reevaluated.***

Response. Please see Comment 62 and the revision of the proposed rule.

The commenter would like for the rule to be revised further to only allow one way to assess streams for nutrients, the localized presence of excessive algae. The responsibility to assess streams as impacting downstream waters would be removed, plus any other indicators of excessive nutrients. EPA would be unlikely to approve this approach, as it would result in pollution of Waters of the United States.

Additionally, in suggesting that the criteria be removed so that previous assessments can be changed, the commenter is not remembering that delistings must also be approved by EPA. TDEC considers that approval unlikely.

Comment 75. ***The second paragraph under the fish and aquatic life criterion for nutrients [Chapter 0400-40-.03(k)] should be deleted as this cited document is an inappropriate method for interpretation of the criterion. It has not been peer reviewed.***

Response. The second paragraph in question is a reference to the TDEC document "Development of Regionally-based Interpretations of Tennessee's Narrative Nutrient Criterion." The rule states that the document may be used to help interpret the criterion, but that other "scientifically defensible methods" may also be used to assess streams.

As stated in previous responses, nutrient concentrations are only one part of the weight of evidence approach used by the agency to assess nutrient impacts. The document in question was developed almost 20 years ago and was issued 15 years ago, an approach approved by EPA. The agency must have ecoregionally-based methods to help interpret narrative criteria, like nutrients.

It is not correct that the document in question was not peer reviewed. In 2001, EPA arranged for the draft document to be reviewed by national nutrient experts. The reference to the document was approved by the Board following a public review period. It is important to note that the approach described above was adopted instead of EPA's published national criteria for nutrients.

The commenter has not suggested doing this evaluation of nutrient concentrations a different way, rather that TDEC not do it at all.

If these regional translators are removed, EPA would likely require that the State adopt EPA's national numeric criteria and would promulgate them for the State if the State declined. TDEC cannot recommend this approach.

Comment 76. ***TDEC should allow site-specific criteria studies for nutrients. EPA encourages this.***

Response. The commenter is referred to Rule 0400-40-03-.02(9). This section specifically identifies the types of site-specific criteria development procedures. All are specific to fish and aquatic life protection criteria. In subparagraph (a), Water Effect Ratio (WER) studies are discussed. The WER approach is specifically for metals. The two methods in subparagraph (b) are limited to toxics. Specific to nutrients, the only toxic form is ammonia.

If the commenter meant the term "site-specific" more generally, in a sense, all interpretations of narrative criteria are site specific and TDEC along with EPA agree that the best place to start is subecoregional characteristics. That was the reason TDEC began the Ecoregion Project in 1995 in which we identified the reference condition in subecoregions across the state and then

tested various criteria levels based on percentiles of the data. In TDEC's studies, TDEC found that the 90th percentile of the reference data was the best predictor of nutrient impairment in wadeable streams. The 75th percentile of the reference condition data was also tested and found to be overly sensitive in most streams and suggested harm where none could be documented.

Sometimes TDEC is asked if site-specific means that criteria for one parameter can be set aside in favor of a different criterion. As stated previously, TDEC has some flexibility in how narrative criteria are interpreted, but that flexibility does not include setting them aside.

Comment 77. ***TDEC should explain why it uses the 90th percentile of nutrient reference data rather than the 75th percentile. EPA might not approve it.***

Response. Please see the previous response. EPA approved this selection 15 years ago.

Comment 78. ***The rule lists the parameters associated with nutrients, but then says that the parameters are not limited to that list. That is a problem for the regulated community. Any parameter that might act as a nutrient should be named.***

Response. The parameters of concern for nutrients normally consist of the various forms of phosphorus and nitrogen. The phrase that troubles the commenter is standard regulatory language to allow for the possibility that an unnamed parameter might cause an issue in a stream. The language will be retained.

Comment 79. ***The rule lists calcium, magnesium, and potassium as nutrients. What is the source of this belief?***

Response. EPA guidance. https://www.epa.gov/caddis-vol2/caddis-volume-2-sources-stressors-responses-nutrients

> *Nutrients are elements that are essential for plant growth. They include nitrogen (N), phosphorus (P), potassium (K), calcium (Ca), magnesium (Mg), sulfur (S) and silicon (Si). N, P and K are considered primary nutrients. N and P are the major limiting nutrients in most aquatic environments.*

Comment 80. ***The commenter does not agree with how TDEC has interpreted the 80% watershed guidance for comparing test streams to reference streams. Commenter does not agree with how the reference watershed was selected for comparison.***

Response. Narrative criteria are written to provide flexibility in interpretation. How TDEC applied this provision in a specific assessment decision is not a water quality standards issue. There is a different process for contesting assessment decisions.

0400-40-03-.03(4) Recreation

Comment 81. ***Tennessee should not adopt EPA's pathogen criterion for marine waters.***

Response. The Board has no plans to do so. Tennessee has no marine waters.

Comment 82. ***Tennessee should not change the current risk level (10^{-5}) for carcinogens.***

Response. The Board has not proposed changing this risk level which has been in place for many years. However, in response to numerous comments, the Board is postponing adoption of EPA's recommended human health criteria pending further review in conjunction with other Region 4 states. This process could result in reconsideration of the current risk level.

Comment 83. ***Tennessee should have numeric human health criteria for radionuclides.***

Response. The commenter is correct that Tennessee does not currently have numeric criteria for radionuclides, but this should not be taken to mean that Tennesseans are less protected as a result. Under the Act, radiological quality is one of the properties of water that is protected. However, TDEC is not the agency that authorizes radiological discharges to streams in Tennessee. By federal law, that is the responsibility of the Nuclear Regulatory Commission (and the Agreement State division, the Division of Radiological Health).

TDEC does assess streams and where alteration of radiological properties has led to loss of classified uses, TDEC has identified those waters as impaired under the criterion that states that:

> *The waters shall not contain substances or a combination of substances including disease - causing agents which, by way of either direct exposure or indirect exposure through food chains, may cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), physical deformations, or restrict or impair growth in fish or aquatic life or their offspring.* Rule 0400-40-03-.03(g)

If EPA published national human health criteria for radionuclides (or recommended adoption of another agency's guidance), the State would consider following EPA's lead. In the absence of this guidance, TDEC follows the best scientific advice TDEC can find to apply the above "free-from" narrative criterion.

Comment 84. ***Tennessee should not adopt the new human health criteria published by EPA. These new recommendations are based on ultra-conservative assumptions that will have a detrimental impact on industry in Tennessee.***

Response. When it comes to adopting or not adopting EPA's national criteria recommendations, Tennessee has the same options other states have. The State can (1) adopt the number as recommended, (2) propose different protection levels based on our own

research, or (3) propose leaving criteria as they are, again with proper scientific justification. Whichever option the State chooses must ultimately be approved by EPA.

After considering all the information at our disposal, TDEC has decided to postpone recommendation of these revisions in favor of retaining the existing criteria. The basis for this position is not that TDEC fundamentally disagrees with EPA's recommendations or methodologies. However, TDEC has learned that several other Region 4 states are postponing, or considering postponing, adoption of these recommended criteria to more thoroughly evaluate them. In addition, Florida adopted criteria based on a variation of EPA's recommendation and was sued by two cities, a Tribe, and an industry group. Prior to proceeding, TDEC considers it prudent to see if these issues are clarified by the courts, and will withdraw its previous recommendation.

Comment 85. ***Tennessee has incorrectly interpreted several new national criteria and should modify these prior to promulgation.***

Response. Please see the response to Comment 84 about the withdrawal of these proposed revisions for future consideration.

Comment 86. ***EPA used both explicit and implicit assumptions in the development of human health criteria. Rather than merely accepting EPA's default values, Tennessee should make an independent, science-based evaluation as was done in Washington and Florida. EPA uses "compounded conservatism" in its assumptions and calculations. The Department should reconsider this and propose a different set of assumptions, like Washington and Florida did.***

Response. Please see the response to Comment 84. For additional perspective, following is EPA's response to this comment when it was made during the public review period for the national criteria:

> *EPA based the revised AWQC recommendations on sound science and policies that have been thoroughly vetted publicly. The exposure and toxicity inputs used to derive the AWQC follow the approach described in the 2000 Methodology (USEPA 2000a). AWQC for the protection of human health are designed to minimize the risk of adverse effects occurring to humans from chronic (lifetime) exposure to substances through the ingestion of drinking water and consumption of fish obtained from surface water. Following the 2000 Methodology, EPA used a combination of median values, mean values, and percentile estimates for the parameter value defaults to calculate its updated AWQC. EPA's assumptions afford an overall level of protection targeted at the high end of the general population (i.e., the target population or the criteria-basis population) (USEPA 2000a). This approach is reasonably conservative and appropriate to meet the goals of the CWA and the 304(a) criteria program (USEPA 2000a). EPA made the following standard assumptions for the updated AWQC (USEPA 2000a). The default body weight (80 kg) is an arithmetic mean. National BAFs were computed using mean lipid values and median (i.e., 50th percentile) values for dissolved organic carbon and particulate organic carbon. The default drinking water intake rate and fish*

consumption rate are 90th percentile estimates. The use of these values result in 304(a) AWQC that are protective of a majority of the population; this is EPA's goal (USEPA 2000a).

Comment 87. ***EPA used a "deterministic approach" to derive human health criteria. The Department should consider using a probabilistic approach instead.***

Response. Please see the response to Comment 84. Following is EPA's response to this comment when it was made during the public review period for the national criteria:

> *EPA has not implemented probabilistic risk assessment approaches in this update to the AWQC. The use of probabilistic techniques was not reflected in the 2000 Methodology (USEPA 2000a), which served as the guide for the current revisions (for the reasons described above in EPA response to comment 1.2.3). EPA intends to consider probabilistic techniques in future updates of the 2000 Methodology.*

Comment 88. ***EPA used a "relative source contribution" of 80% to 20% to derive human health criteria. Tennessee should consider going back to a value of 1.0.***

Response: Please see the response to Comment 84.

The idea behind relative source contributions is that the water and/or organisms in a waterbody might not be the only sources of a pollutant to an individual. Other sources might be ocean fish consumption (not included in the fish consumption rate), non-fish food consumption (meats, poultry, fruits, vegetables, and grains), dermal exposure, and respiratory exposure.

The goal of these criteria is human health protection. TDEC does not find it difficult to accept that an individual might ingest a pollutant from sources other than water or local aquatic life and consider it reasonable to factor that into calculations.

Following is EPA's response to this comment when it was made during the public review period for the national criteria:

> *In cases where there is a lack of environmental or exposure data, or both, the Exposure Decision Tree approach results in a recommended RSC of 20 percent. This 20 percent value for the RSC may be replaced where sufficient data are available to develop a scientifically defensible alternative value. When appropriate, if scientific data demonstrating that sources and routes of exposure other than water and fish from inland and nearshore waters are not anticipated for the pollutant in question, the RSC may be raised to 80 percent based on the available data (USEPA 2000a).*

Comment 89. ***EPA switched from using bioconcentration factors (BCFs) in favor of bioaccumulation factors. Tennessee should reconsider this step.***

Response. Please see the response to Comment 84. Following is EPA's response to this question during the public review period for the national criteria:

> *Several attributes of the bioaccumulation process are important to understand when deriving national BAFs for use in developing national recommended section 304(a) AWQC. First, the term bioaccumulation refers to the uptake and retention of a chemical by an aquatic organism from all surrounding media, such as water, food, and sediment. The term bioconcentration refers to the uptake and retention of a chemical by an aquatic organism from water only. For some chemicals (particularly those that are highly persistent and hydrophobic), the magnitude of bioaccumulation by aquatic organisms can be substantially greater than the magnitude of bioconcentration. Thus, an assessment of bioconcentration alone might underestimate the extent of accumulation in aquatic biota for those chemicals. Accordingly, the EPA guidelines presented in the 2000 Methodology emphasize using, when possible, measured or estimated BAFs, which account for chemical accumulation in aquatic organisms from all potential exposure routes (USEPA 2000a).*

Comment 90. ***Tennessee should reconsider EPA's default assumption about daily water consumption.***

Response: Please see the response to Comment 84. Following is EPA's response to this question during the public review period for the national criteria. (Please note that EPA changed this value as a result of the comments received.):

> *In light of the comments received, EPA revised the drinking water intake rate used in the final 2015 updated AWQC. EPA revised the default drinking water intake rate from the proposed 3 L/d to 2.4 L/d, rounded from 2.414 L/d, based on NHANES data from 2003 to 2006 as reported in EPA's Exposure Factors Handbook (USEPA 2011, Table 3-23). This rate represents the per capita estimate of combined direct and indirect community water1 ingestion at the 90th percentile for adults ages 21 and older. EPA selected the per capita rate for the updated drinking water intake rate because it represents the average daily dose estimates; that is, it includes people who reported that they drank water during the survey period and those who reported that they did not, which is appropriate for a national-scale assessment such as CWA section 304(a) AWQC development (USEPA 2011, section 3.2.1).*

Comment 91. ***In making these calculations and setting these protection levels, EPA assumes that drinking water sources would be at these concentration levels consistently for 70 years.***

Response. Please see the response to Comment 84. Criteria are set at levels known to be safe to most of the people, most of the time. TDEC appreciates EPA's guidance regarding

how these public policy decisions should be made. TDEC recognizes that the public may have differing views on where protection levels are set.

Comment 92. ***In Rule 0400-40-03-.03(4)(l), EPA guidance is mentioned as a source for information on risk calculation. This guidance should be identified.***

Response. The guidance is EPA's 2000 four volume ***Guidance for Developing Fish Advisories.*** These documents are available on EPA's website. https://www.epa.gov/fish-tech/epa-guidance-developing-fish-advisories#national The commenter should additionally note that a volume of this guidance is already cited in the risk calculation portion of the rule.

Comment 93. ***In Rule 0400-40-03-.03(4)(l), TDEC is proposing to delete previous assumptions in the formula in favor of a reference to EPA guidance. These provisions should be retained.***

Response. TDEC does not agree and the commenter did not elaborate on why the existing approach was preferable.

0400-40-03-.04 Definitions

Comment 94. ***Definitions should not be used to make substantive rules for Antidegradation.***

Response. Definitions do not make substantive rules. The Antidegradation Statement itself imposes the applicable substantive requirements in part through the application of defined terms. The definitions section of these standards is necessary to ensure that the terminology used within the Antidegradation Statement has clear, transparent, and common meanings. Any person seeking to apply statutes or rules to specific situations should familiarize himself or herself with applicable legal definitions.

Comment 95. ***Several comments were received asking that the Board eliminate the definition [0400-40-03-.04(4)] and application of de minimis degradation.***

Response. The Board declines to make this change. The *de minimis* provision allows very small amounts of degradation to be authorized without an economic and social necessity determination in some, but not all situations. For habitat alterations, an impact can only get to *de minimis* status through avoidance, minimization, or in-system mitigation.

The rule prohibits new or increased domestic wastewater dischargers from being considered *de minimis*. For other types of discharges and water withdrawals, alterations can only be considered *de minimis* if they consume less than five percent of the assimilative capacity or 7Q10 flow, respectively. In waters with unavailable parameters, even a *de minimis* amount of degradation by that same parameter is prohibited, if due to a new or increased discharge or withdrawal.

New or increased discharges, or water withdrawals, are prohibited in Outstanding National Resource Waters (ONRWs) unless the effect is unmeasurable. A *de minimis* amount of degradation due to these activities would be measurable and therefore prohibited. In ONRWs, no habitat alterations can be authorized unless the impact is minimal or mitigation is provided in the same ONRW.

Additionally, there is a cumulative cap on the amount of degradation that can be allowed under the *de minimis* provision for discharges and withdrawals.

This approach to regulating very small amounts of degradation has been endorsed by EPA and previously approved. Additionally, the concept has been upheld in court cases.

Finally, the *de minimis* provision is a powerful tool in convincing applicants to minimize the amount of degradation they request. If permit applicants had to go through the economic and social necessity determination process for any amount of degradation, there would be no incentive for them to request and strive for a smaller amount.

Comment 96. ***If TDEC determines that an alteration is de minimis 0400-40-03-.04(4) in effect, citizens have little ability to comment or appeal.***

Response. The Board disagrees with this comment. Under these rules, citizens may comment on a proposed alteration when the draft ARAP is public noticed. The only change is to provide public notice of a draft ARAP rather than of a complete ARAP application. Under both the previous and the current rules, there is a single public notice and comment period. In addition, the Act allows certain third parties to file a permit appeal. As previously explained, the Department's determination that a proposed activity will result in only *de minimis* degradation as defined by the Board's rules is reviewable through a permit appeal.

Comment 97. ***Application of the de minimis exception [0400-40-.04(4)(a)(1)] allows new or increased discharges to skip the Tier 2 analysis, and proceed straight to the permitting process with the de facto presumption that a permit will be issued. Although there are cases applying free-floating principles of administrative law to authorize a limited de minimis exception to antidegradation review, there is nothing in the text or structure of the Clean Water Act or EPA's implementing regulations to support this approach.***

Response. As the commenter notes, several cases have expressly upheld the application of *de minimis* degradation. Specifically, 5% individual and 10% cumulative caps have been upheld, as provided in the current rules.

Comment 98. ***The existing language does not go far enough in protecting our waters from bioaccumulative pollutants because it does not address the 10% cumulative cap in subpart (3) of the rule and fails to address sensitive aquatic species. Also, Commenters are concerned that this language was previously added through a parenthetical note,***

rather than as a stand-alone provision. Accordingly, Commenters request the Board delete the note to Rule 0400-40-03-.04(4)(a)1., and add the following language as Rule 0400-40-03-.04(4)(a)4:

> ***4. Consistent with T.C.A. § 69-3-108, special consideration will be given to the discharge of bioaccumulative parameters to confirm the effect is de minimis, if even the single discharge is less than five percent (5%) of the available assimilative capacity and, if more than one activity described in part 1 or 2 of this subparagraph has been authorized in a segment, the total of the authorized and proposed discharges is less than ten percent (10%) of the available assimilative capacity. In addition, special consideration will be given to the discharge or withdrawal of water upstream from federally- designated critical habitat or other waters with documented non- experimental populations of state or federally-listed threatened or endangered aquatic or semi-aquatic plants, or aquatic animals to confirm the effect is de minimis, even if the conditions of parts 1, 2, and/or 3 of this subparagraph have been documented.***

Response. This change will not be made. Whether a provision in a rule is written within parentheses or not, it has the same legal effect. Water quality criteria for fish and aquatic life are designed to be protective of sensitive species. Maintaining discharges to the 5%, or a total of 10%, of available assimilative capacity is particularly appropriate in water bodies with sensitive species and is far more protective than allowing discharges up to 100% of assimilative capacity based on economic or social justification. Moreover, the commenter is reminded that under this rule, bioaccumulative parameters are not necessarily considered *de minimis* even if less than 5%.

Comment 99. ***The definition of de minimis [0400-40-03-.04(4)] references "available" assimilative capacity. This should be defined.***

Response. "Available parameters" is defined in the Antidegradation Statement. Tenn. Comp. R. & Regs. 0400-40-03-.06(3) ("Available parameters exist where water quality is better than the levels specified in water quality criteria in Chapter 0400-40-03.") The available assimilative capacity is the amount of a pollutant that could be added to a particular stream segment after consideration of the most stringent applicable criterion, background concentrations of that parameter, and the applicable stream flow, plus a margin of safety.

Comment 100. ***The definition of de minimis [0400-40-03-.04(4)(a)2] should cite an amount of water withdrawal rather than a percentage of a low flow.***

Response. Such a rule would be unworkable, or worse, cause the condition of impairment. The amount of withdrawal that might not be noticed in one stream might devastate a smaller stream.

Comment 101. ***Regarding Rule 0400-40-.04(4)(a)3, do not add "available" before assimilative capacity to ensure there is an effective mechanism to maintain the 10% cumulative cap.***

Response. This change has been made.

Comment 102. ***The commenter objects to the use of 5% of the 7Q10 flow as being the threshold for a water withdrawal to be considered de minimis in effect. The amount should be greater. TDEC should provide scientific studies that justify this existing provision.***

Response. This provision has previously been publicly-reviewed; promulgated by the Board; approved by EPA; and in place in the rules for many years. Given that EPA and court cases have supported the idea of 10% as being the upper maximum for cumulative *de minimis* degradation in a waterbody, 5% seemed like a reasonable amount to allow a single withdrawer. Withdrawals above that amount can still be authorized, they just aren't *de minimis*.

Comment 103. ***A water withdrawal should not have to have an antidegradation review unless a Section 401 certification is required. A withdrawal that uses less than 5% of the daily average flow should be de minimis.***

Response. The trigger for antidegradation review is whether a new or increased activity on which TDEC acts causes more than *de minimis* degradation of waters. Whether a Section 401 certification is required in addition to an ARAP is irrelevant to this analysis. The withdrawal threshold suggested by the commenter would not be *de minimis* in effect in many streams because it is not protective at low flow conditions and TDEC will not recommend it.

Comment 104. ***According to the revised rule [0400-40-03-.04(4)(b)], habitat alterations are by definition de minimis if in system mitigation performed. As we interpret this, "impact minimization" is no longer required. If this is the case, how does TDEC account for multiple/cumulative impacts on a water body in a watershed over time? If mitigation is only in response to permanent impacts, how are multiple/cumulative temporary impacts accounted for if at all?***

Response. The definition of *de minimis* degradation for habitat alterations will not be changed from the current rule. The intent of the proposed change was to clarify, rather than to significantly change, the existing standard. One reason for the proposed change was confusion about what "impact minimization" means in this definition. Some applicants believe it means to reduce the impacts to what they consider to be small for their project, for example by reducing a wetland impact from 10 acres to 6 acres. The intent of the rule is that the impact be objectively small enough that individually and cumulatively the impacts will not result in noticeable loss of resource values. These small impacts are represented by the thresholds for general ARAPs, and also include impacts that are below the threshold at which compensatory mitigation is required.

Comment 105. ***TDEC should define "appreciable" and "permanent" so the commenter can determine whether the definition [0400-40-03-.04(4)(b)] has significantly changed.***

Response. The definition of *de minimis* degradation for habitat alterations will revert to the current definition.

Comment 106. ***The existing requirements for alternatives analyses and social and economic justification for Exceptional Tennessee Waters appear short-circuited by a reliance on newly proposed definitions of "de minimis" and "in-system mitigation."***

Response. The rule for ETWs is not being changed, nor is the definition of *de minimis* degradation for habitat alterations. The previous rules did not define "in-system," and thus no "existing requirements" are being changed.

Comment 107. ***Per Antidegradation Regarding Aquatic Resource Alteration or Habitat Alterations ("ARAPs") - The proposal contains several new provisions regarding ARAPs and antidegradation . This includes a proposed change to the definition of "De Minimis degradation" in Rule 0400-40-03-.04(4)(b) and proposed new definitions of "In-system mitigation," "Resource values," and "Significant degradation" in Rule 0400-40-03-.04(12) , (27), and (20), respectively . Rule 0400-40-03-.06(l)(b)1(iii) (pertaining to application requirements) and Rule 0400-40-03-.06(2)(c) (pertaining to waters with unavailable parameters) are proposed to be amended to incorporate the new "significant degradation" standard.***

The commenter supports the Department's efforts to make the ARAP process more workable. In particular, the commenter supports the concept of providing more flexibility by not limiting mitigation for waterbodies with unavailable parameters to "in-system" mitigation.

Response. The Board appreciates the comment. The rule amendments better conform to federal law, and reflect a balancing of the legislative directives in T.C.A. § 69-3-102(b) to protect and restore waters while allowing maximum use of Tennessee's water resources consistent with the maintenance of unpolluted waters.

Comment 108. ***Per Rule 0400-40-03-.04(4)(b): There may be times when mitigation may not be able to be accomplished through in-system mitigation. As such, we recommend retaining "impact minimization and/or" so that impact minimization may be utilized where in-system mitigation cannot be accomplished.***

Response. The definition will not be changed from the current one, which includes "impact minimization."

Comment 109. ***The rules should not be changed to render a habitat alteration de minimis through compensatory mitigation.***

Response. The definition will not be changed from the current one, which already provides that a habitat alteration causes only *de minimis* degradation when in-system compensatory mitigation is provided.

Comment 110. ***Regarding Rule 0400-40-.04(4)(b), in the definition of de minimis degradation for habitat alterations, please define "appreciable" and "permanent" to ensure this provision remains narrow in reach and tightly bound.***

Response. The definition of *de minimis* degradation for habitat alterations will not be changed to include these terms.

Comment 111. ***De minimis [0400-40-.04(4)(b)] is simply unavailable to short circuit the application of the Antidegradation rules by jumping to the conclusion that any degradation or net water resources loss will be mitigated or that the mitigation will occur "in-system."***

Response. The rules and TDEC permitting procedures do not assume that net resource loss will be mitigated or that the mitigation will occur in-system. For proposed impacts that have more than a minimal impact and require compensatory mitigation, that mitigation is incorporated as an express permit condition in an ARAP, a Section 404 permit, or both. In such a project, if a permit applicant claims *de minimis* degradation, then the requirement that compensatory mitigation be provided in-system is also incorporated as an express permit condition.

Comment 112. ***These proposed regulations also ignore the important requirement that any allowed degradation from discharge of pollutants, even if individually "de minimis", must be subject to a cumulative cap. (Kentucky Waterways Alliance v. Johnson, 540 F.3d at 486-487). This logically applies to degradation caused by loss of habitat as proposed in an ARAP application. The proposed regulation has no such cap or any approach to determining a cap. The proposal to discount "baseline" conditions allows cumulative degradation directly contrary to a cumulative limit as mandated by Ohio Valley Environmental Coalition v. Horinko, 279 F. Supp.2d 732 (S.D. W.Va. 2003) and Kentucky Waterways Alliance v. Johnson at 491-493.***

Response. The Board is not aware of cases interpreting the application of "*de minimis* degradation" to the context of ARAPs or Section 401 certifications for Section 404 permits that authorize comparable impacts. The *Kentucky Waterways* and *Horinko* cases concern NPDES permits for discharges of pollutants. The concept of available assimilative capacity for the discharge of pollutants is well established in the implementation of the NPDES program, and numeric percentages are fairly easy to establish and implement, including those applicable to a cumulative cap.

ARAPs and Section 404 permits utilize compensatory mitigation instead of the concept of available assimilative capacity. Compensatory mitigation is required to ensure no overall net loss of resource values so there is no overall degradation.

The use of existing conditions is entirely consistent with antidegradation requirements, which are designed to maintain existing water quality. Moreover, the use of this term is a clarification of existing rules, which already require mitigation for impacts caused by the proposed activity, rather than a change.

Moreover, the definition of *de minimis* degradation includes the concept of cumulative impacts, which are to be considered in making the determination.

Comment 113. ***Regarding Rule 0400-40-03-.04(4)(b), the use of such subjective terms as "appreciable" and "permanent" could place the determination of these important issues in the hands of consultants to project proponents and then TDEC's potentially unreviewable discretion. Further, the "permanent" loss requirement obviates all consideration of temporary impacts, including without limitation their duration and severity. Commenters note that it can be many years before it can be determined whether a particular mitigation project or bank will provide the ecological lift contemplated.***

Response. The previous definition will be retained.

Comment 114. ***Regarding Rule 0400-40-03-.04(4)(b), by definition, habitat alterations are "de minimis" if in-system mitigation is performed. This is a major change in policy but is accomplished, not by thorough public discussion of the issues involved, but by a grammatical manipulation. Pursuant to this major change in policy, avoidance or minimization of impacts is no longer required as was the case previously.***

Response. The previous definition will be retained. However, the comment incorrectly interprets the previous rule, which already allowed in-system mitigation as one way to qualify for *de minimis* degradation. Although avoidance and minimization are also ways to achieve *de minimis* degradation, in-system compensatory mitigation is, and has been, the other way.

Comment 115. ***Regarding Rule 0400-40-03-.04(4)(b) - It is EPA's understanding that although the phrase "the Division finds" is being deleted that the Department will continue to make this decision. If this is not the case, please specify the decision maker.***

Response. The previous definition will be retained. TDEC was, and will remain, the decision maker concerning whether a proposed habitat alteration project will result in *de minimis* degradation. That decision may be challenged through a permit appeal.

Comment 116. ***The proposed regulations [0400-40-.04(4)(b)] do not explain the difference between offsetting the "appreciable permanent loss of resource values"***

which is supposed to result from the ARAP mitigation rules and the deficiency in water resources which is cured or compensated for by "in- system" mitigation.

Response. Requiring compensatory mitigation to occur "in-system" to qualify as *de minimis* degradation generally limits such mitigation to the same watershed, thus requiring localized compensation for localized impacts. This is an additional requirement above and beyond ARAP mitigation rules (which encourage, but do not require, mitigation close to the impact site) and the federal Section 404 rules.

Comment 117. ***Please confirm that for TDEC to consider the effects of a water withdrawal or discharge as "de minimis degradation," the total of the authorized and proposed impacts cumulatively may use no more than 10% of the total assimilative capacity of the affected waters [0400-40-03-.04(4)(b)].***

Response. The comment is correct. This was the intent of the proposed change in the language in this provision. However, the term "available" will not be added to this provision given that it is subject to different interpretations.

Comment 118. ***Regarding Rule 0400-40-.04(4)(b), please confirm that it remains up to the Division to determine whether aquatic habitat impacts are de minimis.***

Response. The definition approved through the prior rulemaking will not be changed. Although the applicant and third parties may comment on this issue, TDEC makes the determination of whether a proposed aquatic alteration causes only *de minimis* degradation. This determination may be challenged through a permit appeal.

Comment 119. ***Does the definition of "domestic wastewater discharge" intend to exclude POTWs [0400-40-03-.04(5)]? Please explain the reference to industrial waste.***

Response. Yes, the Board intends to exclude POTWs from this definition. The goal is to disincentivize new decentralized waste treatment systems for domestic wastewater and to encourage alternatives including the utilization of existing POTWs. The reference to industrial wastes recognizes that many POTWs in Tennessee have pretreatment programs that include industrial wastewater.

Comment 120. ***Per Rule 0400-40-03-.04(12) In-system mitigation – Commenters object to this new definition on several grounds, including the following:***

First, TDEC improperly dispenses with any requirement to avoid or minimize environmental damage from proposed activities, as noted.

Second, the change improperly proposes to allow mitigation to occur anywhere within the same eight- digit HUC code. An eight-digit HUC code can, in some cases, encompass many counties, which is far too wide a net to repair or mitigate the damage

caused to a particular stream. Even this too broad a net is nearly meaningless because substitute mitigation can be approved in another area "proximate" to the alteration. This definition's use of the term "proximate" could also be used to make TDEC's decision unreviewable. This could lead to results where mitigation could occur several counties away, depriving local residents of the use and enjoyment of their resource. Mitigation should be required in an area no broader than the applicable twelve (12)-digit HUC code, and preferably within an area that is hydrologically connected to the damaged area. Please clarify how these potentially untoward results can be avoided.

Third, Commenters request clarification of how the proposed regulations comply with the Clean Water Act and implementing regulations, which have previously been interpreted by the State to require antidegradation analysis be done on a location-by-location basis. See Tennessee Attorney General Opinion No. 09-76, May 12, 2009.

Response. First, the commenters misstate the existing requirement. Impact minimization was one option to achieve *de minimis* degradation, but that could also have been achieved through in-system mitigation, so there was no requirement in rule to avoid or minimize when sufficient in-system mitigation was provided. Moreover, provision for *de minimis* degradation of habitat is not new, and the existing definition of *de minimis* degradation will be retained.

Second, TDEC's determination of *de minimis* degradation is reviewable through a permit appeal to the extent that the petitioner alleges a violation of the Act or the Board's rules. The term "proximate" is intended to allow for the use of mitigation banks and other forms of mitigation closer to the original impact and (particularly for wetlands) within the same subecoregion area, if appropriate, rather than farther away but within the HUC-8.

Third, the application of the concept of "*de minimis* degradation" has been affirmed by the courts and was approved by EPA and the Tennessee Attorney General in the previous version of these rules. The referenced Attorney General opinion does not address the question of what conditions would be required to constitute *de minimis* degradation. The rules still require a site-specific review by TDEC, subject to public notice and comment requirements, even for *de minimis* degradation. In particular, such review is required to determine the need for, and the sufficiency of, compensatory mitigation. The requirement that compensatory mitigation sufficient to offset the loss of resource values must be provided "in-system" to constitute *de minimis* degradation is based on the State's interpretation of applicable case law.

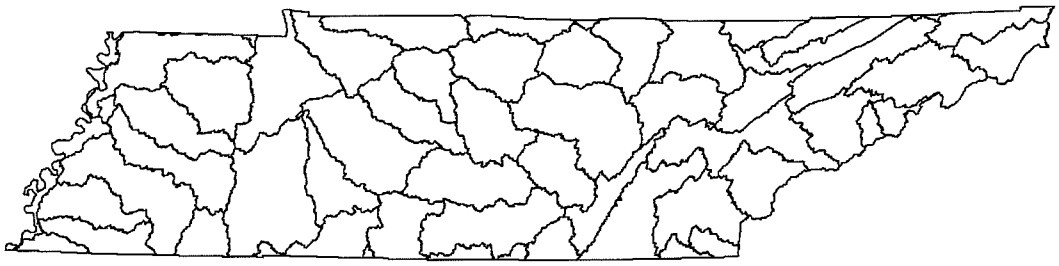
Comment 121. ***A primary concern with the proposed definition of "in-system" to include any location within a Hydrologic Unit Code 8 (HUC 8) watershed is that this is far too broad a scale to ensure resource values are not lost, particularly for habitat alterations [0400-40-03-.04(12)].***

Response. The definition of "in-system" applies only to habitat alterations. Previously, there was no definition in the rules for this term, and it was applied flexibly. By clearly defining the term to be limited to the HUC-8 and other proximate areas, the rules will promote mitigation that occurs within the same watershed. Using the HUC-8 watershed rather than a sub-watershed approach was selected so as to avoid penalizing third-party mitigation, such as mitigation banks and those in-lieu fee programs that are limited to a sufficiently small service

area. Moreover, using the HUC-8 watershed is consistent with TDEC's approach to watershed planning, which is conducted at the HUC-8 scale.

Comment 122. ***TDEC previously defined "in-system" to be within the same HUC-12. The expansion of "in-system" to include virtually anywhere in the state makes the term meaningless [0400-40-03-.04(12)].***

Response. The term "in-system" has not previously been defined. In practice, TDEC has generally, but far from always, used the same HUC-12. The new definition of "in-system is based on HUC-8 watersheds, which are common drainage systems, and other areas proximate to the alteration. It excludes mitigation that occurs within a different major drainage basin. In addition, the ARAP rules require mitigation for impacts to Tennessee streams and wetlands to be in Tennessee, so the portions of HUC-8s that extend into bordering states cannot be utilized. The HUC-8s in Tennessee do not include "virtually anywhere in the state," and are illustrated in this map:



Comment 123. ***Per Rule 0400-40-03-.04(12): Definition of In-system mitigation - We recognize that the wording, "or in another area proximate to the alteration," allows for the use of mitigation banks and in lieu fee programs where those banks and programs often have several HUC 8 watersheds as a service area. It is our understanding that "in-system mitigation" is not intended to discourage the use of banks and in-lieu fee programs in favor of permittee responsible mitigation.***

Response. The commenter is correct, but that was only part of the intent. The new definition of in-system is intended to allow for use of mitigation banks, which typically use a HUC-8 as a service area, and those in-lieu fee programs that have a small service area. Some mitigation banks have a service area that includes part of an adjacent HUC-8 within the same major drainage basin and subecoregion. These could qualify as in-system. Some in-lieu fee programs may have small service areas that do not precisely overlap with HUC-8 boundaries. In this case, TDEC would need to evaluate whether mitigation sites within that service area would be sufficiently proximate to a proposed impact to qualify as in-system. However, in-lieu fee programs that have service areas larger than two adjacent HUC-8s are unlikely to qualify as in-system.

The wording "or in another area proximate..." was also intended to allow mitigation outside of the HUC-8 if the proposed compensatory mitigation site is closer to the site of impact and within the same subecoregion, but just outside the HUC-8. In that case, TDEC would evaluate whether the service area is scientifically-defensible as being "in-system." It is likely that

mitigation within the same EPA Level IV ecoregion would satisfy this condition. To be clear, "another area proximate" means the mitigation site must be close to the impact site.

Comment 124. ***Commenters request that the Board eliminate all references to measurable degradation [(0400-40-03-.04(15)] from Tennessee's Antidegradation Statement.***

Response. The term "measurable degradation" reflects the reality that changes in water quality that cannot be measured cannot effectively be monitored or regulated. The language will be retained.

Comment 125. ***Commenters request that Rule 0400-40-03-.04(15) be changed to:***

1. ***Measurable degradation, as used in the context of discharges or withdrawals – Increased loadings or concentrations of pollutants or loss of habitat [in parameters of waters] that are of sufficient magnitude to be detectable at the point of discharge or withdrawal by the best available instrumentation or laboratory analyses.***

   (Note: Because analytical techniques change, the Department may consider either the most sensitive detection method needed to comply with state standards or any biological, chemical, physical, or analytical method, conducted in accordance with U.S. EPA approved methods as identified in 40 C.F.R. part 136. Consistent with T.C.A. § 69-3-108, for scenarios involving cumulative, non-measurable activities or parameters that are managed by a narrative criterion, the Department will use mathematical models and ecological indices to ensure no degradation will result from the authorization of such activities, [consistent with the state's mixing zone policy].)

Response. The proposed changes will not be made. Rule 0400-40-03-.05(2) expressly authorizes mixing zones, and it would be inconsistent to disallow mixing zones here. However as a practical matter, when a parameter is unavailable, there is no available mixing zone because there is no available assimilative capacity. Increased loadings can be permissible where accompanied by increased flow that increases assimilative capacity. In other words, even in impaired waters, a facility can discharge the pollutant that is unavailable in a concentration below the applicable water quality criterion because that does not cause or contribute to pollution. The term "measurable degradation" is not used in the context of habitat alterations.

Comment 126. ***The definition [0400-40-03-.04(16)] of "Minimum Level" should include the entire Appendix A of 40 CFR Part 136 as amended rather than just referring to it.***

Response. The rule's definition of Minimum Level is based on EPA's Sufficiently Sensitive Methods Final Rule. It is common practice in state rules to refer to other regulations,

especially federal. It would not be practical or desirable to include all these additional texts. However, the date of the federal rule will be added to this rule.

Comment 127. ***A new discharge of a substance does not necessarily use up assimilative capacity [0400-40-03-.04(19)]. For example, the discharge may be at a lower concentration than the receiving stream. In that situation, the discharge might actually add assimilative capacity to the waterbody.***

Response. If a discharger adds sufficient flow, that may add assimilative capacity. However many pollutants, including but not limited to bioaccumulative parameters, are more appropriately regulated through loading.

Comment 128. ***The definition [0400-40-03-.04(19)] of "New or increased discharge" needs to include the word "either" so that it is clear that either one of the two provisions could apply.***

Response. This change will be made.

Comment 129. ***The definition [0400-40-03-.04(19)] of "New or increased discharge" needs to be deleted as it isn't required by state or federal law.***

Response. The Board agrees that nothing requires the rules to have a definition, but the scope of the Antidegradation Statement must be established and the alterations that do or do not fall under its provisions must be identified. For the sake of clarity, this definition is needed and will be retained to define the trigger for antidegradation review, particularly for increased discharges. This question has previously arisen in litigation, and the Board believes that regulatory clarity is important in this respect.

Comment 130. ***The definition [0400-40-03-.04(19)] of "New or increased discharge" needs to be interpreted as being based on the permitted discharge level rather than the existing discharge level. Otherwise, the rule would incentivize discharging at permitted levels.***

Response. This provision will be retained as proposed. The two different provisions apply to two different scenarios: one in which a permit establishes a specific effluent limitation for a particular pollutant (in which case, that limit is the baseline) and another in which there is no permit limit, but the discharge of the pollutant is nonetheless authorized by the NPDES permit. The recommended revision would be silent as to what to do in the second scenario.

Comment 131. ***Rule 0400-40-03-.04(19) effectively grandfathers in existing pollution levels in violation of the statutory mission of T.C.A. § 69-3-102.***

Response. The comment is incorrect that this definition "grandfathers" existing pollution. The Act and the Board's permitting rules prohibit the issuance of permits for activities that cause pollution, and that is true whether or not antidegradation review is required.

Antidegradation review is a device for maintaining existing water quality, providing an additional measure of analysis beyond the prohibition on pollution. Thus, antidegradation review only applies to new, increased, or expanded activities, not to permit renewals for ongoing activities (with a partial exception for ETWs). This has always been the case, and is consistent with federal requirements.

Moreover, any discharge – whether new, increased, or existing – that has the reasonable potential to cause or contribute to pollution would be subject to water quality-based effluent limitations to prevent or abate pollution as a function of the NPDES permitting process separate and apart from whether antidegradation review is required.

Finally, the change merely defines a term that was previously used in the Antidegradation Statement without having been defined. The definition is based on how TDEC has consistently applied and interpreted this term, and promulgating it through rulemaking is intended to provide greater clarity.

Comment 132. ***We object to each of the definitions [0400-40-03-.04(19)] and uses of "new or increased water withdrawals," "new or expanded habitat alterations," and "new or increased temperature alterations," because this definition appears to facilitate the further pollution of Tennessee's streams.***

Response. See previous response. The Act and the Board's permitting rules prohibit the issuance of permits that authorize pollution, regardless of whether antidegradation review is required.

Comment 133. ***The definition [0400-40-03-.04(19)] of "new or increased discharge" appears to be part of TDEC's pre-existing policy choices that facilitate additional pollution. As explained in Pickard v. Tennessee Dep't of Env't and Conservation, No. M2011–02600–COA–R3–CV, 2012 WL 3834777 (Tenn.Ct.App. Sept. 4, 2012), 24, TDEC has chosen to interpret and apply antidegradation requirements on a parameter-by-parameter approach, rather than a water body-by-water body approach. This approach allows for increased discharges of pollutants in that even though a water body can be impaired for one pollutant, and thus additional loadings of that pollutant are improper, it can receive loadings of other pollutants. This approach is difficult to reconcile with the statutory mission under T.C.A. § 69-3-102 and commenters object to attempts to enshrine it in TDEC's rules.***

Response. As stated previously, regardless of whether antidegradation review is required, TDEC cannot issue permits that authorize activities that cause pollution. Moreover, EPA has recognized the parameter-by-parameter approach as being more protective than the waterbody-by-waterbody approach because antidegradation review is tiered based on the water quality status of the stream. Under federal law, impaired waters (Tier 1) receive less

antidegradation protection than high quality waters (Tiers 2, or 3). So, applying the waterbody-by-waterbody approach, a water body that otherwise has available parameters would only receive Tier 1 protection if even one parameter is unavailable. Finally, there is no water quality justification for limiting one pollutant simply because there is too much of an unrelated pollutant in a water body. This is why NPDES permitting nationwide is based on a parameter-by-parameter approach.

Comment 134. ***Commenters request clarification on how this new definition of new or increased discharges [0400-40-03-.04(19)] can be reconciled with many years of interpretation of these same rules. For example, in the Final YEAR 2016 303(d) LIST, TDEC states as follows:***

If a stream is impaired, regardless of whether or not it appears on the 303(d) List, the Division cannot authorize additional loadings of the same pollutant(s).

Response. The two statements are not related to each other. The definition of "new or increased discharge" merely determines when antidegradation review is required and has no effect on the requirement to issue permits with effluent limitations that are sufficiently stringent to protect water quality. Those requirements are established by T.C.A. § 69-3-108(g) and by the Board's permitting rules, and apply regardless of whether antidegradation review is required. Moreover, when a discharge adds flow, it adds assimilative capacity, so a marginal increase in loading may be permissible for non-bioaccumulative pollutants even in impaired waters.

Comment 135. ***Commenters question how the definition of (and thus permission for) "new or increased discharges" [0400-40-.04(19)] can be reconciled with the obligation to prevent "backsliding" contained in Rule 0400-40-05-.08(j) and 40 CFR § 122.44(l). Please clarify.***

Response. The definition of "new or increased discharge" has no bearing on the antibacksliding provision of the cited NPDES permit rules. Again, the term as used in these rules only applies to determining when antidegradation review is required.

Comment 136. ***Commenters request clarification of the scope of the term "numeric effluent limitations" as used in the definition of "new or increased discharge" [0400-40-.04(19)]. A numeric limitation could be either expressed in concentrations (which language appears in several TDEC regulations) per unit of measure, or in poundage limitations. It is unclear which is intended. An increase in volume with respect to a limit expressed in concentration per unit of measure could result in a significant increase in loading, but not be an increase in the concentration limit. Similar loading increase could result through the application of Rule 0400-40-05-.08(m) which requires limitations be expressed as averages in certain circumstances.***

Response. The term "numeric effluent limitation" is intended to apply to any limitation applied as a number rather than in narrative form. If a facility proposes an increase in effluent flow rate,

TDEC will translate the permitted discharge into a current loading allowance. For publicly owned treatment works, this is based on design flow as required by federal rules.

Comment 137. ***The proposed definition must consider any impact on water bodies from any increased volume of water in a discharge. Increased volumes can have scouring and other effects and carry contaminants that are not yet controlled, whether in a permit or otherwise. Please explain how this change can be reconciled with the definition of pollution in T.C.A. § 69-3-103 (28), which includes changes in the physical properties of waters.***

Response. The Board shares the commenter's concern about physical alteration of streams in Tennessee and our habitat surveys indicate that bank erosion can be a significant factor in increasing sediment bedload. However, the NPDES permitting program regulates the discharge of pollutants, not the release of water.

Comment 138. ***Per Rule 0400-40-03-.04(27) Resource values -- This definition is used only in determining when mitigation is sufficient. See the references thereto in the definitions of De Minimis degradation and in-system mitigation. This is insufficient. TDEC should recognize and consider throughout these regulations the concept of ecosystem services and consider the values provided by such services.***

Response. The water quality standards recognize the value of habitat through Rule 0400-40-03-.03(3)(n). Other ecosystem services are inherent in many additional narrative and numeric criteria.

Comment 139. ***Per Rule 0400-40-03-.04(27) Definition of Resource Values -- Under paragraph (27), the Department proposes a definition for "Resource values" as the benefits provided by the water resource that help maintain classified uses, with a number of examples of such benefits provided. This definition is very broad and raises a question in light of the accompanying definition of "significant degradation" under paragraph (29). Where a permanent loss of resource values would otherwise occur, "significant degradation" is deemed not to occur if mitigation ensures "no overall net loss of resource values." In light of the various attributes of "resource values" we would like to confirm that this is based upon an overall evaluation of "resource values." For example, if some small loss associated with one of the factors (e.g., loss in the ability to assist in flood prevention) were to occur after mitigation, such loss could be addressed by an increase in another factor (e.g., provide drinking water for wildlife and livestock) such that no "significant degradation" would be deemed to occur. We request confirmation of this reading.***

Response. These definitions apply only in the context of habitat alterations. Because antidegradation rules allow for offsite compensatory mitigation in this context, it is possible that a mitigation proposal would result in no overall net loss of resource values by providing functional lift in a variety of resource categories. Thus, it is possible that any resource value scoring system that we implement might score the final mitigation product as higher than the

existing condition, but actually represent a slight decrease in one resource value which is offset by a improvements in another resource value.

Comment 140. ***In 0400-40-03-.04(29), change the definition of "significant degradation" to "an appreciable permanent loss of resource values resulting from a habitat alteration in a waterbody with unavailable parameters for habitat, ~~unless offset by~~ requiring mitigation sufficient to ensure no overall net loss of resource values to the State."***

Response. The suggested change will not be made. The intent of the proposed rule amendment for habitat alterations in waters with unavailable parameters for habitat is to better conform Tennessee's Antidegradation Statement to the plain language of EPA's antidegradation rule and long-standing EPA guidance on the subject. EPA has consistently stated that 40 C.F.R. § 131.12(a)(1), which applies to Tier 1 waters (in this case, waters with unavailable parameters for habitat) is satisfied in the case of wetland fills if the authorized impacts do not result in "significant degradation" under 40 C.F.R. § 230.1(c) of the 404(b) rules. Under these rules, no significant degradation occurs when compensatory mitigation is provided such that there is no net loss of water resources, which is the same standard Tennessee applies through its ARAP permitting program.

EPA's position was stated in Appendix D of the Second Edition of the Water Quality Standards Handbook in 1990, and was restated in the 2012 Water Quality Standards Handbook, Chapter 4: Antidegradation. This interpretation reflects the fact that 40 C.F.R. § 131.12(a)(1) "provides the absolute floor of water quality" and "applies a minimum level of protection." 2012 Handbook, Ch. 4, at 1. By contrast, 40 C.F.R. § 131.12(a)(2) and (3) provide higher levels of protection for higher quality waters. Under the prior version of Tennessee's Antidegradation Statement, the highest level of protection was given to the lowest quality waters, inverting the prioritization established by EPA.

Comment 141. ***The preamble states, "If a waterbody is impaired for habitat ("unavailable parameters"), then an application can only be approved if it causes "no significant degradation," which simply means it has to comply with ARAP rules for mitigation [0400-40-03-.04(29)]. This contradicts the Clean Water Act and EPA requirements for Antidegradation review.***

Response. The commenter is correct that compliance with the ARAP rules for waters with unavailable parameters satisfies antidegradation review. The comment is not correct regarding federal requirements. Please see the previous response.

Comment 142. ***Regarding Rule 0400-40-03-.04(29), through the linguistic device of inserting the word "unless" before "mitigation sufficient to ensure no overall not loss of resources values is provided" TDEC is making a significant and unwarranted change to environmental policy and practice: TDEC is substituting mitigation of uncertain scope, performance, and responsibility for previous requirements that environmental damage***

be avoided or minimized. This is effectively abdicating, if not renouncing, the obligations under T.C.A. § 69-3-102.

Response. As explained previously, this change is warranted to better conform the Antidegradation Statement to EPA's antidegradation rule and guidance. Moreover, mitigation is not of uncertain scope or performance: it is an express permit requirement in either an ARAP/Section 401 certification or a Section 404 permit, or both. EPA's antidegradation rule and guidance were issued pursuant to the Clean Water Act, which has language comparable to that found in T.C.A. § 69-3-102, so we have no reason to believe that applying EPA's long-standing interpretation of its own antidegradation rule is contrary to the overarching policy of the Act.

Comment 143. ***Regarding Rule 0400-40-03-.04(29), by using subjective terms such as "appreciable," and "permanent," "sufficient," and "overall," too much power and authority is placed in the hands of paid consultants for project proponents as well as making any such determinations subject to potentially unreviewable discretion. Please clarify how these potentially untoward results can be avoided.***

Response. The terms used in this rule are borrowed from the existing ARAP mitigation rules, which have been in use for many years. Projects that require mitigation always require individual permits, and thus are individually reviewed by TDEC staff and subject to permit appeals.

Comment 144. ***Regarding Rule 0400-40-03-.04(29), TDEC does not specify the types and amounts of, or establish any system to ensure that, "sufficient" mitigation is performed. Commenters request clarification on the relative preferences for mitigation banking, in lieu fee programs, and permittee mitigation, and how the certainty needed for well-managed growth will be facilitated.***

Response. The referenced rule is a definition, and as such is not the appropriate place to define substantive requirements for mitigation. The ARAP rules address mitigation for ARAPs, and federal Section 404(b) rules establish mitigation requirements for projects requiring those permits.

TDEC does not have a relative preference for mitigation banking, in-lieu fee programs, or permittee-responsible mitigation. Moreover, TDEC does have a system to ensure that sufficient mitigation is provided to offset appreciable permanent loss of resource values, and implements this system through its individual ARAP program. The ARAP rules specify minimum ratios for compensatory mitigation for wetlands and establish performance criteria for stream mitigation. TDEC is separately updating its stream mitigation guidelines, which will be subject to public notice and comment.

Comment 145. ***Per Section 0400-40-03-.04(29) Significant degradation - Please define the terms appreciable and permanent. What are the parameters for habitat?***

Response. The term "appreciable permanent loss of resource values" has long been the trigger in the ARAP program for when habitat alterations require compensatory mitigation. The current general ARAPs define a number of activities that have minimal impacts. The ARAP program is Tennessee's parallel to the Corps' Section 404 program. ARAPs, like Section 404 permits, must result in no significant degradation. Parameters are those constituents of water quality that can be measured, so the parameters of habitat are those aspects of habitat that can be measured to assess habitat quality. For example, these include but are not limited to: bank stability, riparian vegetative width, riffle frequency (for riffle streams), embeddedness, and percent canopy cover.

0400-40-03-.05 Interpretation of Criteria

Comment 146. ***With the new human health criteria, the Board should consider adopting a variance process and implementation guidelines.***

Response. Please see responses to comments 84 to 91 with respect to the new human health criteria.

Variances authorize the violation of water quality criteria for some restricted period of time, usually because a discharger needs time to implement additional treatment, or because the cost of meeting the criterion would cause "widespread and substantial" economic harm to the community (not just the discharger).

The commenter is correct that Tennessee water quality standards do not contain such a provision. Such a provision was considered back in the late 1980s and was ultimately rejected. The appropriate goals of this provision can be achieved in other ways, such as compliance schedules or, as applicable, mixing zones.

Comment 147. ***TDEC proposes to add a prohibition against "offensive colors, odors, or other conditions" in the mixing zone policy [Rule 0400-40-03-.05(2)]. This means that the mixing zone is regulated more stringently than the rest of the stream and the language differs from the existing color criterion which refers to "objectionable" color. The reference to color should be deleted.***

Response. TDEC has only proposed adding the words "colors, odors, or other" to the sentence. The words "offensive" and "conditions" were already there. TDEC does not think it is true that this provision establishes more stringent conditions since the rule always prohibited offensive conditions. The recommended rule language will be changed to use the term "objectionable" here to be consistent with the criterion.

Comment 148. ***The revisions to the mixing zone policy references bioaccumulative substances but does not identify them.***

Response. Bioaccumulative substances are identified with the letter "(b)" in the numeric criteria for protection of recreational uses, Rule 0400-40-03-.03(4)(l). Please check the footnotes of this table for additional information.

Comment 149. ***The revisions to the mixing zone policy references would prohibit bioaccumulative substances if certain risk assessment criteria are already exceeded. This is inappropriate as the discharge may not be the reason for the original bioaccumulation and other parts of the regulations prohibit loss of use. A TMDL should be conducted instead.***

Response. The commenter is correct that the Antidegradation Statement does not allow the agency to authorize additional measurable degradation to already impaired waters. However, antidegradation review is not a substitute for this modest strengthening of the mixing zone policy. Continuation of ongoing discharges at the same level is not subject to a new antidegradation review. Moreover, the Antidegradation Statement does not speak to mixing zone policy, or address how to apply the mixing zone policy particularly when the problem is accumulation in fish tissue rather than ambient water quality. The provision in question is intended to prevent areas directly around a discharge from getting increasingly worse over time, regardless of the original source of the bioaccumulative substance. If a discharge of a bioaccumulative substance is ongoing in this circumstance, a permit renewal could reduce the allowed loading to a level equivalent to complying with water quality criteria end-of-pipe but also provide for a compliance schedule to allow sufficient time to comply.

Comment 150. ***We appreciate the inclusion of compliance schedules in Rule 0400-40-03-.05(3). We request the following revisions:***

Permits for the discharge of pollutants ~~may~~ shall establish a schedule of compliance when necessary to allow a reasonable opportunity to comply with these water quality standards. The technical and economic feasibility of waste treatment, recovery, or adjustment of the method of discharge shall be considered in establishing a schedule of compliance. Any such schedule of compliance shall require compliance with an enforceable final effluent limitation as soon as possible and include a final compliance date. If compliance will take longer than one year, the schedule of compliance shall establish enforceable interim requirements, establish dates for compliance with these requirements that are no longer than one year apart, and require reporting of interim compliance actions within fourteen days of the applicable deadline. If the time necessary for completion of any requirement is more than one year and the requirement is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of interim requirements.

Response. The Board believes that TDEC needs to retain the discretion to establish compliance schedules to comply with water quality standards. There are situations, such as proposed new discharges, pre-existing standards, or serious conditions of pollution where compliance schedules may not be appropriate.

The rules are amended to include, "When the Division establishes a compliance schedule, it shall consider the technical and economic feasibility of waste treatment, recovery, or adjustment of the method of discharge."

The rules will also be amended to include the final sentence as proposed by the commenter.

Comment 151. ***The language about compliance schedules should acknowledge that compliance schedules can last longer than the five year permit term. Also the language should acknowledge that MS4 programs are under a "Maximum Extent Practicable" goal rather than the stated "as soon as possible" goal.***

Response. The Board agrees that compliance schedules may, in unusual circumstances, last longer than a five-year permit term. However, any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement.

These are rules for water quality criteria, not NPDES permitting rules, so the requested reference to MS4 programs will not be added to these rules.

Comment 152. ***TDEC should not delete the provision in Rule 0400-40-03-.05(4) that addresses how criteria for nutrients, biological integrity and habitat relate to flow basis in doing stream assessments.***

Response. The sentence in question is unrelated to the rest of the paragraph, which explains how criteria and ambient stream flows are blended to derive permit conditions and calculate limits for specific parameters. The additional discussion about flows and stream assessment is unnecessary and might be taken to mean that there is a relationship between flow and the application of other criteria. Criteria apply to streams regardless of flow. TDEC can use assessment discretion when criteria violations occur during excessively high or low flows.

Comment 153. ***The commenter objects to the new description of the "condition of impairment" in Rule 0400-40-03-.05(5). This provision should be deleted.***

Response. This description was needed to contrast water quality impairment with the "condition of pollution" defined in the Act. According to the Act, any water quality criteria violation is the condition of pollution. The proposed description of the condition of impairment makes it clear that TDEC will not automatically assess a stream as impaired simply on the basis of a single excursion from applicable water quality criteria, but will rather consider the "magnitude, frequency and duration" of such excursions. The commenter has not suggested alternative language, but has instead asked that it be deleted. The language will be retained.

Comment 154. ***The commenter objects to the deletion of the phrase "The criteria and standards provide that" in Rule 0400-40-03-.05(6). This deletion makes this provision a***

mandate regarding treatment levels rather than a goal. Further, this provision does not belong in rules section .05, Interpretation of Criteria.

Response. The Board does not agree with this interpretation. This provision is a restatement of the treatment requirements found in the Act. The deletion of the phrase in question was made, not to change this meaning, but simply to avoid stating the obvious. The proposed language will be retained.

Comment 155. ***The commenter objects to the new language in Rule 0400-40-03-.05(7) concerning intake water. This provision should be deleted.***

Response. As requested, this proposed addition to the rules will not be made.

Comment 156. ***The commenter does not understand why natural sources of pathogens [Rule 0400-40-03-.05(7)] should be treated differently than natural sources of other parameters.***

Response. This provision is in reference to how water quality assessment is done. When TDEC assesses water quality, criteria violations caused by natural sources are not called impairment and these waters would not be added to Tennessee's 303(d) List of Impaired Waters. However, the pathogen criterion does not differentiate between natural or anthropogenic sources and either can make people equally sick. Additionally, it is much more difficult to say with confidence what are "natural" sources. For example, livestock and pets are not natural sources.

Comment 157. ***TDEC identified that even natural sources of pathogens could be assessed as contributing to the condition of impairment [Rule 0400-40-03-.05(7)], but then cited beavers as being natural sources that would not be the condition of impairment. Are there beavers that don't add pathogens to the water?***

Response. It is understandable that this might cause confusion. When using beaver as an example of impacts that would not be the condition of impairment, it is a reference to their tendency to alter habitat significantly. TDEC will not assess one of these streams as impacted by "flow alteration" just because beaver had dammed it.

Comment 158. ***There are other natural sources beyond the ones TDEC identified.***

Response. The natural sources identified are not an inventory of all the natural sources, just a few examples.

Comment 159. ***The "sufficiently sensitive" method will cause confusion, especially at contract labs.***

Response. The Board is aware of the confusion that exists due the terms and acronyms used to refer to the various detection limits and quantitation levels. The Board feels that the specificity of the rule change will help eliminate some of the confusion by using "minimum level" (ML) as the standard term when referring to quantitation level.

The rule change does not address synonymous terms used by individual laboratories, commercial or private. However, the Board encourages permittees to request that their labs use MDL (method detection limit) and ML (minimum level), when respectively referring to detection limits and quantitation levels, in order to be consistent not only with the rule but also with federal Clean Water Act rules in general.

Comment 160. ***The new sufficiently sensitive rules require permittees to research methods and are a regulatory burden subject to misinterpretation. TDEC should identify the analytical method they want permittees to use rather than leave it up to them.***

Response. See the previous response. In some cases the acceptable analytical methods are specified, for example, low-level mercury analysis. However, it would be onerous and perhaps cost-prohibitive to specify a "sufficiently sensitive" method in all cases. Many facilities will be able to demonstrate compliance using a less sensitive (but still "sufficiently sensitive") and less costly analytical method.

To specify use of more costly methods would penalize those facilities without sufficient justification for doing so. In addition, it would open up avenues for complaints from additional entities who publish analytical methods. For example, if use of EPA methods was required, that action could generate complaints from other sources of analytical measures like Standard Methods, ASTM, and others.

Comment 161. ***In 0400-40-03-.05(9), TDEC again wants to use the word "pollutants" rather than pollution. The word pollutants is more narrow than the Act envisions. This should be allowed to remain the word "pollution."***

Response. This revision is withdrawn.

0400-40-03-.06 Antidegradation Statement

General Antidegradation Comments

Comment 162. ***Tennessee should not allow degradation in any circumstance.***

Response. TDEC cannot authorize an activity that would cause pollution. This prohibition is built into the Act, the Board's permit rules, and for new or expanded activities, the Antidegradation Statement.

Degradation is a lowering of water quality that does not necessarily rise to the level of pollution. Both federal and State regulations allow the level of existing water quality to be

incrementally lowered in Tier 2 waters (available parameters/ETWs) if practicable alternatives are absent and the public interest is served by the lowering. That the lowering of water quality is in the public's interest is established by the determination of social or economic necessity. For ONRWs, no measurable or discernable degradation can be permitted with respect to discharges and withdrawals, and no more than *de minimis* degradation for habitat alterations.

Comment 163. ***The Aquatic Resource Alteration Permit (ARAP) process was developed by the State of Tennessee. TDEC should not be bound by EPA or U.S. Corps of Engineers interpretations, rules or policies, including those for antidegradation.***

Response. The Board understands the sense of this comment and agrees with the commenter's account of how the ARAP program originated. TDEC has also publicly noted that EPA's Antidegradation guidance was originally developed for dischargers and is an awkward fit for habitat alterations. In that regard, the process has been modified in numerous important ways, such as how *de minimis* degradation is applied to habitat alterations and how to incorporate the concept of mitigation into the Antidegradation Statement. Where it has made sense, the State has modified its approach and will continue to do so. However, habitat alterations and water withdrawals do have the potential to result in degradation, so EPA's antidegradation rule apply to such activities.

With respect to Section 404(b) rules, the Board's goal is to minimize direct conflicts between State rules and the Corps' rules. If a permit application requires both an ARAP and a Section 404 permit, direct conflicts between the rules could create unnecessary regulatory hurdles.

Rule 0400-40-03-.06(1) General

Comment 164. ***In Rule 0400-40-03.06(1)(a), consider adding "to reclaim polluted waters" as a purpose of the Antidegradation Statement. To do otherwise ignores the mandate of the Water Quality Control Act.***

Response. The Board agrees that restoration of impacted waters is an important goal of TDEC, but does not agree that the Antidegradation Statement is a tool designed for that purpose. The intent of the Antidegradation Statement is to provide guidance to the agency in regard to allowing or not allowing the lowering of water quality based on the conditions found in individual waterbodies and the nature of the proposed activity. The Antidegradation Statement is designed to maintain water quality. Other programs like permitting, TMDLs, enforcement, watershed management, and cost share projects are tools to restore impacted streams.

Comment 165. ***In Rule 0400-40-03-.06(1)(a), consider adding "It is the purpose of Tennessee's standards to fully protect . . . . . Sources or activities exempted from permit requirements under the Water Quality Control Act should utilize all cost-effective and reasonable best management practices <u>in order to prevent degradation of waters</u>" to show this statement is tied to Antidegradation.***

Response. The words "to prevent degradation of waters" have been added.

Comment 166. ***In Rule 0400-40-03.06(1)(a), consider changing as follows, "To apply this antidegradation statement ~~in the permitting context~~ to activities, including but not limited to, permits for new or increased discharges, new or increased water withdrawals, or new or expanded habitat alterations," to include 401 certifications and other actions.***

Response. Instead of making this change, the current language regarding public participation and intergovernmental coordination will be restored to Rule 0400-40-03.06(1)(a).

Comment 167. ***Please consider adding public participation and intergovernmental coordination requirements be added to the general antidegradation statement at 0400-40-03-.06 (1)(a).***

Response. The language regarding public participation and intergovernmental coordination that is in the current version of the rule will be restored, clarified by the inclusion of "as established herein." Please note that TDEC utilizes ARAPs as Section 401 certifications.

Comment 168. ***Regarding Rule 0400-40-03.06(1)(a), please state the reasons for the deletion of the sentence reading: "Additionally, the Tennessee Water Quality Standards shall not be construed as permitting the degradation (see definition) of high quality surface waters." Such deletion could be viewed as an improper renunciation of TDEC's mission under T.C.A. § 69-3-102 and in contravention of other provisions of law.***

Response. This sentence is a remnant of an early version of the Antidegradation Statement, and had a different meaning before the rule was amended to include detailed procedures and standards for allowing degradation of high quality waters. There is no substantive change to the rules proposed as a result of deleting this sentence. It is important to recognize that degradation is not the same thing as pollution. In no case may TDEC issue permits for activities that cause pollution. T.C.A. § 69-3-108(g).

Comment 169. ***The commenter would like for TDEC to confirm that according to Rule 0400-40-03.06(1)(b), if an existing water withdrawer requests the renewal of a permit at existing withdrawal rates, the renewal would not need a antidegradation review.***

Response. The commenter's understanding is correct.

Comment 170. ***The commenter interprets the revisions to Rule 0400-40-03.06(1)(b)1 to mean that the rule does not require an applicant to explain "if it will cause measurable degradation as long as de minimis degradation is not caused."***

Response. The commenter's interpretation is only accurate for applications for habitat alterations, for which the term "measurable degradation" is not used. If a new or increased

discharge or water withdrawal would cause measurable degradation according to the definition [Rule 0400-40-03-.04(15)], that should be reported in the application, regardless of whether the discharge or withdrawal would only cause *de minimis* degradation. Rule 0400-40-03-.06(2) prohibits new or increased discharges or withdrawals in waters with unavailable parameters that would cause measurable degradation of the unavailable parameter.

Comment 171. ***In Rule 0400-40-03.06(1)(b)2(i), change "lesson" to "lessen."***

Response. This change has been made.

Comment 172. ***In Rule 0400-40-03.06(1)(b)2.(i), add the word "reasonably" so that the beginning of the sentence reads, "Reasonably analyze a range of potentially practicable alternatives..."***

Response. While the agency should always be reasonable, the Board prefers the sentence as currently worded. Reasonableness is hard to define and is based on perspective. TDEC requires information adequate to make a determination.

Comment 173. ***In Rule 0400-40-03.06(1)(b)2(ii), consider adding "in which the waters are located" at the end.***

Response. This change has been made.

Comment 174. ***Regarding Rule 0400-40-03-.06(1)(b)2(iii), existing uses may not always have WQS criteria. Consider deleting the reference to water quality criteria and calling "uses existing in the receiving water" existing uses of the receiving water instead. It would read . . . "Demonstrate that the proposed degradation will not violate the existing uses in the receiving waters." There will be no confusion then over whether the State is referring to designated uses or existing uses.***

Response. The rule will be changed to "Demonstrate that the proposed degradation will maintain water quality sufficient to protect existing uses in the receiving water." This is consistent with the language of 40 C.F.R. § 131.12 because it retains the reference to water quality.

Comment 175. ***Regarding Rule 0400-40-03.06(1)(b)3, consider adding the phrase to the new first sentence so that it now reads " An alternative to degradation is practicable if it is technologically possible, able to be put into practice, and economically viable <u>for the applicant entity (not considering related entities) in the context of project purposes and budgeting</u>" (Underlining added to show requested new wording.)***

Response. The language regarding practicable alternatives is derived directly from EPA's rules and will be retained in the final rule as proposed. Practicability is an application-specific inquiry, and will depend on a variety of factors relevant to the specific covered activity and applicant.

Comment 176. ***The definition of "practicable alternatives" in Rule 0400-40-03.06(1)(b)3, is different than the one in the ARAP rules.***

Response. The definition in the ARAP rules derives from the Section 404(b) rules, and is used in that chapter to be consistent with the Corps's permitting. The definition here derives from EPA's water quality standards rules, which apply to withdrawals as well as discharges and habitat alterations. Even so, we do not consider the definitions to be significantly different.

Comment 177. ***Regarding Rule 0400-40-03.06(1)(b)3(i), consider adding "prevent or" before "reduce."***

Response. This change will be made.

Comment 178. ***The "Antidegradation Guidance for the Department of Environment and Conservation" needs to be publicly available, and the State needs to provide an opportunity for public involvement whenever this document is revised in the future (40 CFR 131.12(b)).***

Response. TDEC understands that the procedures for implementing the Antidegradation Statement are subject to an opportunity for public involvement and that the procedures need to be available to the public. The referenced document has previously undergone such public involvement, and was in the process of being revised for another round of public involvement when the proposed rule was placed on notice. However, given that the planned additional comment period has not yet taken place, the reference to this guidance document is being removed from the rule. Any future implementation procedures will comply with 40 C.F.R. § 131.12(b).

Comment 179. ***Several comments were received objecting to the rule's reference to the "Antidegradation Guidance for the Department of Environment and Conservation," which has been public noticed but not finalized.***

Response. Rule 0400-40-03-.06(1)(b)4 deletes this reference and substitutes:

To demonstrate that greater than *de minimis* degradation is necessary to accommodate important social or economic development in the area in which the waters are located, the applicant shall provide a written justification to include, as applicable, a description of a project, the number of jobs anticipated to be created (including salaries/benefits, duration, and type), tax revenue to be generated, impact of the proposed degradation to development potential in

the area, other social/cultural impacts, and any other justification. Applicants shall submit alternative or additional information regarding economic or social necessity as directed by the Department. The justification should demonstrate an overall benefit to the local community, not just a benefit to the applicant.

Comment 180. ***In 0400-40-03-.06(b)3(ii) examples of reasonable alternatives to water withdrawals are given. For pricing structures to encourage conservation, the rule should note that this example is limited to community public water supply systems.***

Response. All of the examples provided in this subparagraph have limited applicability and are cited simply to provide illustrations. The Board prefers the language to continue to provide general examples of alternatives. Obviously, not every alternative applies in each situation.

Comment 181. ***In 0400-40-03-.06(b)3.(iii) examples of reasonable alternatives are given. For physical alterations, these examples should include putting a site somewhere else.***

Response. The example provided by the commenter is a degradation avoidance strategy. The rule states that examples of potential alternatives "are not limited to the following actions." The Board does not believe it necessary or even possible to list every possible strategy.

Comment 182. ***The reference to the Antidegradation guidance document creates new, unchallengeable powers in the Division.***

Response. In response to numerous comments on this provision, it has been removed.

Comment 183. ***The Board's rules should not refer to guidance documents that have not yet been adopted.***

Response. The references to new guidance documents have been deleted.

Comment 184. ***The Antidegradation Statement establishes the idea of existing stream condition as being the starting point for measuring degradation. This approach automatically handicaps urban streams where substantial alterations have already occurred.***

Response. The Board understands the sense of this comment and notes that historically degraded conditions occur not only in urban settings, but also areas that have been mined or substantially altered by agricultural activities. However, the purpose of antidegradation review is to maintain existing uses and existing water quality. Thus, antidegradation review is designed to keep even impacted streams from getting worse, but it does not substitute for voluntary restoration efforts and does not give TDEC regulatory authority not otherwise provided in the Act.

Comment 185. ***We support the clarification in Rule 0400-40-03-.06(1)(c) that draft permits, not complete applications, are to be put on public notice. We believe that noticing the draft permit allows public participation on a more complete and representative project description, which reflects negotiations and compromises already agreed to between the permittee and the Department. This will also streamline the permitting process and maximize Departmental resources.***

Response. The Board appreciates the comment and agrees that this process will be more transparent and efficient.

Comment 186. ***A commenter notes that the public participation requirements in Rule 0400-40-03-.06(1)(c) are inconsistent with those in the ARAP rules. In the ARAP rules, no public notice is required for permit renewals or modifications with no changes. These differences should be reconciled. The same inconsistency occurs in Rule 0400-40-03-.06(1)(d).***

Response. The Board does not see a conflict. Rule 0400-40-03-.06(1)(c) only requires public notice for new or increased water withdrawals or new or expanded habitat alterations, so if an ARAP is renewed or modified without changes, then no public notice is required under either set of rules. Rule 0400-40-03-.06(1)(d) only applies if the public notice in Rule 0400-40-03-.06(1)(c) was required and completed, so it also applies only to new or increased water withdrawals or new or expanded habitat alterations.

Comment 187. ***The proposal to define alternatives to degradation as those that are "technologically possible, able to be put into practice, and economically viable" is a common sense acknowledgement of the differences between theory and practice. We support this change.***

Response. The Board appreciates the comment. This definition is based on EPA water quality rules.

Comment 188. ***Regarding Rule 0400-40-03-.06(1)(b)2(ii): The Department proposes to change the first word from "discuss" to "demonstrate" in relation to the social or economic justifications. This is a significant change that will significantly burden permittees, potentially open up legal challenges, and create a more stringent requirement than federal law.***

Response. Both federal law and Tennessee's Antidegradation Statement (both the prior version and the revised version) require a demonstration of social or economic necessity, not merely a discussion, for high quality waters. See Rule 0400-40-03-.06(3) and (4)(d). It is up to the applicant to make this demonstration. The referenced provision concerns the requirements for a complete application, and the change here is merely to clarify the preexisting requirement.

Comment 189. ***We are concerned that the database proposed for use with the new antidegradation review document will not appropriately capture the on-the-ground realities of current economic conditions. Please provide additional information about this database.***

Response. The reference to the antidegradation document is being removed from the rule. If TDEC proceeds with that guidance document, there will be an additional opportunity for public notice and comment.

Comment 190. ***Please add "public" before "notice" in Rule 0400-40-03-.06(1)(c) for consistency.***

Response. The requested change has been made.

Comment 191. ***Rule 0400-40-03-.06 does not appear to require the applicant to explain if it will cause measurable degradation as long as de minimis degradation is not caused. Please confirm this interpretation.***

Response. The answer depends on the circumstances. If an applicant is proposing a new or increased discharge to, or a new or expanded withdrawal from, waters with unavailable parameters, it will need to demonstrate that its discharge will not cause measurable degradation of the parameter that is unavailable.

Comment 192. ***In Rule 0400-40-03-.06(1)(d), please do not delete, "Not all activities cause an addition of pollutants, diminish flows, or impact habitat."***

Response. The language from the current version of the rule will be retained.

Comment 193. ***The draft permit idea for ARAPs coming out of this is in fact a device for cutting off antidegradation reviews, because once you find you've got de minimis and you don't have to have antidegradation, you just stop the internal process for that as part of the permit. Once you have the draft permit, the TN Supreme Court has said that the only route of appeal is to challenge the permit. The permit is issued, it goes into effect and the activity goes on notwithstanding any appeal. Since even the fastest appeals of permits that may raise antidegradation would take at least six months, many projects will have done damage to the waters that are at issue and that will be irretrievable. So, the remedy of antidegradation as something that could really go to the board and be decided adversely to the permit applicant and degradation disallowed has really disappeared as a practical matter under these regulations.***

Response. The purpose of providing a draft permit is to ensure a greater level of transparency for both members of the public and the permit applicant. Moreover, the Antidegradation Statement - both before and after these amendments - combines the public notice and comment period for ARAPs for the purposes of antidegradation and permit review. This is not a change to the rules.

Comment 194. ***Regarding Rule 0400-40-03-.06(1)(d)3: a 303(d) designated stream is not currently supposed to be permitted for impacts that would make its current impairments worse. With the new definitions for "in-system" and "de minimis," the stream could now be damaged with the mitigation occurring in some other watershed, yet the impact would be designated as "de minimis" and the new rule would prohibit the TDEC reviewer from applying principles of antidegradation to prevent further degradation of this 303(d) stream.***

Response. The current rule allows new or expanded habitat alterations in waters with unavailable parameters for habitat so long as the project results in only *de minimis* degradation, which includes either minimal impact activities or greater impacts that are offset by in-system compensatory mitigation. The proposed rule would allow such impacts so long as they do not result in significant degradation, which includes impacts for which compensatory mitigation is not provided in-system.

Comment 195. ***Regarding Rule 0400-40-03-.06(1)(d)3, what is to prevent additional projects in the future to continue to degrade the same water resource until there is no ecological function left, not to mention human uses. A discussion of cumulative impacts here would necessarily lead to an absolute limit to the amount of allowable degradation regardless of whatever mitigation has occurred outside the HUC12.***

Response. This comment concerns habitat alterations, including those authorized by ARAPs. TDEC cannot issue permits for activities that cause pollution either by themselves or in combination with others. See T.C.A. § 69-3-108(g). Cumulative impacts are evaluated within this rubric.

Comment 196. ***TDEC does not have, or at least does not use, any independent analysis or sources of information or expertise in deciding to accept or reject an applicant's assertion that its preferred course of action is the only "practicable" way to conduct the proposed activity. (Revised Rule 0400-40-03-.06(1)(b)2)***

Response. The commenter is incorrect to assert that TDEC does not have or use independent analysis or sources of expertise concerning practicable alternatives. TDEC regularly challenges alternatives analyses submitted by permit applicants and requires additional documentation. TDEC has expert engineers who can review design plans. Staff routinely seek out independent information to verify an applicant's assertions regarding alternatives and economic necessity.

In any case, although it is the applicant's responsibility to demonstrate a lack of practicable alternatives and economic or social necessity, it is TDEC's responsibility to determine whether these demonstrations have been made. These issues are also subject to the public notice and

comment process, which allows input from external experts. TDEC's determination of practicable alternatives is subject to a permit appeal filed with the Board.

Comment 197. ***In 0400-40-03-.06(1)(b)3(iii) examples of reasonable alternatives are given. For physical alterations, these examples should include putting a site somewhere else.***

Response. The Board agrees that avoidance through putting a project at another location is one example of an alternative. In some cases avoidance is not an option; for example, if you own the mineral rights on a property. The example provided by the commenter is clearly a degradation avoidance strategy. The rule states that examples of potential alternatives "are not limited to the following actions." The Board does not believe it necessary or even possible to list every possible strategy.

Comment 198. ***The addition of language to the Antidegradation Statement related to new or increased water withdrawals should be supplemented to include language setting a minimum quantity of water withdrawals requiring antidegradation review.***

Response. The Antidegradation Statement applies to all new or expanded water withdrawals that may cause degradation of waters of the state. The rules already provide that water withdrawals causing no more than *de minimis* degradation individually or cumulatively as defined in the rules, do not require additional antidegradation review in waters with available parameters or ETWs. However, if the waters have unavailable parameters, no new or expanded withdrawals that cause additional degradation of the unavailable parameter can be authorized. It would not be possible to define a minimum level of withdrawals that would apply to all waterbodies due to wide variations in ambient conditions, including flow levels.

Comment 199. ***Rule 0400-40-03-.06(1)(d)3 provides, "In the case of habitat alterations, if the department determines that no degradation or only de minimis degradation will occur, no further review under the rule is required regardless of the antidegradation classification of the receiving stream." The Department permit writers will doubtless assist permit applicants to understand how they can "mitigate" their way out of any examination of alternative sites and the need to show social or economic necessity for an activity. Should somehow a permit for a proposed activity be appealed as violating antidegradation requirements the proposed regulations add an escape device to moot the appeal by a permit modification to add mitigation to achieve a "de minimis" impact: "In unusual circumstances, including but not limited to emergency permits, a state, county, or local government applicant may propose a specific mitigation plan after an Individual Permit has been issued, provided that the permit shall specify the amount of mitigation required and an implementation timeline." (Proposed revised ARAP rule 0400-40-07-.04(5)(c)).***

Response. The Act, in T.C.A. § 69-3-141(b) provides, "Permit applicants shall have the right to assistance from the department in understanding regulatory and permit requirements."

Accordingly, staff are expected to explain options to permit applicants, including – where applicable – options to achieve *de minimis* degradation through in-system mitigation.

The ARAP rule language quoted concerning unusual circumstances is necessary to deal with atypical situations, often dangerous to the public health. For example, if a road or bridge is washed out or undermined by a flood, it may be too dangerous to wait to do the needed repairs until a permit can be reviewed or placed on public notice (citizens could be stranded in their neighborhoods, and fire departments and ambulances unable to reach parts of their service area). Or, a municipality may need to proceed with a sewer line repair expeditiously to avoid a potential break that would cause significant pollution. TDEC retains the authority to judge when a situation is sufficiently urgent to justify application of this provision.

Comment 200. ***The procedure proposed by the rules is to issue a draft ARAP together with the first notice of a permit application that is considered administratively complete. This allows TDEC to issue a final permit immediately. If the Division ever issues a determination of economic or social necessity, it will be accompanied by a draft permit. The only administrative appeal available will be of the permit as explained above. The procedure for a prompt appeal to the Board for disposition of Antidegradation Statement challenges to proposed activities before a permit is issued and activity can begin has been abandoned.***

Response. The procedure under the previous rules was to provide the only ARAP public notice and the Antidegradation public notice together. The only change is that the ARAP public notice rules will now require that a draft permit and rationale be placed on notice, which the Board believes will provide an improvement in the public participation process. Currently the only requirement is to provide public notice that a complete applications has been *received*; there is little detailed information for the public to actually review. Under this change, both the public and the permit applicant can see the actual proposed permit along with a rationale explaining TDEC's decision process, as has always been the case for NPDES permits.

Comment 201. ***Regarding Rule 0400-40-03-.06(1)(b), Commenters request clarification of the reasons for and the intended result of the insertion of the phrase "to permits for new or increased discharges, new or increased water withdrawals, or new or expanded habitat alterations." By inserting this phrase, antidegradation requirements henceforth appear to apply only in such cases, which would prohibit TDEC from considering the overall condition of a water body, and further would constitute a renunciation of the mission of T.C.A. § 69-3-102.***

Response. Consistent with federal law, antidegradation review has always applied only to new or expanded activities, with a partial exception for permit renewals for ETWs. This is because antidegradation is about maintenance of water quality, and establishing procedures to allow lowering of water quality in waters with available parameters. See 40 C.F.R. § 131.12(a)(1) ("existing instream water uses...shall be maintained and protected"), (a)(2) (for Tier 2 waters, "...that quality shall be maintained and protected"), (a)(3) (for ONRWs, "that

water quality shall be maintained and protected"). EPA made it clear from very early on, in Appendix A of the Water Quality Standards Handbook (Dec. 1983) that antidegradation is about maintaining, rather than restoring, water quality. Id. at p. 1 (citing Section 101(a) of the Clean Water Act clause, "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" as a rationale for requiring antidegradation review) (emphasis in original). Ongoing activities do not result in additional degradation, and therefore maintain, not lower, water quality.

The prior version of the rules for waters with unavailable parameters (subparts (2)(a), (2)(b), and (2)(c) ("additional degradation"), available parameters (subparts (3)(a), (3)(b)), ETWs (4)(c)1 and (4)(c)2), and ONRWs (subparts (5)(b)1 and (5)(b)2) included comparable language. Subparts (2)(c), (3)(c), and (4)(c)3, all referred to habitat alterations causing "degradation," which was defined as a lowering of water quality, which only occurs the first time an impact is authorized. Comparable language was inadvertently omitted from part (1) of the prior version of the rule, but that section was always intended to apply only to new or expanded activities.

The rule changes are intended to clarify, not change, the applicability of antidegradation review to new or expanded activities.

Moreover, the commenter should note that antidegradation review is only one requirement that applies to issuance of permits. In particular, the overall prohibition on authorizing activities that cause pollution applies to renewals of permits for ongoing activities notwithstanding that such permits are not subject to additional antidegradation review.

Comment 202. ***Regarding Rule 0400-40-03.06 (1)(b), Commenters request clarification about the final inserted sentence, that only applicants be notified in writing of complete applications. Public notice to interested parties should be required. It is unclear, when comparing this provision to subsection (1)(c) when notice to permit applicants is required versus when public notification is required, or why two (2) separate provisions, one dealing with notice to the applicant and the other to the public, are required.***

Response. Rule 0400-40-03.06(1)(b) provides that only applicants are formally notified that an application has been reviewed and has been determined complete. This written notification is provided to ensure compliance with the Permit Applicant's Bill of Rights. This notification is typically posted on Waterlog, which is available to the public, but because no specific permit action is proposed at that time, there is no reason for formal public notice. Rule 0400-40-03.06(1)(c) addresses public notice of the proposed permit action. It requires that TDEC provide a separate written notification to the applicant and additionally provide notice to the public as specified therein.

Comment 203. ***Per Rule 0400-40-03.06 (1)(b)2(i) - By deletion of the requirement to "analyze all reasonable alternatives" TDEC appears to obviate any requirement that a***

project proponent propose a "no project" alternative or one that avoids or minimizes degradation. Please clarify whether that or some other result was intended.

Response. This rule does not eliminate any existing requirements. A discussion of potentially practicable alternatives is provided in Rule 0400-40-03-.06(1)(b), and includes various ways to avoid degradation.

Comment 204. ***Per Rule 0400-40-03-06(1)(b)1 - Antidegradation Statement General – Application - Proposed changes to the rule identify that the applicant must provide its basis for concluding that the proposed activity (a) will not cause measurable degradation, (b) will only cause de minimis degradation, (c) will cause no significant degradation, or (d) will cause more than de minimis degradation. As such, the rule does not appear to require the applicant to explain if it will cause measurable degradation (as long as de minimis degradation is not caused). Please confirm this reading of the proposed rules.***

Response. Rule 0400-40-03-.06(1)(b)1 requires the applicant to provide its basis for determining which level of degradation its activity would cause. The term "measurable degradation" is only used in the context of discharges and withdrawals, as indicated in the parenthetical. Rule 0400-40-03-.06(2)(a) and (b) provide that in waters with unavailable parameters, no new discharges or withdrawals that cause measurable degradation of the unavailable parameter can be authorized. Therefore, if a proposed activity falls into this category, then the applicant will need to demonstrate that the activity will not cause measurable degradation. This is the only situation in which such a demonstration is required.

Comment 205. ***In Rule 0400-40-03-.06(1)(d), it is proposed to delete the following language from Rule 0400-40-03-.06(1)(d): "Not all activities cause an addition of pollutants, diminish flows, or impact habitat." It is unclear as to why this language is being deleted. To avoid confusion, is it requested that this language be maintained.***

Response. The current language will be restored.

Comment 206. ***In Rule 0400-40-03-.06(1)(d)(2), it is not clear that water withdrawal permit modification or renewals with no changes would not be subject to antidegradation review.***

Response. A permit modification or renewal requesting no changes would not be a new or expanded water withdrawal, so no antidegradation review is required.

Comment 207. ***Analysis of degradation should include evaluation of the "resource value" (ecosystem services value) of the non-disturbed natural area. This could be done by evaluation of the "resource values" as enumerated in 0400-40-03-.04 (27) (Definitions).***

Response. We agree that this evaluation will often be needed for habitat alterations, and the Stream Mitigation Guidelines will address how to apply this review. In many cases, it would not require an intensive evaluation to make that determination, and we remind the commenter that most proposed alterations occur on stream segments that have already been heavily altered in the past and are no longer in a 'natural' condition. For example, relocating a stream that is currently underground in a culvert to a more natural surface channel clearly is an improvement over its current status and clearly not degradation.

Comment 208. ***I have heard it asserted that TDOT road location and design criteria and public participation process may be the equivalent of antidegradation or at least of the "practicability" analysis required in newly revised Rule 0400-40-03-.06(1)(b) so that antidegradation need not be considered as part of the ARAP permitting process. That "dodge" has already been rejected by the Sixth Circuit in reviewing Kentucky's antidegradation rule.***

Response. The rules do not propose that "TDOT road location and design criteria and public participation process may be the equivalent of antidegradation." Moreover, the Kentucky rule referred to by the commenter is not the language overturned by the Sixth Circuit. Rather, it appears to be the language adopted in response to the Sixth Circuit remand.

Comment 209. ***The proposed rule does not appear to require application of known effective, existing alternatives in the case of sewer plants, for example. Plant optimization should be, but is not, required as one of alternatives to be evaluated, most likely because TDEC defines "new or increased discharge" to mean that review of discharge levels for existing sewer plants is no longer required. Please clarify the place of such "best practices" in making these determinations.***

Response. The list of potential alternatives listed here is not exhaustive, as demonstrated by the clause "include, but are not limited to." However, wastewater treatment plant optimization for nutrient removal is one of many types of "treatment alternatives to reduce the level of degradation" that should be considered where applicable.

Again, the review of existing discharge levels for sewer plants which maintain existing water quality was never required by the Antidegradation Statement, with the narrow exception of more than *de minimis* degradation of an ETW.

Comment 210. ***The proposed rules are designed to avoid public participation in antidegradation determinations. It appears that the public notice and draft permit may never disclose that an ETW water body has been denied antidegradation protection due to a proffer of the usual and necessary compensatory mitigation.***

Response. It is the intent of the proposed rule, and the practice of TDEC, to identify the antidegradation category of the affected waterbody as provided by Rule 0400-40-03-.06(1)(c). However, while ETW streams are generally identified on the dataviewer before a permit

application is received, wetlands are not generally assessed for ETW status absent a specific proposal. If the proposal is for *de minimis* degradation, then there is no concrete reason to make an ETW determination, so that information may not be available to the permit writer. However, because the ARAP rules require that compensatory mitigation offset the resource loss and account for unusual or high quality waters, this information may be available, in which case TDEC is expected to include that information in the public notice.

The proposed changes are intended to enhance public participation by adding more information on public notice than is currently required.

Rule 0400-40-03-.06(2) Waters With Unavailable Parameters

Comment 211. ***Delete "or" from Rule 0400-40-03.06(2).***

Response. This change has been made.

Comment 212. ***Tennessee uses "fuzzy language" in the Antidegradation section about unavailable parameters.***

Response. The section in question is the provision that water quality for a specific parameter can't be lowered in a stream that is already impaired for that substance. Much of the extra language is an explanation of how this applies specifically to parameters.

Comment 213. ***Commenters request the following change to Rule 0400-40-03-.06(2):***

In waters with unavailable parameters, no discharge will be authorized that increases the instream concentration of the pollutant or pollutants causing the parameter to be unavailable at the point of discharge. ~~Measurable degradation of the parameter that is unavailable shall not be authorized.~~

Response. The existing language will be retained. The rules allow for the application of mixing zones, but in waters with unavailable parameters, there is effectively no mixing zone because there is no available assimilative capacity for the parameter that is unavailable. The current rule reflects the practical limitation that a change in water quality that cannot be measured cannot be regulated.

Comment 214. ***Regarding Rule 0400-40-03-.06(2) Waters with unavailable parameters, it is uncertain whether insertion of the phrase "or even if caused by natural conditions" is intended to be consistent with the provisions of 0400-40-03-.05 Interpretation of Criteria (7) regarding "naturally formed conditions" or how it comports with the definition of pollution in T.C.A. § 69-3-103 (28) "Pollution," or § 69-3-108 (g). This should be clarified.***

Response. This addition was made to clarify that a waterbody may be characterized as having unavailable parameters for purposes of antidegradation review even if that condition is

naturally caused. This situation occurs rarely, but when it does, then the permitting process must account for those conditions consistent with Rule 0400-40-03-.05(7). Pollution as defined in the Act is man-made, a result of an "alteration," but a waterbody can have unavailable parameters for additional degradation even if the condition is not man-made. The Act also prohibits the issuance of permits for an activity that causes pollution either by itself or in combination with others, and the latter can include natural background conditions.

Comment 215. ***Regarding Rule 0400-40-03-.06(2), the commenter believes the inserted phrase "or even if caused by natural conditions" in regard to unavailable conditions is targeted at dischargers in middle Tennessee where streams might have elevated phosphorus levels due to natural geologic formations or low dissolved oxygen levels. Facilities should not be prevented from discharging in these situations.***

Response. The commenter has identified one possible scenario under this provision, but there are others. The Antidegradation Statement does not allow TDEC to authorize additional measurable degradation of unavailable parameters in impaired waters, regardless of the source (natural or manmade) of parameter that is unavailable. This is a basic tenet of EPA's antidegradation rule, and any other approach would ensure federal disapproval.

Comment 216. ***Regarding Rule 0400-40-03-.06(2)(b) This section refers to "new or expanded" water withdrawals. To be consistent with the new language in Rule 0400-40-03-.06(1)(b), the phrase should be "new or increased."***

Response. The Board agrees and will make this change.

Comment 217. ***Regarding Rule 0400-40-03-.06 (2)(c): Where one or more of the parameters comprising the habitat criterion are unavailable, ~~activities~~ habitat alterations that cause ~~additional~~ significant degradation ~~of the unavailable parameter or parameters above the level of de minimis~~ shall not be authorized. (p. 35). We request clarification on what constitutes "significant degradation." <u>Also, we recommend not removing the wording "of the unavailable parameter or parameters."</u> If an applicant is proposing work that impacts a parameter for habitat alteration that is not listed, and yet another habitat alteration parameter is listed that the project would not impact, the applicant should not be required to do in-system mitigation when the particular habitat alteration parameter is not being further degraded.***

Response. No significant degradation includes a proposal that either has so little impact that no mitigation is required or when compensatory mitigation sufficient to ensure no overall net loss of resources values is provided. This term is intended to be commensurate with the definition of no significant degradation in the federal Section 404(b) rules.

With the proposed rule amendments, applicants are not required to provide in-system mitigation in waters with unavailable parameters for habitat, so the proposed rule change will not be made.

Comment 218. ***Regarding Rule 0400-40-03-.06(2)Waters with unavailable parameters, the change in the reference here from "additional degradation" to "significant degradation" (coupled with the other changes to this subparagraph), appear to unjustifiably weaken protections and the prospect for restoration of already impaired (303(d) listed) streams.***

Response. This change is intended to hew Tennessee's Antidegradation Statement more closely to the requirements of federal law. The term "significant degradation" is used instead of the term "de minimis degradation," consistent with long-standing EPA antidegradation guidance.

Rule 0400-40-03-.06(3) Waters With Available Parameters

Comment 219. ***Regarding Rule 0400-40-03.06(3), the commenter recommends adding, "In allowing such degradation or lower water quality, the Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources" either here or in Rule 0400-40-03-.06(1)(a).***

Response. The Board agrees that the proposed language is consistent with 40 C.F.R. § 131.12(2), which applies to waters with available parameters and Exceptional Tennessee Waters. Comparable language will be added to the existing sentence regarding BMPs in Rule 0400-40-03-.06(1)(a) as applied to waters with available parameters and Exceptional Tennessee Waters.

Comment 220. ***Regarding Rule 0400-40-03.06(3)(a), (b), and (c) and in (4)(c) 1 and 2, the commenter suggests the following changes to the sentence: "...if the applicant has demonstrated to the Department that there are no practicable alternatives to prevent or lessen degradation associated with the proposed activity and the degradation..."***

Response. The Board agrees that the proposed language better reflects the language and intent of 40 C.F.R. § 131.12(a)(2)(ii). In particular, the language clarifies that degradation can be reduced, even if not entirely eliminated, through this process and that permit applicants are only responsible for the degradation associated with their proposed activities. The changes have been made.

Comment 221. ***Regarding Rule 0400-40-03.06(3)(a), (b), and (c), and in (4)(c) 1 and 2, the commenter suggests referring to this as "existing uses of the receiving water" rather than "uses existing in the receiving waters" to avoid confusion.***

Response. This language has been included in the Antidegradation Statement through several amendments, and has not caused any more confusion than the proposed language would. The proposed change might imply some change in requirements that does not exist, and will not be adopted. To be clear, however, the term "uses existing in the receiving waters" means, and has always intended to mean, the same thing as "existing uses of the receiving water" as applied in EPA antidegradation rules.

Comment 222. ***Regarding Rule 0400-40-03.06(3)(a), (b), and (c), EPA requests that you add the following sentence to the end of this section - "If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation."***

Response. This comment addresses the conditions for approving additional degradation in waters with available parameters consistent with EPA's revised antidegradation rule, 40 C.F.R. § 131.12(a)(2)(ii), which provides, "When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation." While the Board believes the language proposed in the rulemaking document is just a different way of saying the same thing, the additional sentence will clarify the conditions under which TDEC can issue a permit even if there is a less degrading alternative to the activity proposed by the applicant.

The same change will be made with respect to Exceptional Tennessee Waters, because these waters are equally subject to the provisions of 40 C.F.R. § 131.12(a)(2)(ii).

Comment 223. ***In Rule 0400-40-03-.06(3)(a), the term "practicable" replaces "feasible" and includes the concept of "cost-effective." This is problematic because TDEC staff is not equipped to determine the finances of the applicant and whether the project budget would accommodate a particular option. The applicant can therefore claim that only the option they chose is practicable, and TDEC must take their word for it.***

Response. The definition and application of the term "practicable" comes from EPA's water quality rules, 40 C.F.R. §§ 131.12(a)(2)(ii) and 131.3(n). See prior response regarding TDEC review of an applicant's analysis of alternatives.

Comment 224. ***Regarding Rule 0400-40-03-.06(3) Waters with available parameters, Commenters are concerned about the deletion of the term "feasible" in favor of "practicable." Although "practicable" is usually defined to mean "feasible" (capable of being done) and "usable," it is unclear what change in practice or enforcement is intended.***

Response. The definition of the term 'practicable' comes from EPA's water quality rules, 40 C.F.R. §§ 131.12(a)(2)(ii) and 131.3(n). This is now the applicable standard for antidegradation review, and is not anticipated to result in any significant substantive change from past practices.

Comment 225. ***Regarding Rule 0400-40-03-.06(3)(b) This section refers to "new or expanded" water withdrawals. To be consistent with the new language in Rule 0400-40-03-.06(1)(b), the phrase should be "new or increased."***

Response. The Board agrees and will make this change.

Comment 226. ***Rule 0400-40-03-.06(3)(b) should be revised with added phrases (underlined) so that it would read:***

> ***In water with available parameters, new or increased water withdrawals that would cause degradation above the level of de minimis will only be authorized if the applicant has demonstrated to the Department that there are no <u>reasonably</u> practicable alternatives <u>that entail appreciably less</u> degradation...***

Response. The rule defines practicable alternatives in 0400-40-03-.06(1)(b)(3) as being those that are "technologically possible, able to be put into practice, and economically viable." As stated previously, reasonableness is in the eye of the beholder and the addition of this word would add uncertainty to the definition and could set the stage for endless arguments about what is reasonable. Regarding the second suggestion, according to EPA rules, if an alternative is practicable and less degrading, it must be chosen. The Board does not believe that EPA would approve this revision as suggested and will not adopt it.

Comment 227. ***We believe that TDEC should consider adding mitigation methods whereby a proposed new or increased ARAP water withdrawer can have its degradation status reduced to de minimis up front by use of off-setting gains to the resource in other ways, even if a water withdrawal under a properly conditioned permit typically does not result in appreciable permanent loss of resource values. Other than reducing a proposed withdrawal to 5% or less of the stream's 7Q10 low flow (a very strict standard for what is de minimis), or adding new compensating water flows to the stream from some other source, typically no realistic avenue exists for water withdrawers to use up-front mitigation for this purpose as is available to ARAP applicants proposing habitat alterations.***

Response: The water quality standards apply different definitions of *de minimis* degradation for water withdrawals and habitat alterations because the former can be easily evaluated numerically. The case law affirms the same numeric limitations for NPDES permits for discharges, so the standard is well-supported as constituting *de minimis* degradation. The addition of water upstream could result in *de minimis* degradation as defined in these rules, but it is otherwise difficult to conceive of potential mitigation measures to offset impacts of water withdrawals.

Comment 228. ***Regarding Rule 0400-40-03-.06(3)(c) - Determination of Economic / Social Necessity. Inasmuch as the proposed regulations add two new requirements, namely that (1) the degradation be above "de minimis" (which has been changed to potentially grandfather existing discharges, and allow for mitigation in the case of habitat alterations), and (2) the determinations are required only in the case of "new or increased" discharges (with the effect of potentially grandfathering in existing pollution levels), the existing regulation is substantially vitiated. Please clarify whether this was***

the intended result and how regulated entities and the public will be able to have such determinations reviewed.

Response. The commenter incorrectly states the existing version of this rule: that rule excludes new or increased discharges from repeated antidegradation review and does not require antidegradation review for habitat alterations resulting in *de minimis* degradation, which could be achieved through in-system mitigation. The determinations regarding whether a discharge is "new or increased" and whether an activity causes only *de minimis* degradation as defined and provided-for by these proposed rules are reviewable through permit appeals.

Comment 229. ***Some of the changes, however, are confusing and we request that you confirm our reading of the proposed changes or clarify the final rule. It appears from the proposal a habitat alteration in a waterbody with unavailable parameters for habitat would result in "no significant degradation" where mitigation is sufficient to ensure no overall net loss of resource values. If in-system mitigation occurs, then the habitat alteration would be considered "de minimis." Please confirm whether this understanding is correct. In either case, as long as "significant degradation" would not be occurring, then Rule 0400-40-03-.06(2)(c) would allow the project to be authorized in waters with unavailable parameters. The commenter supports such approach.***

Response. The commenter is correct: the distinction between *de minimis* degradation and no significant degradation is that the former requires that any required mitigation be provided "in-system," while the latter does not. Please note that TDEC retains the authority to decide whether mitigation is sufficient to result in no significant degradation.

Rule 0400-40-03-.06(4) Exceptional Tennessee Waters

Comment 230. ***Regarding Rule 0400-40-03.06(4)(c)1 and 2, the commenter recommends adding, "In allowing such degradation or lower water quality, the Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost effective and reasonable best management practices for sources exempted from permit requirements under the Water Quality Control Act."***

Response. We agree that the proposed language is consistent with 40 C.F.R. § 131.12(2), which applies to Tier 2 waters. In Tennessee, this also applies to ETWs, which are effectively Tier 2.5 waters. Comparable language will be added to the existing sentence regarding BMPs in Rule 0400-40-03-.06(1)(a) as applied to Tier 2 and Tier 2.5 waters. Because the current final sentence of Rule 0400-40-03-.06(4)(c)1 is redundant, it will deleted.

Comment 231. ***The rules should not use the term "alternatives analysis" to make it clear that the analysis required by the Antidegradation Statement is distinct from that required in other programs, such as the National Environmental Policy Act and CWA section 404 permitting.***

Response. This change will be made to Rules 0400-40-03-.06(4)(c)1 and (5)(b) to be consistent with EPA's antidegradation rule.

Comment 232. ***EPA Antidegradation regulations are clear that for Exceptional Tennessee Waters (ETW) the antidegradation determination as to alternatives including alternative sites and designs for an activity and the finding as to whether or not a proposed activity is "necessary to accommodate important economic or social development in the area in which the waters are located" must precede any consideration of mitigation.***

Response. EPA Antidegradation regulations do not address Exceptional Tennessee Waters. ETWs fall within what is informally referred to as "Tier 2.5," an optional more protective provision than the "Tier 2" provisions required by EPA. The commenter is correct that a determination of alternatives and necessity is typically required for Tier 2 waters. Nowhere does EPA's antidegradation rule require that these Tier 2 determinations precede any consideration of mitigation. Moreover, the availability of a *de minimis* exception to such review has been confirmed by both EPA and the courts.

Comment 233. ***There is no regulatory provision for staying either the issuance of a permit (as is now authorized for antidegradation) or of staying or otherwise suspending the use of a permit once issued based upon the pendency of an administrative appeal. This will lead to litigation.***

Response. The commenter is correct that there is no regulatory provision to stay the issuance of a permit or for staying the effectiveness of a permit after it has been issued, except by going to court. The Tennessee Supreme Court addressed this issue in the *Pickard* case, noting that the Act does not provide the Board with the authority to stay a permit. The Tennessee General Assembly has not changed the underlying statute, so the Board is not empowered to create a permit stay by rule.

Comment 234. ***Should a permit applicant seeking to degrade Exceptional Tennessee Waters have to face an antidegradation determination, the proposed regulation now explicitly states that the initial notice will contain only a "preliminary determination" and a later "final determination," i.e. a revised final permit different from the draft permit. The proposed revision to ARAP rule 0400-40-07-.04(5)(c) would allow TDOT or another government agency that desires to quash any question of antidegradation can find some additional mitigation which it can assert makes a project or activity "de minimis" or less in impact.***

Response. The intent behind the language "preliminary" and "final" determination is simply to acknowledge that TDEC will review and address comments received during the public comment period. This may result in a change between a draft and final permit, and that is entirely appropriate and consistent with the purpose and intent of holding a public comment period. The Act expressly addresses this situation, and authorizes TDEC to make material

changes between a draft and a final permit, provided that such changes are subject to appeal by third persons even though no comments could have been received. T.C.A. § 69-3-105(i).

If a permit applicant or qualified third party disagrees with the TDEC's determination of whether a particular activity constitutes *de minimis* degradation *as defined and provided for by the Board's rules*, they may challenge that determination through a permit appeal.

Comment 235. ***Regarding Rule 0400-40-03-.06(4)(c)2, this section refers to "new or expanded" water withdrawals. To be consistent with the new language in Rule 0400-40-03-.06(1)(b), the phrase should be "new or increased."***

Response. Rule 0400-40-03-.06(4)(c)2 already refers to "new or increased" water withdrawals. This language will be retained.

Comment 236. ***In Rule 0400-40-03-.06(4)(d), in order to be consistent with changes made elsewhere in the Rule, this section should refer to "important economic <u>or</u> social development" rather than economic <u>and</u> social development.***

Response. The Board agrees and will make this revision.

Rule 0400-40-03-.06(5): Antidegradation: ONRWs

Comment 237. ***In Rule 0400-40-03-.06(5)(a)7, this section refers to the Cumberland Plateau Regional Water Authority. We are not aware of any activities of this entity recently. If this entity no longer exists, this reference should be removed.***

Response. TDEC researched this comment. The entity was formed by private act, but we have been unable to confirm its status. The current language will be retained in this rulemaking, and the matter will be revisited in the next triennial review.

Comment 238. ***Rule 0400-40-03-.06(5)(b)2 does not clearly conform with earlier statements that exempted ONRWs from the new definition of "de minimis." This statement would allow degradation at the same level as other streams. It is not clear whether the term "waterbodies" refers to each of the various tributaries within an ONRW or to the ONRW as a whole. The degradation of these ONRWs is further complicated by the fact that this protection does not apply upstream of the designated ONRW segments, which is particularly relevant to the Big South Fork, Obed, and Reelfoot.***

Response. The definition of *de minimis* degradation has a specific provision for ONRWs, requiring that any mitigation occur both within the ONRW and that it occur in-system. This definition applies as used in Rule 0400-40-03-.06(5).

ONRWs are established and defined by the Board through rule. The rule does not include tributaries of the listed waterbodies. However, the Reelfoot Lake designation includes its associated wetlands.

If a habitat alteration upstream of an ONRW degrades that ONRW, then compensatory mitigation must occur within the ONRW.

Other

Comment 239. ***Since most all waters of the State are also waters of the U.S., I am confused regarding how changes to the rules are not contrary to CWA Section 404(b)(1) guidelines requiring that avoidance must be considered first, minimization second and only then, mitigation.***

Response. These rules do not supersede or substitute for the 404(b) rules. If a proposal affects waters of the United States and is otherwise subject to the Section 404 permit requirement, then the applicant must obtain that permit from the U.S. Army Corps of Engineers in accordance with the 404(b) rules. Tennessee rules do not alter or affect that requirement.

Comment 240. ***The proposed rule changes state that impacts are to be considered de minimis with regard to "degradation" if mitigation is proposed by the applicant to be provided "in system." While this change would seemingly apply to Clean Water Act Section 402, it does not appear to apply to evaluating dredge or fill physical impacts subject to Section 404 of the Clean Water Act. Does allowing the consideration of mitigation in making a de minimis impact determination under the antidegradation rule before considering whether the proposed project meets the requirements of the ARAP Rule comport with the sequencing requirements Section 404 permit?***

Response. These rules do not alter or affect requirements imposed separately under Section 404 of the Clean Water Act or the 404(b) rules promulgated thereunder.

Comment 241. ***The draft regulation fails to acknowledge the EPA rules governing stream and wetland protection under Clean Water Act Section 404.***

Response. These rules do not alter or affect requirements imposed separately under Section 404 of the Clean Water Act or the 404(b) rules promulgated thereunder.

Comment 242. ***Please clarify how the changes in the proposed regulations can be reconciled with the obligations and procedures in the General Wetland Banking Memorandum of Agreement dated June 12, 1995 (the "1995 MOA"), as well as in the prior agreement it references, the "Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning***

determination of mitigation under the Clean Water Act, Section 404 (b)(1) Guidelines, 1990."

Response. The "1995 MOA" was supplanted with the promulgation of the 2008 mitigation rules. Those rules established the Interagency Review Team (IRT) which oversees third party mitigation banking. As to the MOA between the Army and EPA it is not clear that it is still in effect, and even if it is, it only applies to the relationship between those parties which signed it of which TDEC was not a signatory.

Comment 243. ***Under the proposed rule language, potential "new" habitat alterations requested by permit can also come in many forms, from the building of an impoundment to the straightening, fill, or other alteration of a stream channel. In applying the new rule language, could TDEC determine that a new proposed impoundment, causing "habitat alteration," results in "de minimis" degradation so long as some other stream channels somewhere in the HUC 8 watershed are restored or enhanced?***

Response. Regardless of the type of habitat alteration, TDEC cannot issue a permit if the impact's appreciable and permanent resource value loss cannot be offset through compensatory mitigation. Many impoundments are simply not eligible for permitting because they would cause permanent resource loss that cannot be compensated for through traditional compensatory mitigation. While it is possible that on-site mitigation could be provided to offset the loss of resource values caused by an impoundment, it is difficult to foresee a situation in which off-site mitigation for an impoundment would be permitted, much less count as *de minimis* degradation.

Comment 244. ***Because TDEC proposes to rely so heavily on mitigation throughout the proposed rules (including those for ARAPs), any such reliance must be demonstrated to be effective. Commenters would support a thorough and objective survey of the effectiveness and longevity of mitigation measures already approved throughout the State, taking into account all the factors relevant thereto, including the potential for "remedy failure" and financial assurance therefor. Commenters would be ready to assist TDEC in scoping and implementing such a survey.***

Response. This comment does not address a specific rule, or proposed rule change. The Board appreciates the recommendation of a study of mitigation.

Comment 245. ***Please clarify how citizens may challenge the decisions of interagency review teams (IRTs) with respect to antidegradation decisions in particular, and their relationships to citizens' rights under CWA Section 505.***

Response. This comment is not directed at this rulemaking. Moreover, the interagency review team (IRT) does not make antidegradation determinations. Those determinations are made by TDEC and subject to permit appeals, and for determinations of economic or social necessity of more than *de minimis* degradation of an ETW, through a petition for declaratory order.

Rule Chapters 0400-40-03 and 0400-40-04

2018 Amendments – Appendix 1

T.C.A. § 4-5-205(b) Concise Statement of

Principal Reasons for Rulemaking

Rule 0400-40-03-.01 Tennessee Board of Water Quality, Oil and Gas. This rule is unchanged.

Rule 0400-40-03-.02 General Considerations. This rule is amended to clarify that best available technology does not apply to all point source categories as the previous rule incorrectly suggested. The rule adds several models to the methods that can be used for site-specific criteria studies.

Rule 0400-40-03-.03 Criteria for Water Uses.

(1) Domestic Water Supply. This paragraph is amended to clarify the units applicable to E. coli criteria, which had previously been omitted. It is also updated to add new criteria.

(2) Industrial Water Supply. This paragraph is unchanged.

(3) Fish and Aquatic Life. This paragraph adds revised criteria for several pollutants for which EPA has updated its national recommendations. Primary among these are ammonia and selenium. EPA's ammonia criteria were developed to be protective of mussels, which are present throughout Tennessee waters. EPA's selenium criteria allow use of water column values or fish tissue values. Because not all classified waters have fish (especially headwaters), and due to the logistical difficulty and expense of conducting fish tissue studies, that approach is added as an option, but not a requirement, for assessment.

(4) Recreation. The primary revision to this paragraph is to update the toxic equivalency factors for dioxins. Determinations concerning EPA's updated recommended human health criteria are deferred for further consideration in light of pending litigation elsewhere and the decision by other states in Region 4 to defer adoption of these criteria.

(5) Irrigation. This paragraph is unchanged.

(6) Livestock Watering and Wildlife. This paragraph is unchanged.

Rule 0400-40-03-.04 Definitions. This rule is amended to define terms that have been used elsewhere in the rules, but had not previously been defined. These additional definitions are intended to improve transparency and avoid ambiguity, and include in-system mitigation, domestic wastewater discharge, and new or increased discharge. The rule also defines new

terms added in this rulemaking to other portions of this chapter, including lentic, lotic, minimum level, resource values, and significant degradation.

Rule 0400-40-03-.05 Interpretation of Criteria. Paragraph (2) is updated to clarify the conditions that are allowed within mixing zones, and to ensure that mixing zones cannot be applied to the discharge of bioaccumulative pollutants where the risk-based factors necessary to issue a fish consumption advisory are exceeded for those pollutants, which are identified with a (b) in the criteria tables.

Paragraph (3) is added in response to EPA requirements that allow compliance schedules for water quality only where state criteria expressly allow them. This provision is intended to allow dischargers adequate time to come into compliance with new standards.

Paragraph (4) is amended to clarify that the different flow levels are used for permitting purposes, not assessment purposes.

Paragraph (5) is amended to identify what is meant by the term, "condition of impairment," and to clarify that this does not apply to single event exceedances.

Paragraph (7) is amended to clarify that even if pathogens are elevated due to natural conditions, this elevation could constitute impairment and to give several examples of naturally-formed conditions.

Paragraph (8) is updated to refer to EPA's sufficiently sensitive reporting levels rather than listing the required reporting levels in the rule.

Rule 0400-40-03-.06 Antidegradation Statement.

(1) General. This paragraph is amended to delete an incorrect statement that degradation of high quality waters is not permitted: such degradation (but not pollution) is and has been allowed through application of the procedures of the Antidegradation Statement or where the Antidegradation Statement does not apply. The paragraph also includes revisions applicable to waters with available parameters and Exceptional Tennessee Waters as required by 40 C.F.R. § 131.12(a)(2) for Tier 2 waters. The paragraph is also updated to clarify – consistent with EPA rules and Tennessee's long-standing application of the Antidegradation Statement – that antidegradation review only applies to new or expanded impacts to waters. The paragraph refines the description of a complete application consistent with EPA antidegradation policy. The rule eliminates reference to outdated EPA forms for economic and social necessity because they were not applicable to many activities, and replaces a requirement for the applicant to provide specific information to the division. The paragraph updates the public notice process for discharge permits so that there is only one notice and comment period, consistent with the pre-existing requirements for ARAPs. The new rule also provides that the division should include its preliminary determination of the level of degradation in the public notice so the public is more informed.

(2) Waters with unavailable parameters. This paragraph is amended to be consistent with EPA's long-standing guidance with respect to habitat alterations, including wetland fills, in Tier 1 waters. Specifically, EPA interprets antidegradation requirements as being satisfied in this situation so long as there is no significant degradation.

(3) Waters with available parameters. This paragraph is amended to reflect updates in EPA's antidegradation rule.

(4) Exceptional Tennessee Waters. This paragraph is amended to reflect updates in EPA's antidegradation rule. It is also amended to clarify that wet weather conveyances cannot constitute ETWs. The procedures are amended to eliminate confusion about how the ETW process correlates with the public notice and comment procedures of paragraph (1)(c) of this rule.

(5) Outstanding National Resource Waters. This paragraph is edited slightly to use terminology consistent with that used other places in the Antidegradation Statement.

Rule Chapter 0400-40-04. This chapter was opened for public review as required by the Clean Water Act and EPA rules. The only change made to this chapter was to identify Buffalo Creek and Toll Branch as a naturally reproducing trout streams in the Watauga River watershed (Rule 0400-40-04-.11).

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

(1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

TDEC receives applications for individual water quality permits, and coverage under general permits, from thousands of applicants. Many of these permittees are small businesses, including property developers, construction companies, and others. Currently, there are approximately 2,400 aquatic resource alteration permit (ARAP) files that are active or for which complete applications have been received. In addition, there are 1,228 individual discharge permits, including 364 with ammonia limits and 83 with selenium limits. These water quality standards could affect the terms and conditions of these permits. However, overall the impacts are expected to be modest.

(2) The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

This rulemaking does not change preexisting reporting, recordkeeping, or other administrative requirements for compliance, with one exception. The rules will eliminate the requirement in Rule 0400-40-03-.06(1)(b)3 of the Antidegradation Statement to utilize outdated, complicated EPA forms to demonstrate a permit applicant's claim of economic or social necessity to degrade water quality. It is believed that this will make it easier for applicants for individual permits to comply with antidegradation review requirements.

(3) A statement of the probable effect on impacted small businesses and consumers.

Overall, the impact of this rulemaking on small businesses and consumers is expected to be minimal. Some small businesses may incur additional costs to treat their wastewater to remove additional ammonia or selenium, though this number is expected to be fairly small and the rules provide for a compliance schedule to allow sufficient time to comply with any new permit limits.

Other small businesses, including construction companies or real estate developers, might benefit from streamlined antidegradation review for ARAPs. In particular, under the previous rules, ARAPs for habitat alterations in waters with habitat impairment could only be issued if they involved very minimal impacts or if any required mitigation was provided in-system. Under the rule revisions, mitigation would not be required to be provided in-system. This change is consistent with long-standing EPA guidance that impaired waters receive the lowest level of protection under antidegradation review, and that habitat alterations satisfy antidegradation requirements so long as there is no significant degradation.

(4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

These rules are designed to comply with requirements of the federal Clean Water Act and EPA rules in a reasonable and cost-effective manner consistent with protecting water quality. The most significant concern that was expressed from the business community during the comment period was its opposition to adopting EPA's national recommended water quality criteria for public health without additional evaluation. In response to those comments, TDEC postponed recommendation of adoption of those standards pending further review.

(5) A comparison of the proposed rule with any federal or state counterparts.

These rules are based on the requirements of the federal Clean Water Act and EPA rules, which require states to promulgate water quality standards to include classified uses, water quality criteria, and an

antidegradation statement. One reason TDEC has elected to postpone recommendation of adoption of the new recommended human health criteria is that other neighboring states are doing the same.

(6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Exemptions for small businesses are not authorized by the federal Clean Water Act or the Tennessee Water Quality Control Act of 1977. Anyone conducting regulated activities is subject to the applicable permitting requirements.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

These rules will impact those local governments that require permits to discharge pollutants, withdraw water, or alter aquatic habitat because the rules establish water quality criteria that potentially affect those permits. In particular, local governments that operate publicly-owned treatment works may be subject to ammonia limits, which may become more stringent, depending on the volume of the effluent, and the flow and quality of water in the receiving stream.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This rulemaking updates Rule Chapters 0400-40-03 (General Water Quality Criteria) and 0400-40-04 (Use Classifications for Surface Waters).

Pursuant to the federal Clean Water Act, states are required to review their water quality standards at least once every three years, including a review of EPA's new recommended water quality criteria. EPA recently published extensive changes to its criteria. The Board made all revisions required by EPA to be consistent with applicable requirements of the Clean Water Act and EPA rules. At the request of the regulated community and other stakeholders, the Board retained the current human health criteria rather than adopt EPA's updated recommended criteria at this time. TDEC and several other Region 4 states have postponed adoption of these recommended criteria for further evaluation. In addition, in response to comments, the Board chose to retain the current narrative nutrient criterion for fish and aquatic life rather than adopt a revised criterion as had been proposed.

The proposed rules also make revisions to the Antidegradation Statement as applied to aquatic resource alterations, including a clarification that, consistent with EPA rules and Tennessee's long-standing application of the Antidegradation Statement, antidegradation review only applies to new or expanded impacts to waters. In addition, changes were made to provisions on waters with unavailable parameters, waters with available parameters, Exceptional Tennessee Waters, and Outstanding National Resource Waters to provide more consistency with EPA's antidegradation rule (updated in 2015) and the Corps of Engineers standards for Section 404 permits.

Additional definitions were added to improve transparency and avoid ambiguity. They include definitions of terms previously used but undefined and new terms added in this rulemaking. The proposed rules also update the public notice process to streamline the notice and comment period for discharge permits.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

Section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), and EPA regulations, 40 C.F.R. § 131.20, require states to conduct a review of water quality standards, including public hearings on the subject, at least once every three years.

T.C.A. § 69-3-105(a) – (e) establish the duty of the Board of Water Quality, Oil and Gas to promulgate water quality standards and to review these standards periodically.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Water quality standards affect permits for pollutant discharges, water withdrawals, and habitat alterations statewide, in addition to watershed planning. Accordingly, there are a wide range of persons potentially affected by this rulemaking, including permittees and members of the public who use Tennessee waters.

The regulated community has generally expressed support for this rulemaking, but asked for a decision to adopt EPA's 2015 human health criteria to be deferred until there could be further study. The adoption of these criteria has been deferred.

Some nongovernmental organizations have expressed opposition to amendments to the Antidegradation Statement because they would like it to be more stringent and to focus on restoring polluted waters. Some have incorrectly asserted these changes would allow pollution. The response to comments explains, with citations to legal authority, that state and federal antidegradation policy has always had the purpose of maintaining, not

restoring, water quality. Moreover, pursuant to T.C.A. § 69-3-108(g), the Department does not issue permits for activities that cause pollution.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

While there are attorney general opinions discussing the state's water quality standards and antidegradation review, the department is not aware of any AG opinions or judicial rulings directly related to this rulemaking at this time.

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

This rulemaking is not expected to affect state or local revenues. With respect to expenditures, there may be a small increase in costs for treatment to remove ammonia at four state-owned facilities and fourteen local government facilities. All of these facilities already have strict ammonia limits and the treatment equipment required to remove ammonia, so the expected impact would be a modest increase in operating expenses.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Jennifer Dodd, Director, Division of Water Resources
Stephanie Durman, Assistant General Counsel, Office of General Counsel

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Mallorie Kerby
Assistant General Counsel
Office of General Counsel

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Office of General Counsel
Tennessee Department of Environment and Conservation
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, Tennessee 37243
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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

The Board of Water Quality, Oil and Gas is not aware of any requests.

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For Department of State Use Only

Sequence Number: 06-18-19
Rule ID(s): 9043-9044
File Date: 6/13/19
Effective Date: 9/11/19

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Board of Water Quality, Oil and Gas
Division:	Water Resources
Contact Person:	Gregory Denton
Address:	William R. Snodgrass Tennessee Tower 312 Rosa L. Parks Avenue, 11th Floor Nashville, Tennessee
Zip:	37243
Phone:	(615) 532-0699
Email:	Gregory.Denton@tn.gov

Revision Type (check all that apply):

X Amendment
___ New
___ Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0400-40-03	General Water Quality Criteria
Rule Number	**Rule Title**
0400-40-03-.01	Tennessee Board of Water Quality, Oil and Gas
0400-40-03-.02	General Considerations
0400-40-03-.03	Criteria for Water Uses
0400-40-03-.04	Definitions
0400-40-03-.05	Interpretation of Criteria
0400-40-03-.06	Antidegradation Statement

Chapter Number	**Chapter Title**
0400-40-04	Use Classifications For Surface Waters
Rule Number	**Rule Title**
0400-40-04-.01	Memphis Area Basin
0400-40-04-.02	Hatchie River Basin
0400-40-04-.03	Obion-Forked Deer Basin

0400-40-04-.04	Tennessee River Basin – Western Valley
0400-40-04-.05	Duck River Basin
0400-40-04-.06	Elk River Basin (including Shoal Creek)
0400-40-04-.07	Lower Tennessee River Basin (including Conasauga Basin)
0400-40-04-.08	Upper Tennessee River Basin
0400-40-04-.09	Clinch River Basin
0400-40-04-.10	French Broad River Basin
0400-40-04-.11	Holston River Basin
0400-40-04-.12	Lower Cumberland River Basin
0400-40-04-.13	Upper Cumberland River Basin
0400-40-04-.14	Barren River Basin

Place substance of rules and other info here. Please be sure to include a detailed explanation of the changes being made to the listed rule(s). Statutory authority must be given for each rule change. For information on formatting rules go to http://sos-tn-gov-files.s3.amazonaws.com/forms/Rulemaking%20Guidelines_September2016.pdf.

Chapter 0400-40-03
·General Water Quality Criteria

Amendments

Rule 0400-40-03-.01 Tennessee Board of Water Quality, Oil and Gas is amended by deleting it in its entirety and substituting instead the following:

0400-40-03-.01 Tennessee Board of Water Quality, Oil and Gas

The Water Quality Control Act, T.C.A., § 69-3-101, et seq., makes it the duty of the Board of Water Quality, Oil and Gas to study and investigate all problems concerned with the pollution of the ~~Waters~~ waters of the ~~State~~ state and with its prevention, abatement, and control; and to establish such standards of quality for any ~~Waters~~ waters of the ~~State~~ state in relation to their reasonable and necessary use as the Board shall deem to be in the public interest; and establish general policies relating to pollution as the Board shall deem necessary to accomplish the purposes of the Act. The following general considerations and criteria shall be used to determine the permissible conditions of waters with respect to pollution and preventative or corrective measures required to control pollution in various waters or in different sections of the same waters.

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

Rule 0400-40-03-.02 General Considerations is amended by deleting it in its entirety and substituting instead the following:

(1) Tennessee water quality standards shall consist of the General Water Quality Criteria and the Antidegradation Statement found in Chapter 0400-40-03, and the Use Classifications for Surface Waters found in Chapter 0400-40-04.

(2) Waters have many uses which in the public interest are reasonable and necessary. Such uses include: sources of water supply for domestic and industrial purposes; propagation and maintenance of fish and other aquatic life; recreation in and on the waters including the safe consumption of fish and shellfish; livestock watering and irrigation; navigation; generation of power; propagation and maintenance of wildlife; and the enjoyment of scenic and aesthetic qualities of waters.

(3) The rigid application of uniform water quality is not desirable or reasonable because of the varying uses of such waters. The assimilative capacity of a stream for sewage and waste varies depending upon various factors and including the following: volume of flow, depth of channel, the presence of falls or rapids, rate of flow, temperature, natural characteristics, and the nature of the stream.

(4) In order to permit the reasonable and necessary uses of the ~~Waters of the State~~ waters of the state, existing pollution should be corrected as rapidly as practicable, and future pollution prevented through the ~~best available technology economically achievable~~ level of treatment technology applicable to a specific source or that greater level of technology necessary to meet water quality standards; i.e., modeling and stream survey assessments, treatment plants or other control measures.

(5) Since all ~~Waters of the State~~ streams are classified for more than one use, the most stringent criteria will be applicable. ~~In cases where criteria for protection of more than one use apply at different stream flows (e.g., aquatic life versus recreation), the most protective will also be applicable.~~

(6) Waters identified as wet weather conveyances according to the definition found in Rule 0400-40-03-.04, shall be protective of humans and wildlife that may come in contact with them and shall not adversely affect the quality of downstream waters. Applicable water quality standards will be maintained downstream of wet weather conveyances.

(7) Where general water quality criteria are applied on a regional, ecoregional, or subecoregional basis, these criteria will be considered to apply to a stream if eighty percent (80%) of its watershed or catchment is contained within the unit upon which the criterion is based.

(8) All fish and aquatic life metals criteria are expressed as total recoverable, except cadmium, copper, lead, nickel, silver, and zinc which are expressed as dissolved. Translators will be used to convert the dissolved fraction into a total recoverable permit limit. One of three approaches to metals translation will be used: (1) translator is the same as the conversion factor, (2) translator is based on relationships derived from STORET data, (3) a site-specific translator is developed. Where available, a site-specific translator is preferred. For assessing whether criteria for cadmium, copper, lead, nickel, silver, and zinc are exceeded by ambient water quality conditions, the dissolved criteria will also be translated in order to allow direct comparison to the ambient data, if total recoverable. The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit From a Dissolved Criteria (EPA-823-B-96-007) may be referenced in applying this provision.

(9) Site-specific numeric criteria studies may be conducted on any appropriate fish and aquatic life ~~criteria~~ criterion.

(a) Site-specific criteria studies based on a Water Effects Ratio (WER) calculated from the documented toxicity of a parameter in the stream in which it will be introduced may supersede the adopted criteria at a site. The Division shall approve a site-specific ~~criteria~~ criterion for metals developed by others provided that the WER methodology [Interim Guidance on Determination and Use of Water-effect Ratios for Metals (EPA-823-B-94-001)] or the Streamlined Water-effects Ratio Procedure for Discharges of Copper (EPA-822-R-01-001) is used, both the study plan and results are approved by the Department, and the U.S. Environmental Protection Agency (EPA) has concurred with the final site specific criterion value(s).

(b) Any site specific criterion for other toxics based on methodologies other than the above-listed methodologies ~~WER methodology~~ which recalculate specific criterion, such as the Resident Species Method or the Recalculation Method or the Biotic Ligand Model (BLM) for copper, must be adopted as a revision to Tennessee water quality standards into this ~~Chapter~~ chapter, and following EPA approval, can be used for Clean Water Act purposes.

References on this subject include, but are not limited to: Technical Support Document for Water Quality-based Toxics Control (EPA - 505/2-90-001); Technical Guidance Manual for Performing Waste Load Allocations: Book VIII (EPA/600/6-85/002a/002b/002c); MinteqA2, An Equilibrium Metal Speciation Model (EPA/600/3-87/012); Water Quality Standards Handbook, Second Edition (EPA-823-B-93-002); ~~The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit From a Dissolved Criteria (EPA-823-B-96-007);~~ Interim Guidance on Determination and Use of Water-effect Ratios for Metals (EPA-823-B-94-001).

(10) Interpretation and application of narrative criteria shall be based on available scientific literature and EPA guidance and regulations.

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

Rule 0400-40-03-.03 Criteria for Water Uses is amended by deleting it in its entirety and substituting instead the following:

(1) The criteria for the use of Domestic Water Supply are the following.

(a) Dissolved Oxygen - There shall always be sufficient dissolved oxygen present to prevent odors of decomposition and other offensive conditions.

(b) pH - The pH value shall lie within the range of 6.0 to 9.0 and shall not fluctuate more than 1.0 unit in this range over a period of 24 hours.

(c) Hardness or Mineral Compounds - The hardness of or the mineral compounds contained in the water shall not appreciably impair the usefulness of the water as a source of domestic water

supply.

(d) Total Dissolved Solids - The total dissolved solids shall at no time exceed 500 mg/l.

(e) Solids, Floating Materials, and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits, or sludge banks of such size or character as may impair the usefulness of the water as a source of domestic water supply.

(f) Turbidity or Color - There shall be no turbidity or color in amounts or characteristics that cannot be reduced to acceptable concentrations by conventional water treatment processes (See definition).

(g) Temperature - The maximum water temperature change shall not exceed 3°C relative to an upstream control point. The temperature of the water shall not exceed 30.5°C and the maximum rate of change shall not exceed 2°C per hour. The temperature of impoundments where stratification occurs will be measured at a depth of ~~5~~ five feet or mid-depth, whichever is less, and the temperature in flowing streams shall be measured at mid-depth.

(h) Coliform - The concentration of the E. coli group shall not exceed 630 colony forming units (cfu) per 100 ml as a geometric mean based on a minimum of ~~5~~ five samples collected from a given sampling site over a period of not more than 30 consecutive days with individual samples being collected at intervals of not less than 12 hours. For the purpose of determining the geometric mean, individual samples having an E. coli group concentration of less than 1 cfu per 100 ml shall be considered as having a concentration of 1 cfu per 100 ml.

(i) Taste or Odor - The waters shall not contain substances which will result in taste or odor that prevent the production of potable water by conventional water treatment processes.

(j) Toxic Substances - The waters shall not contain toxic substances, whether alone or in combination with other substances, which will produce toxic conditions that materially affect the health and safety of man or animals, or impair the safety of conventionally treated water supplies. Available references include, but are not limited to: Quality Criteria for Water (Section 304(a) of Public Law 92-500 as amended); Federal Regulations under Section 307 of Public Law 92-500 as amended; and Federal Regulations under Section 1412 of the Public Health Service Act as amended by the Safe Drinking Water Act, (Public Law 93-523). ~~Limits set for some of the most commonly occurring toxic substances are as follows:~~ In addition, the following numeric criteria are for the protection of domestic water supply:

Compound	Criteria (µg/L)	Compound	Criteria (µg/L)
Antimony	6	Diquat	20
Arsenic	10	Endothall	100
Beryllium	4	Glyphosate	700
Barium	2000	Hexachlorobenzene	1
Cadmium	5	Hexachlorocyclopentadiene	50
Chromium, total	100	Oxamyl (Vydate)	200
Lead	5	Picloram	500
Cyanide (as free cyanide)	200	Simazine	4
Mercury	2	2,3,7,8 TCDD (Dioxin)	0.00003
Nickel	100	Benzene	5
Selenium	50	Carbon tetrachloride	5
Thallium	2	1,2-Dichloroethane	5
Alachlor	2	1,1-Dichloroethylene	7
Atrazine	3	1,1,1-Trichloroethane	200
Carbofuran	40	Trichloroethylene	5
Chlordane	2	Vinyl chloride	2
Dibromo chloropropane	0.2	para-Dichlorobenzene	75

Compound	Criteria (µg/L)	Compound	Criteria (µg/L)
2,4 Dichlorophenoxyacetic Acid	70	cis 1,2-Dichloroethylene	70
Ethylene dibromide	0.05	1,2-Dichloropropane	5
Heptachlor	0.4	Ethyl benzene	700
Heptachlor epoxide	0.2	Monochlorobenzene	100
Lindane	0.2	ortho-Dichlorobenzene	600
Methoxychlor	40	Styrene	100
Polychlorinated biphenyls	0.5	Tetrachloroethylene	5
2,4,5 Trichlorophenoxyprioponic acid	50	Toluene	1000
Pentachlorophenol	1	trans 1,2-Dichloroethylene	100
Benzo(a)pyrene	0.2	Xylenes, total	10000
Chlorobenzene	100	Dichloromethane	5
Dalapon	200	1,2,4-Trichlorobenzene	70
Di(2-ethylhexyl) adipate	400	1,1,2-Trichloroethane	5
Di(2-ethylhexyl) phthalate	6	Endrin	2.0
Dinoseb	7	Toxaphene	3
		Nitrate	10000
		Nitrite	1000

(k) Other Pollutants - The waters shall not contain other pollutants in quantities that may be detrimental to public health or impair the usefulness of the water as a source of domestic water supply.

(2) The criteria for the use of Industrial Water Supply are the following.

(a) Dissolved Oxygen - There shall always be sufficient dissolved oxygen present to prevent odors of decomposition and other offensive conditions.

(b) pH - The pH value shall lie within the range of 6.0 to 9.0 and shall not fluctuate more than 1.0 unit in this range over a period of 24 hours.

(c) Hardness or Mineral Compounds - The hardness of or the mineral compounds contained in the water shall not appreciably impair the usefulness of the water as a source of industrial water supply.

(d) Total Dissolved Solids - The total dissolved solids shall at no time exceed 500 mg/l.

(e) Solids, Floating Materials, and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits, or sludge banks of such size or character as may impair the usefulness of the water as a source of industrial water supply.

(f) Turbidity or Color - There shall be no turbidity or color in amounts or characteristics that cannot be reduced to acceptable concentrations by conventional water treatment processes.

(g) Temperature - The maximum water temperature change shall not exceed 3°C relative to an upstream control point. The temperature of the water shall not exceed 30.5°C and the maximum rate of change shall not exceed 2°C per hour. The temperature of impoundments where stratification occurs will be measured at a depth of ~~5~~ five feet or mid- depth, whichever is less, and the temperature in flowing streams shall be measured at mid-depth.

(h) Taste or Odor - The waters shall not contain substances which will result in taste or odor that would prevent the use of the water for industrial processing.

(i) Toxic Substances - The waters shall not contain toxic substances whether alone or in combination with other substances, which will adversely affect industrial processing.

(j) Other Pollutants - The waters shall not contain other pollutants in quantities that may adversely affect the water for industrial processing.

(3) The criteria for the use of Fish and Aquatic Life are the following.

(a) Dissolved Oxygen - The dissolved oxygen shall not be less than 5.0 mg/l with the following exceptions.

1. In streams identified as trout streams, including tailwaters, dissolved oxygen shall not be less than 6.0 mg/L.

2. The dissolved oxygen concentration of trout waters ~~designated~~ identified as supporting a naturally reproducing population shall not be less than 8.0 mg/L. (Tributaries to trout streams or naturally reproducing trout streams should be considered to be trout streams or naturally reproducing trout streams, unless demonstrated otherwise. Additionally, all streams within the Great Smoky Mountains National Park should be considered naturally reproducing trout streams.)

3. In wadeable streams in subecoregion 73a, dissolved oxygen levels shall not be less than a daily average of 5.0 mg/L with a minimum dissolved oxygen level of 4.0 mg/L.

4. The dissolved oxygen level of streams in ecoregion 66 (Blue Ridge Mountains) not ~~designated~~ identified as naturally reproducing trout streams shall not be less than 7.0 mg/L.

Substantial and/or frequent variations in dissolved oxygen levels, including ~~diurnal~~ diel fluctuations, are undesirable if caused by man-induced conditions. ~~Diurnal~~ Diel fluctuations in wadeable streams shall not be substantially different than the fluctuations noted in reference streams in that region.

In lakes and reservoirs, the dissolved oxygen concentrations shall be measured at mid-depth in waters having a total depth of ~~ten~~ 10 feet or less, and at a depth of five feet in waters having a total depth of greater than ~~ten~~ 10 feet and shall not be less than 5.0 mg/L.

(b) pH - The pH value shall not fluctuate more than 1.0 unit over a period of 24 hours and shall not be outside the following ranges: 6.0 – 9.0 in wadeable streams and 6.5 – 9.0 in larger rivers, lakes, reservoirs, and wetlands.

(c) Solids, Floating Materials, and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits, or sludge banks of such size or character that may be detrimental to fish and aquatic life.

(d) Turbidity, Total Suspended Solids, or Color - There shall be no turbidity, total suspended solids, or color in such amounts or of such character that will materially affect fish and aquatic life. In wadeable streams, suspended solid levels over time should not be substantially different than conditions found in reference streams.

(e) Temperature - The maximum water temperature change shall not exceed 3°C relative to an upstream control point. The temperature of the water shall not exceed 30.5°C and the maximum rate of change shall not exceed 2°C per hour. The temperature of recognized trout waters shall not exceed 20°C. There shall be no abnormal temperature changes that may affect aquatic life unless caused by natural conditions. The temperature in flowing streams shall be measured at mid-depth.

The temperature of impoundments where stratification occurs will be measured at mid-depth in the epilimnion (see definition in Rule 0400-40-03-.04) for warm water fisheries and mid-depth in the hypolimnion (see definition in Rule 0400-40-03-.04) for cold water fisheries. In the case of large impoundments (100 acres or larger) subject to stratification and recognized as trout waters,

the temperature of the hypolimnion shall not exceed 20°C.

A successful demonstration as determined by the Department conducted for thermal discharge limitations under Section 316(a) of the Clean Water Act, (33 U.S.C. §1326), shall constitute compliance with this paragraph.

(f) Taste or Odor - The waters shall not contain substances that will impart unpalatable flavor to fish or result in noticeable offensive odors in the vicinity of the water or otherwise interfere with fish or aquatic life. References include, but are not limited to: Quality Criteria for Water (section 304(a) of Public Law 92-500 as amended).

(g) Toxic Substances - The waters shall not contain substances or a combination of substances including disease - causing agents which, by way of either direct exposure or indirect exposure through food chains, may cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), physical deformations, or restrict or impair growth in fish or aquatic life or their offspring. References on this subject include, but are not limited to: Quality Criteria for Water (Section 304(a) of Public Law 92-500 as amended); Federal Regulations under Section 307 of Public Law 92-500 as amended. ~~The~~ In addition, the following numeric criteria are for the protection of fish and aquatic life:

Compound	Criterion Maximum Concentration µg/L (CMC)	Criterion Continuous Concentration µg/L (CCC)
Arsenic (III)* [1]	340	150
Cadmium** [2]	~~2.0~~ 1.8	~~0.25~~ 0.72
Chromium, III** [2]	570	74
Chromium, VI* [1]	16	11
Copper** [2]	13	9.0
Lead** [2]	65	2.5
Mercury* [1] (b)	1.4	0.77
Nickel** [2]	470	52
Selenium (lentic)	20	~~5~~ 1.5 [3]
Selenium (lotic)	20	3.1 [3]
Silver** [2]	3.2	---
Zinc** [2]	120	120
Cyanide*** [4]	22	5.2
Chlorine (TRC)	19	11
Pentachlorophenol **** [5]	19	15
Acrolein	3.0	3.0
Aldrin	3.0	---
g-BHC – Lindane (b)	0.95	---
Carbaryl	2.1	2.1
Chlordane (b)	2.4	0.0043
Chlorpyrifos	0.083	0.041
4-4'-DDT (b)	1.1	0.001
Demeton	----	0.1
Diazinon	~~0.1~~ 0.17	~~0.1~~ 0.17
Dieldrin (b)	0.24	0.056
a-Endosulfan	0.22	0.056
b-Endosulfan	0.22	0.056
Endrin	0.086	0.036
Guthion	----	0.01
Heptachlor	0.52	0.0038
Heptachlor epoxide	0.52	0.0038
Malathion	----	0.1
Methoxyclor	----	0.03
Methoxyclor	----	0.001

Nonylphenol	28.0	6.6
Parathion	0.065	0.013
PCBs, total (b)	---	0.014
Toxaphene (b)	0.73	0.0002
Tributyltin (TBT)	0.46	0.072

(b) Bioaccumulative parameter.

* [1] Criteria for these metals are expressed as dissolved.

** [2] Criteria for these metals are expressed as dissolved and are a function of total hardness (mg/L). Hardness-dependent metals criteria may be calculated from the following (values displayed above correspond to a total hardness of 100 mg/l and may have been rounded):

CMC (dissolved) = exp{mA[ln(hardness)]+bA } (CF)

CCC (dissolved) = exp{mC [ln(hardness)]+bC} (CF)

Chemical	MA	bA	MC	BC	Freshwater Conversion Factors (CF)	
					CMC	CCC
Cadmium	~~1.0166~~ 0.9798	~~-3.924~~ -3.866	~~0.7409~~ 0.7977	~~-4.719~~ -3.909	1.136672-[(ln hardness)(0.041838)]	1.101672-[(ln hardness)(0.041838)]
Chromium III	0.8190	3.7256	0.8190	0.6848	0.316	0.860
Copper	0.9422	-1.700	0.8545	-1.702	0.960	0.960
Lead	1.273	-1.460	1.273	-4.705	1.46203-[(ln hardness)(0.145712)]	1.46203-[(ln hardness)(0.145712)]
Nickel	0.8460	2.255	0.8460	0.0584	0.998	0.997
Silver	1.72	-6.59			0.85	
Zinc	0.8473	0.884	0.8473	0.884	0.978	0.986

If criteria are hardness-dependent, the Criterion Maximum Concentration (CMC) and Criterion Continuous Concentration (CCC) shall be based on the actual stream hardness. When an ambient hardness of less than 25 mg/L is used to establish criteria for cadmium or lead, the hardness dependent conversion factor (CF) shall not exceed one. When ambient hardness is greater than 400 mg/L, criteria shall be calculated according to one of the following two options: (1) calculate the criterion using a default Water Effects Ratio (WER) of 1.0 and a hardness of 400 mg/L in the hardness based equation; or (2) calculate the criterion using a WER and the actual ambient hardness of the surface water in the hardness based equation. For information concerning metals translation and site-specific criteria, see paragraph (9) of Rule 0400-40-03-.02.

[3] The numeric water criteria for selenium are applicable for all purposes, but for water quality assessment, fish tissue values may be used to confirm or refute impacts to aquatic life in accordance with and using the values from EPA's Final Criterion: Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater (June 30, 2016). However, a lack of fish tissue data or the absence of fish from a waterbody will not prevent it from being assessed as impaired if a numeric water concentration criterion is exceeded. Fish tissue concentration alone may be used to establish use impairment.

*** [4] If Standard Methods 4500-CN I (Weak Acid Dissociable), 4500-CN G (Cyanides Amenable to Chlorination after Distillation), or OIA-1677 are used, this criterion may be applied as free cyanide.

**** [5] Criteria for pentachlorophenol are expressed as a function of pH. Values displayed above correspond to a pH of 7.8 and are calculated as follows:

CMC = exp(1.005(pH) - 4.869) CCC = exp(1.005(pH) - 5.134)

(h) Other Pollutants - The waters shall not contain other pollutants that will be detrimental to fish or aquatic life.

(i) Iron – The waters shall not contain iron at concentrations that cause toxicity or in such amounts that interfere with habitat due to precipitation or bacteria growth.

(j) Ammonia – The ~~one-hour average~~ concentration of total ammonia nitrogen (in mg N/L) shall not exceed the CMC (acute criterion) calculated using the following ~~equations~~ equation:

~~Where salmonid fish are present:~~

$$CMC = \frac{0.275}{1 + 10^{7.204 - pH}} + \frac{39.0}{1 + 10^{pH - 7.204}}$$

~~Or where salmonid fish are not present:~~

$$CMC = \frac{0.411}{1 + 10^{7.204 - pH}} + \frac{58.4}{1 + 10^{pH - 7.204}}$$

$$CMC = MIN\left(\left(\frac{0.275}{1 + 10^{7.204 - pH}} + \frac{39.0}{1 + 10^{pH - 7.204}}\right), \left(0.7249 \times \left(\frac{0.0114}{1 + 10^{7.204 - pH}} + \frac{1.6181}{1 + 10^{pH - 7.204}}\right) \times \left(23.12 \times 10^{0.036 \times (20 - T)}\right)\right)\right)$$

The ~~thirty~~ 30-day average concentration of total ammonia nitrogen (in mg N/L) shall not exceed the CCC (chronic criterion) calculated using the following ~~equations~~ equation:

~~When fish early life stages are present:~~

$$CCC = \left[\frac{0.0577}{1 + 10^{7.688 - pH}} + \frac{2.487}{1 + 10^{pH - 7.688}}\right] \cdot MIN\left(2.85, 1.45 \cdot 10^{0.028 \cdot (25 - T)}\right)$$

~~When fish early life stages are absent:~~

$$CCC = \left[\frac{0.0577}{1 + 10^{7.688 - pH}} + \frac{2.487}{1 + 10^{pH - 7.688}}\right] \cdot 1.45 \cdot 10^{0.028 \cdot (25 - MAX(T,7))}$$

$$CCC = 0.8876 \times \left(\frac{0.0278}{1 + 10^{7.688-pH}} + \frac{1.1994}{1 + 10^{pH-7.688}}\right) \times \left(2.126 \times 10^{0.028 \times (20 - MAX(T,7))}\right)$$

In addition, the highest four-day average within the 30-day period shall not exceed 2.5 times the CCC.

(k) Nutrients - The waters shall not contain nutrients in concentrations that stimulate aquatic plant and/or algae growth to the extent that aquatic habitat is substantially reduced and/or the biological integrity fails to meet regional goals. Additionally, the quality of downstream waters shall not be detrimentally affected. Examples of parameters associated with the criterion include but are not limited to: nitrogen, phosphorus, potassium, calcium, magnesium, and various forms of each.

Interpretation of this provision may be made using the document Development of Regionally-based Interpretations of Tennessee's Narrative Nutrient Criterion and/or other scientifically defensible methods.

(l) Coliform - The concentration of the E. coli group shall not exceed 630 cfu per 100 ml as a geometric mean based on a minimum of ~~5~~ five samples collected from a given sampling site over a period of not more than 30 consecutive days with individual samples being collected at intervals of not less than 12 hours. For the purposes of determining the geometric mean, individual samples having an E. coli group concentration of less than 1 cfu per 100 ml shall be considered as having a concentration of 1 cfu per 100 ml. In addition, the concentration of the E. coli group in any individual sample shall not exceed 2,880 cfu per 100 ml.

(m) Biological Integrity - The waters shall not be modified through the addition of pollutants or through physical alteration to the extent that the diversity and/or productivity of aquatic biota within the receiving waters are substantially decreased or, in the case of wadeable streams, substantially different from conditions in reference streams in the same ecoregion. The parameters associated with this criterion are the aquatic biota measured. These are response variables.

Interpretation of this provision for any stream which (a) has at least 80% of the upstream catchment area contained within a single bioregion and (b) is of the appropriate stream order specified for the bioregion and (c) contains the habitat (riffle or rooted bank) specified for the bioregion, may be made using ~~the most current revision of the Department's~~ protocols found in the Department's 2017 Quality System Standard Operating Procedure for Macroinvertebrate Stream Surveys and/or other scientifically defensible methods.

Interpretation of this provision for all other wadeable streams, lakes, and reservoirs may be made using Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers (EPA/841-B-99-002) or Lake and Reservoir Bioassessment and Biocriteria (EPA 841-B-98-007), and/or other scientifically defensible methods. Interpretation of this provision for wetlands or large rivers may be made using scientifically defensible methods. Effects to biological populations will be measured by comparisons to upstream conditions or to appropriately selected reference sites in the same bioregion if upstream conditions are determined to be degraded.

(n) Habitat - The quality of stream habitat shall provide for the development of a diverse aquatic community that meets regionally-based biological integrity goals. Examples of parameters associated with this criterion include but are not limited to: sediment deposition, embeddedness of riffles, velocity/depth regime, bank stability, and vegetative protection. Types of activities or conditions which can cause habitat loss include, but are not limited to: channel and substrate alterations, rock and gravel removal, stream flow changes, accumulation of silt, precipitation of metals, and removal of riparian vegetation. For wadeable streams, the in stream habitat within each subecoregion shall be generally similar to that found at reference streams. However, streams shall not be assessed as impacted by habitat loss if it has been demonstrated that the biological integrity goal has been met.

(o) Flow – Stream or other waterbody flows shall support the fish and aquatic life criteria.

(4) The criteria for the use of Recreation are the following.

(a) Dissolved Oxygen - There shall always be sufficient dissolved oxygen present to prevent odors of decomposition and other offensive conditions.

(b) pH - The pH value shall lie within the range of 6.0 to 9.0 and shall not fluctuate more than 1.0 unit in this range over a period of 24 hours.

(c) Solids, Floating Materials, and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits, or sludge banks of such size or character that may be detrimental to recreation.

(d) Total Suspended Solids, Turbidity, or Color - There shall be no total suspended solids, turbidity or color in such amounts or character that will result in any objectionable appearance to the water, considering the nature and location of the water.

(e) Temperature - The maximum water temperature change shall not exceed 3°C relative to an upstream control point. The temperature of the water shall not exceed 30.5°C and the maximum rate of change shall not exceed 2°C per hour. The temperature of impoundments where stratification occurs will be measured at a depth of ~~5~~ five feet, or mid- depth whichever is less, and the temperature in flowing streams shall be measured at mid-depth.

(f) Coliform - The concentration of the E. coli group shall not exceed 126 cfu ~~colony forming units~~ per 100 ml, as a geometric mean based on a minimum of ~~5~~ five samples collected from a given sampling site over a period of not more than 30 consecutive days with individual samples being collected at intervals of not less than 12 hours. For the purposes of determining the geometric mean, individual samples having an E. coli concentration of less than 1 cfu per 100 ml shall be considered as having a concentration of 1 cfu per 100 ml.

Additionally, the concentration of the E. coli group in any individual sample taken from a lake, reservoir, ~~State Scenic River~~ state scenic river, Exceptional Tennessee Water or Outstanding National Resource Water (ONRW) (0400-40-03-.06) shall not exceed 487 cfu ~~colony forming units~~ per 100 ml. The concentration of the E. coli group in any individual sample taken from any other waterbody shall not exceed 941 cfu ~~colony forming units~~ per 100 ml.

(g) Taste or Odor - The waters shall not contain substances that will result in objectionable taste or odor.

(h) Nutrients - The waters shall not contain nutrients in concentrations that stimulate aquatic plant and/or algae growth to the extent that the public's recreational uses of the waterbody or other downstream waters are detrimentally affected. Unless demonstrated otherwise, the nutrient criteria found in subparagraph (3)(k) of this rule will be considered adequately protective of this use.

(i) Nutrient Response Criteria for Pickwick Reservoir: those waters impounded by Pickwick Dam on the Tennessee River. The reservoir has a surface area of 43,100 acres at full pool, 9,400 acres of which are within Tennessee. Chlorophyll *a* (corrected, as described in Standard Methods for the Examination of Water and Wastewater, 20th Edition, 1998): the mean of the photic-zone (See definition) composite chlorophyll *a* samples collected monthly April through September shall not exceed 18 µg/L, as measured over the deepest point, main river channel, dam forebay.

(j) Toxic Substances - The waters shall not contain toxic substances, whether alone or in combination with other substances, that will render the waters unsafe or unsuitable for water contact activities including the capture and subsequent consumption of fish and shellfish, or will propose toxic conditions that will adversely affect man, animal, aquatic life, or wildlife. Human health criteria have been derived to protect the consumer from consumption of contaminated fish and water. The water and organisms criteria should only be applied to those waters classified for both recreation and domestic water supply. ~~The criteria for recreation are as follows:~~ In addition,

the following numeric criteria are for the protection of recreation:

Compound	Water & Organisms Criteria* [1] (µg/L)	Organisms Only Criteria (µg/L)
INORGANICS		
Antimony	5.6	640
Arsenic (c)	10.0	10.0
Mercury (b)	0.05	0.051
Nickel	610	4600
Thallium	0.24	0.47
Cyanide	140	140
Selenium	170	4200
Zinc	7400	26000
Dioxin** [2] (b)	0.000001	0.000001
VOLATILES		
Acrolein	6	9
Acrylonitrile (c)	0.51	2.5
Benzene (c)	22	510
Bromoform (c)	43	1400
Carbon tetrachloride (c)	2.3	16
Chlorobenzene	130	1600
Chlorodibromomethane (c)	4.0	130
Chloroform (c)	57	4700
Dichlorobromomethane (c)	5.5	170
1,2-Dichloroethane (c)	3.8	370
1,1-Dichloroethylene	330	7100
1,2-Dichloropropane (c)	5.0	150
1,3-Dichloropropene (c)	3.4	210
Ethylbenzene	530	2100
Methyl bromide	47	1500
Methylene chloride (c)	46	5900
1,1,2,2-Tetrachloroethane (c)	1.7	40
Tetrachloroethylene (c)	6.9	33
Toluene	1300	15000
1,2-Trans-Dichloroethylene	140	10000
1,1,2-Trichloroethane (c)	5.9	160
Trichloroethylene (c)	25	300
Vinyl chloride (c)	0.25	24

Compound	Water & Organisms Criteria* [1] (µg/L)	Organisms Only Criteria (µg/L)
ACID EXTRACTABLES		
2-Chlorophenol	81	150
2,4-Dichlorophenol	77	290
2,4-Dimethylphenol	380	850
2-Methyl-4,6-dinitrophenol	13	280
Dinitrophenols	69	5300
Pentachlorophenol (c) (pH)	2.7	30
Phenol	10000	860000
2,4,6-Trichlorophenol (c)	14	24
BASE NEUTRALS		
Acenaphthene	670	990
Anthracene	8300	40000
Benzidine (c)	0.00086	0.0020
Benzo(a)anthracene (c)	0.038	0.18
Benzo(a)pyrene (c)	0.038	0.18
Benzo(b)fluoranthene (c)	0.038	0.18
Benzo(k)fluoranthene (c)	0.038	0.18
Bis(2-Chlorethyl)ether (c)	0.30	5.3
Bis(2-Chloro-isopropyl)ether	1400	65000
Bis(2-Ethylhexyl)phthalate (c)	12	22
Bis(Chloromethyl)ether (c)	0.0010	0.0029
Butylbenzyl Phthalate (c)	1500	1900
2-Chloronaphthalene	1000	1600
Chrysene (c)	0.038	0.18
Dibenz(a,h)Anthracene (c)	0.038	0.18
1,2-Dichlorobenzene	420	1300
1,3-Dichlorobenzene	320	960
1,4-Dichlorobenzene	63	190
3,3-Dichlorobenzidine (c)	0.21	0.28
Diethyl phthalate	17000	44000
Dimethyl phthalate	270000	1100000
Di-n-butyl phthalate	2000	4500
2,4-Dinitrotoluene (c)	1.1	34
1,2-Diphenylhydrazine (c)	0.36	2.0
Fluoranthene	130	140
Fluorene	1100	5300
Hexachlorobenzene (b)(c)	0.0028	0.0029
Hexachlorobutadiene (b)(c)	4.4	180
Hexachlorocyclohexane-Technical (b)(c)	0.123	0.414
Hexachlorocyclopentadiene	40	1100
Hexachloroethane (c)	14	33
Ideno(1,2,3-cd)Pyrene (c)	0.038	0.18
Isophorone (c)	350	9600
Nitrobenzene	17	690
Nitrosamines	0.0008	1.24
Nitrosodibutylamine (c)	0.063	2.2
Nitrosodiethylamine (c)	0.008	2.4
Nitrosopyrrolidine (c)	0.16	340
N-Nitrosodimethylamine (c)	0.0069	30
N-Nitrosodi-n-Propylamine (c)	0.05	5.1
N-Nitrosodiphenylamine (c)	33	60

Compound	Water & Organisms Criteria* 1 (µg/L)	Organisms Only Criteria (µg/L)
Pyrene	830	4000
Pentachlorobenzene (b)	1.4	1.5
1,2,4,5-Tetrachlorobenzene (b)	0.97	1.1
1,2,4-Trichlorobenzene	35	70
2,4,5-Trichlorophenol	1800	3600
PESTICIDES		
Aldrin (c)	0.00049	0.00050
a-BHC (c)	0.026	0.049
b-BHC (c)	0.091	0.17
g-BHC - Lindane (b)	0.98	1.8
Chlordane (b)(c)	0.0080	0.0081
4-4'-DDT (b)(c)	0.0022	0.0022
4,4'-DDE (b)(c)	0.0022	0.0022
4,4'-DDD (b)(c)	0.0031	0.0031
Dieldrin (b)(c)	0.00052	0.00054
a-Endosulfan	62	89
b-Endosulfan	62	89
Endosulfan Sulfate	62	89
Endrin	0.059	0.06
Endrin Aldehyde	0.29	0.30
Heptachlor (c)	0.00079	0.00079
Heptachlor epoxide (c)	0.00039	0.00039
PCB, total (b)(c)	0.00064	0.00064
Toxaphene (b)(c)	0.0028	0.0028

(b) Bioaccumulative parameter.

(c) Carcinogenic pollutant. 10-~~5~~ -5 risk level is used for all carcinogenic pollutants.

* 1 These criteria are for protection of public health due to consumption of water and organisms and should only be applied to these waters designated for both recreation and domestic water supply.

** 2 Total dioxin is the sum of the concentrations of all dioxin and dibenzofuran isomers after multiplication by Toxic Equivalent Factors (TEFs). Following are the TEFs currently recommended by EPA (subject to revision):

DIOXIN ISOMERS	TEF	FURAN ISOMERS	TEF
Mono-, Di-, & TriCDDs	0.0	Mono-, Di-, & TriCDFs	0.0
2,3,7,8 TCDD	1.0	2,3,7,8 TCDF	0.1
Other TCDDs	0.0	Other TCDFs	0.0
1,2,3,7,8 PeCDD	~~0.5~~ 1.0	1,2,3,7,8 PeCDF	~~0.05~~ 0.03
Other PeCDDs	0.0	2,3,4,7,8 PeCDF	~~0.5~~ 0.3
		Other PeCDFs	0.0
1,2,3,4,7,8 HxCDD	0.1	~~Other PeCDFs~~ 1,2,3,4,7,8 HxCDF	~~0.0~~ 0.1

1,2,3,6,7,8 HxCDD	0.1	1,2,3,6,7,8 HxCDF	0.1
1,2,3,7,8,9 HxCDD	0.1	1,2,3,7,8,9 HxCDF	0.1
Other HxCDDs	0.0	2,3,4,6,7,8 HxCDF	0.1
		Other HxCDFs	0.0
1,2,3,4,6,7,8 HpCDD	0.01	1,2,3,4,6,7,8 HpCDF	0.01
		1,2,3,4,7,8,9 HpCDF	0.01
Other HpCDDs	0.0	Other HpCDFs	0.0
OCDD	~~0.001~~ 0.0003	OCDF	~~0.001~~ 0.0003

(k) Other Pollutants - The waters shall not contain other pollutants in quantities which may have a detrimental effect on recreation.

(l) Fish Consumption Advisories - A public fishing advisory will be considered when the calculated risk of additional cancers exceeds 10^{-4} for typical consumers or 10^{-5} for atypical consumers (See definition). A "do not consume" advisory will be issued for the protection of typical consumers and a "precautionary advisory" will be issued for the protection of atypical consumers. The following formula will be used to calculate the risk of additional cancers, using the current risk calculation factors and assumptions used by EPA unless better site-specific information is available:

$$R = qE$$

where:

R= Plausible-upper-limit risk of cancer associated with a chemical in a fisheries species for a human subpopulation.

q = Carcinogenic Potency Factor for the chemical (mg kg-1 day-1)-1 estimated as the upper 95% confidence limit of the slope of a linear dose-response curve. Scientifically defensible Potency Factors will be used.

E = Exposure dose of the chemical (mg kg-1 day-1) from the fish species for the human subpopulation in the area. E is calculated by the following formula:

$$E = \frac{C \mid X}{W} \quad \text{where:}$$

C = Concentration of the chemical (mg/kg) in the edible portion of the species in the area. The average levels from multiple fillet samples of the same species will be used. Catfish will be analyzed skin-off with the belly flap included in the sample. Gamefish and carp will be analyzed skin-on with the belly flap included in the sample. Sizes of fish collected for analysis will represent the ranges of sizes likely to be collected and consumed by the public. References on this subject include, but are not limited to: EPA's Guidance for Assessing Chemical Contaminant Data for use in Fish Advisories.

I = Mean daily consumption rate (g/day averaged over 70-year lifetime) of the fish species by the human subpopulation in the area. ~~6.5 g/day will be used unless better site-specific information is available.~~

X = Relative absorption coefficient, or the ratio of human absorption efficiency to test animal absorption efficiency of the chemical. ~~Assumed to be 1.0 unless better information is available.~~

W = Average human mass (kg). ~~75 kg will be used.~~

For substances for which the public health concern is based on toxicity, a "do not consume" advisory will be considered warranted when average levels of the substance in the edible portion of fish exceed U.S. Food and Drug Administration (FDA) Action Levels or EPA national criteria. Based on the rationale used by FDA or EPA for their levels, the Commissioner may issue precautionary advisories at levels appropriate to protect sensitive populations.

(m) Flow – Stream flows shall support recreational uses.

(5) The criteria for the use of Irrigation are the following.

(a) Dissolved Oxygen - There shall always be sufficient dissolved oxygen present to prevent odors of decomposition and other offensive conditions.

(b) pH - The pH value shall lie within the range of 6.0 to 9.0 and shall not fluctuate more than 1.0 unit in this range over a period of 24 hours.

(c) Hardness or Mineral Compounds - The hardness of or the mineral compounds contained in the water shall not impair its use for irrigation.

(d) Solids, Floating Materials, and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits, or sludge banks of such size or character as may impair the usefulness of the water for irrigation purposes.

(e) Temperature - The temperature of the water shall not interfere with its use for irrigation purposes.

(f) Toxic Substances - The waters shall not contain toxic substances whether alone or in combination with other substances which will produce toxic conditions that adversely affect the quality of the waters for irrigation.

(g) Other Pollutants - The waters shall not contain other pollutants in quantities which may be detrimental to the waters used for irrigation.

(6) The criteria for the use of Livestock Watering and Wildlife are the following.

(a) Dissolved Oxygen - There shall always be sufficient dissolved oxygen present to prevent odors of decomposition and other offensive conditions.

(b) pH - The pH value shall lie within the range of 6.0 to 9.0 and shall not fluctuate more than 1.0 unit in this range over a period of 24 hours.

(c) Hardness or Mineral Compounds - The hardness of or the mineral compounds contained in the water shall not impair its use for livestock watering and wildlife.

(d) Solids, Floating Materials, and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits, or sludge banks of such size or character as to interfere with livestock watering and wildlife.

(e) Temperature - The temperature of the water shall not interfere with its use for livestock watering and wildlife.

(f) Toxic Substances - The waters shall not contain substances whether alone or in combination with other substances, which will produce toxic conditions that adversely affect the quality of the waters for livestock watering and wildlife.

(g) Other Pollutants - The waters shall not contain other pollutants in quantities which may be detrimental to the water for livestock watering and wildlife.

(7) The criteria for the use of Navigation are the following.

(a) Solids, Floating Materials and Deposits - There shall be no distinctly visible solids, scum, foam, oily slick, or the formation of slimes, bottom deposits or sludge banks of such size or character as to interfere with navigation.

(b) Other Pollutants - The waters shall not contain other pollutants in quantities which may be detrimental to the waters used for navigation.

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

Rule 0400-40-03-.04 Definitions is amended by deleting it in its entirety and substituting instead the following:

In addition to the meanings provided in the Water Quality Control Act (T.C.A. § 69-3-103), terms used in these rules shall mean the following:

(1) Atypical consumers - Those persons in the vicinity of a stream or lake who due to physiological factors or previous exposure are more sensitive to specific pollutants than is the population in general. Examples of atypical consumers may include, but are not limited to: children; pregnant or nursing women; subsistence fishermen; frequent purchasers of commercially harvested fish; and agricultural, industrial, or military personnel who may have had previous occupational exposure to the contaminant of concern.

(2) Conventional ~~Water Treatment~~ water treatment- Conventional water treatment as referred to in the criteria denotes coagulation, sedimentation, filtration, and chlorination or disinfection.

(3) Degradation - The alteration of the properties of waters by the addition of pollutants, withdrawal of water, or removal of habitat, except those alterations of a short duration.

(4) De Minimis degradation – Degradation of a small magnitude, as provided in this paragraph.

(a) Discharges and withdrawals

1. Subject to the limitation in part 3 of this subparagraph, a single discharge ~~other than those from new domestic wastewater sources~~ will be considered de minimis if it uses less than five percent of the available assimilative capacity for the substance being discharged.

(Note: Consistent with T.C.A. § 69-3-108, special consideration will be given to bioaccumulative substances to confirm the effect is de minimis, even if they are less than five percent of the available assimilative capacity.)

2. Subject to the limitation in part 3 of this subparagraph, a single water withdrawal will be considered de minimis if it removes less than five percent of the 7Q10 flow of the stream.

3. If more than one activity described in part 1 or 2 of this subparagraph has been authorized in a segment and the total of the authorized and proposed impacts uses no more than 10% of the assimilative capacity, or 7Q10 low flow, they are presumed to be de minimis. Where the total of the authorized and proposed impacts uses 10% of the assimilative capacity, or 7Q10 low flow, additional degradation may only be treated as de minimis if the Division finds on a scientific basis that the additional degradation has an insignificant effect on the resource.

(b) Habitat alterations authorized by an Aquatic Resource Alteration Permit (ARAP) are de minimis if the Division finds that the impacts, individually and cumulatively are offset by impact minimization and/or in-system mitigation, provided however, in ONRWs the mitigation must occur within the ONRW.

(5) Domestic wastewater discharge – A discharge of sanitary and other non-process wastewater from a treatment facility other than a publicly-owned treatment works (POTW) treating municipal sewage and/or

industrial waste. Examples of domestic wastewater discharges include, but are not limited to, homes, subdivisions, campgrounds, hotels, travel centers, parks, and schools.

~~(5)~~(6) Ecoregion - A relatively homogeneous area defined by similarity of climate, landform, soil, potential natural vegetation, hydrology, or other ecologically relevant variables.

~~(6)~~(7) Epilimnion – The upper layer of water in a thermally stratified lake or reservoir. This layer consists of the warmest water and has a fairly uniform (constant) temperature.

~~(7)~~(8) ~~Ground-water~~ Groundwater – Water beneath the surface of the ground within the zone of saturation, whether or not flowing through known and definite channels.

~~(8)~~(9) ~~Ground-water~~ Groundwater table – The upper surface of the zone of saturation by ground water.

~~(9)~~(10) Hypolimnion – The lowest layer in a thermally stratified lake or reservoir. This layer consists of colder, more dense water, has a constant temperature and no mixing occurs. The hypolimnion of a eutrophic lake is usually low or lacking in oxygen.

~~(10)~~(11) Interflow – The runoff infiltrating into the surface soil and moving toward streams as shallow, perched water above the main ~~ground-water~~ groundwater level.

(12) In-system mitigation – mitigation for habitat alterations sufficient to result in no overall net loss of resource values, if provided in the same eight-digit hydrologic unit code as the alteration, or in another area proximate to the alteration as approved by the Division to offset the loss of resource values in the area. In-system mitigation may not occur within a different major river drainage basin as the alteration (*i.e.*, Tennessee River, Cumberland River, Mississippi River).

(13) Lentic – Still water aquatic ecosystems such as ponds, lakes, or reservoirs.

(14) Lotic – Flowing water aquatic ecosystems such as streams and rivers.

~~(11)~~(15) Measurable degradation, as used in the context of discharges or withdrawals – Changes in parameters of waters that are of sufficient magnitude to be detectable by the best available instrumentation or laboratory analyses.

(Note: Because analytical techniques change, the Department may consider either the most sensitive detection method needed to comply with ~~state~~ State standards or any biological, chemical, physical, or analytical method, conducted in accordance with ~~U.S.~~ EPA approved methods as identified in 40 C.F.R. part 136. Consistent with T.C.A. § 69-3-108, for scenarios involving cumulative, non-measurable activities or parameters that are managed by a narrative criterion, the Department will use mathematical models and ecological indices to ensure no degradation will result from the authorization of such activities, consistent with the ~~state's~~ State's mixing zone policy.)

(16) Minimum Level (ML) – a term referring to the lowest sample concentration at which reliable quantitative measurements can be made as defined in Appendix A of 40 C.F.R. part 136 (2018).

~~(12)~~(17) Mixing ~~Zone~~ zone - That section of a flowing stream or impounded waters in the immediate vicinity of an outfall where an effluent becomes dispersed and mixed.

~~(13)~~(18) Multiple populations – Two or more individuals from each of two or more distinct taxa, in the context of obligate lotic aquatic organisms.

(19) New or increased discharge – A new discharge of pollutants to waters of the state or an increase in the authorized loading of a pollutant above either (1) numeric effluent limitations established in a National Pollutant Discharge Elimination System permit for that discharge, or (2) if no such limitations exist, the actual discharges of that pollutant.

~~(14)~~(20) Normal weather conditions – 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 data 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.

~~(15)~~(21) Obligate lotic aquatic organisms - Organisms that require flowing water for all or almost all of the aquatic phase of their life cycles.

~~(16)~~(22) Parameter – A biological, chemical, radiological, bacteriological, or physical property of water that can be directly measured. Some criteria are expressed in terms of a single parameter; others, such as habitat, nutrients, and biological integrity are not directly measured, but are derived from measurements of parameters.

~~(17)~~(23) Perched water – 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.

~~(18)~~(24) Photic ~~Zone~~ zone - the region of water through which light penetrates and where photosynthetic organisms live.

~~(19)~~(25) Reference condition - A parameter-specific set of data from regional reference sites that establish the statistical range of values for that particular substance at least-impacted streams.

~~(20)~~(26) Reference ~~Site~~ site - Least impacted waters within an ecoregion that have been monitored to establish a baseline to which alterations of other waters can be compared.

(27) Resource values – The physical, chemical, and biological properties of the water resource that help maintain classified uses. These properties may 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, and wildlife;

(e) Provide drinking water for wildlife and livestock;

(f) Provide and support recreational and navigational uses; and

(g) Provide both safe quality and adequate quantity of water for domestic water supply and other applicable classified uses.

~~(21)~~(28) Response ~~Variable~~ variable – a characteristic of water quality that can be measured and changes as a result of an alteration of habitat, water withdrawal, or discharge of pollutants, as distinguished from agents that cause changes in aquatic systems.

(29) Significant degradation – an appreciable permanent loss of resource values resulting from a habitat alteration in a waterbody with unavailable parameters for habitat, unless mitigation sufficient to ensure no overall net loss of resource values is provided.

~~(22)~~(30) Stratification – The tendency in lakes and reservoirs for distinct layers of water to form as a result of vertical change in temperature and, therefore, in the density of water. During stratification, dissolved oxygen, nutrients, and other parameters of water chemistry do not mix well between layers, establishing chemical as well as thermal gradients.

~~(23)~~(31) Stream - A surface water that is not a wet weather conveyance.

~~(24)~~(32) Subecoregion - A smaller, more homogenous area that has been delineated within an ecoregion.

~~(25)~~(33) Thermocline – The middle layer in a thermally stratified lake or reservoir. In this layer there is a rapid decrease in temperature with depth. Also called the metalimnion.

~~(26)~~(34) Wadeable streams - Streams that can be sampled using a hand held, one meter square or smaller kick net without water and materials escaping over the top of the net.

~~(27)~~(35) Watercourse - A man-made or natural hydrologic feature with a defined linear channel which discretely conveys flowing water, as opposed to sheet-flow.

~~(28)~~(36) Wet weather conveyance - Man-made or natural watercourses, including natural watercourses that have been modified by channelization:

(a) That flow only in direct response to precipitation runoff in their immediate locality;

(b) Whose channels are at all times above the ~~ground water~~ groundwater table;

(c) That are not suitable for drinking water supplies; and

(d) 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.

~~(29)~~(37) Wet weather conveyance determination - The decision based on site specific information of whether a particular watercourse is a stream or a wet weather conveyance. It is synonymous with "stream determination" and "hydrologic determination."

~~(30)~~(38) Zone of saturation – A subsurface zone below the ~~ground water~~ groundwater table in which all of the interconnected voids and pore spaces are filled with water.

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

Rule 0400-40-03-.05 Interpretation of Criteria is amended by deleting it in its entirety and substituting instead the following:

0400-40-03-.05 Interpretation of Criteria

(1) Interpretation of the above criteria shall conform to any rules and regulations or policies adopted by the Board of Water Quality, Oil and Gas.

(2) ~~The~~ For measuring compliance with permit conditions, the effect of treated sewage or waste discharge on the receiving waters shall be considered beyond the mixing zone except as provided in this paragraph. ~~The extent to which this is practicable depends upon local conditions and the proximity and nature of other uses of the waters.~~ Such mixing zones (See definition) shall be restricted in area and length; and shall not (a) prevent the free passage of fish or cause aquatic life mortality in the receiving waters; (b) contain materials in concentrations that exceed acute criteria beyond the zone immediately surrounding the outfall; (c) result in ~~offensive~~ objectionable colors, odors, or other conditions; (d) produce undesirable aquatic life or result in dominance of a nuisance species; (e) endanger the public health or welfare; or (f) ~~adversely affect the reasonable and necessary~~ impair classified uses ~~of the area~~; (g) create a condition of chronic toxicity beyond the edge of the mixing zone; (h) adversely affect nursery and spawning areas; or (i) adversely affect species with special state or federal status. Mixing zones shall not apply to the discharge of bioaccumulative pollutants to waters of the state where the risk-based factors in Rule 0400-40-03-.03(4)(l) are exceeded for the pollutant group.

(3) ~~The technical and economical feasibility of waste treatment, recovery, or adjustment of the method of discharge to provide correction shall be considered in determining the time to be allowed for the development of practicable methods and for the specified correction, to the extent allowable under~~

~~paragraph (5) of Rule 0400-40-03-.06~~ Permits for the discharge of pollutants may establish a schedule of compliance when necessary to allow a reasonable opportunity to comply with these water quality standards. When the Division establishes a compliance schedule, it shall consider the technical and economic feasibility of waste treatment, recovery, or adjustment of the method of discharge. Any such schedule of compliance shall require compliance with an enforceable final effluent limitation as soon as possible and include a final compliance date. If compliance will take longer than one year, the schedule of compliance shall establish enforceable interim requirements, establish dates for compliance with these requirements that are no longer than one year apart, and require reporting of interim compliance actions within 14 days of the applicable deadline. If the time necessary for completion of any requirement is more than one year and the requirement is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of interim requirements.

(4) Water quality criteria for fish and aquatic life and livestock watering and wildlife set forth shall generally be applied in permits on the basis of the following stream flows: unregulated streams - stream flows equal to or exceeding the ~~7~~ seven-day minimum, 10-year recurrence interval; regulated streams - all flows in excess of the minimum critical flow occurring once in ~~ten~~ 10 years as determined by the Division. ~~However, criteria that are wholly or partially based on measurements of ambient aquatic community health, such as the nutrient, biological integrity, and habitat criteria for the fish and aquatic life use, shall support the designated use. These criteria should be considered independent of a specified minimum flow duration and recurrence.~~ All other criteria shall be applied in permits on the basis of stream flows equal to or exceeding the 30-day minimum ~~5~~ five year recurrence interval.

(5) In general, deviations from normal water conditions are undesirable, but the frequency, magnitude and duration of the deviations shall be considered in interpreting the above criteria in assessing use support. Excursions from water quality criteria of a magnitude, frequency, and/or duration such that a specific use classification is no longer supported by existing water quality is the condition of impairment. When interpreting pathogen data, samples collected during or immediately after significant rain events may be treated as outliers unless caused by point source dischargers. Such outlier data may be given less weight in assessment decisions than non-rain event sampling results.

(6) ~~The criteria and standards provide that all~~ All discharges of sewage, industrial waste, and other waste shall receive the degree of treatment or effluent reduction necessary to comply with water quality standards, or state or federal laws and regulations pursuant thereto, and where appropriate will comply with the "Standards of Performance" as required by the Tennessee Water Quality Control Act, (T.C.A., §§ 69-3-101, et seq.).

(7) Where naturally formed conditions (e.g., geologic formations) or background water quality conditions are substantial impediments to attainment of the water quality standards, these natural or background conditions shall be taken into consideration in establishing any effluent limitations or restrictions on discharges to such waters. For purposes of water quality assessment, with the exception of pathogens, exceedances of water quality standards caused by natural conditions will not be considered the condition of ~~pollution~~ impairment. Examples of natural conditions include alterations caused by beaver activity, non-construction related rockslides of pyritic materials, and groundwater with naturally elevated metals or low dissolved oxygen levels.

~~(8) There are cases in which the in-stream criteria as established by this rule are less than current chemical technological capabilities for analytical detection. In instances where permit limits established through implementation of these criteria are below analytical capabilities, compliance with those limits will be determined using the following reporting limits, unless in specific cases other reporting limits are demonstrated to be the best achievable because of the particular nature of the wastewater being analyzed. Such a demonstration shall be made at the time results are submitted and shall affirm that using methods, personnel, training, and equipment appropriate to reach applicable RRLs, the laboratory was unable to do so due to the nature of the sample. The methods, equipment, and general nature of the interference shall be provided. Inability to accurately quantify the level of a contaminant shall not be acceptable grounds for a higher reporting level if the permit requirement is based on detection/non-detection.~~

REQUIRED REPORTING LEVELS [RRL] (µg/L)
Approved EPA Methods Must Be Used)

INORGANICS	RRL
Antimony	3.0
Arsenic, total (c)	1.0
Arsenic (III) (c)	1.0
Beryllium (c)	1.0
Cadmium	1.0
Chromium, total	1.0
Chromium (III)	1.0
Chromium (VI)	10.0
Copper	1.0
Lead	1.0
Mercury	0.2
Nickel	10.0
Selenium	2.0
Silver	1.0
Zinc	1.0
Cyanide	5.0
Dioxin	0.00001

BASE NEUTRALS	RRL
Acenaphthylene (c)	2.3
Anthracene	0.7
Benzo(a)anthracene (c)	0.3
Benzo(a)pyrene (c)	0.3
3,4-Benzofluoranthene (c)	0.3
Benzo(k)fluoranthene (c)	0.3
Bis(2-Chloroethyl)ether (c)	1.0
Bis(2-Ethylhexyl)phthalate(c)	2.5
Chrysene	2.5
1,2-Dichlorobenzene	2.0
1,3-Dichlorobenzene	2.0
1,4-Dichlorobenzene - para-Dichlorobenzene	4.4
Diethyl phthalate	1.9
Dimethyl phthalate	1.6
Di-n-Butyl phthalate	2.5
2,4-Dinitrotoluene (c)	1.0
Fluoranthene	2.2

INORGANICS	RRL
VOLATILES	
Acrolein	1.0
Acrylonitrile (c)	1.0
Benzene (c)	1.0
Bromoform - Tribromomethane (c)	1.0
Carbon tetrachloride (c)	1.0
Chloroform - Trichloromethane (c)	0.5
Dichlorobromomethane (c)	1.0
1,2-Dichloroethane (c)	1.0
1,1-Dichloroethylene (c)	1.0
1,3-Dichloropropylene	1.0
Ethylbenzene	1.0
Methyl chloride - Chloromethane (c)	1.0
Methylene chloride - Dichloromethane (c)	1.0
1,1,2,2-Tetrachloroethane (c)	0.5
Tetrachloroethylene (c)	0.5
Toluene	1.0
1,1,1-Trichloroethane	1.0
1,1,2-Trichloroethane (c)	0.2
Trichloroethylene (c)	1.0
Vinyl chloride (c)	2.0

BASE NEUTRALS	RRL
Fluorene	0.3
Hexachlorobenzene (c)	1.9
Hexachlorobutadiene (c)	5.0
Hexachloroethane (c)	0.5
Nitrobenzene	10.0
Phenanthrene	0.7
Pyrene	0.3
PESTICIDES	
Aldrin (c)	0.5
g-BHC - Lindane (c)	0.5
Chlordane (c)	0.1
4-4'-DDT (c)	0.1
4,4'-DDE (c)	0.1
4,4'-DDD (c)	0.1
Dieldrin (c)	0.05
a-Endosulfan	0.1
b-Endosulfan	0.05
Endrin	0.1
Heptachlor (c)	0.05
Heptachlor epoxide (c)	0.08
PCB-1242 (c)	0.5
PCB-1254 (c)	0.5
PCB-1221 (c)	0.5
PCB-1232 (c)	0.5
PCB-1248 (c)	0.5
PCB-1260 (c)	0.5

ACID EXTRACTABLES	
2-Methyl-4,6-dinitrophenol - 4,6-Dinitro-o-cresol	24.0
2,4-Dinitrophenol	42.0
Pentachlorophenol	5.0
2,4,6-Trichlorophenol (c)	2.7

PCB-1016 (c)	0.5
PCB, total (c)	0.5
Toxaphene (c)	0.5

~~(c) carcinogen~~

(8) All chemical data reported under this rule shall be generated using "sufficiently sensitive" analytical methods approved under 40 C.F.R. part 136 (2018) or required under 40 C.F.R. chapter I, subchapter N or O (2018). An approved method is "sufficiently sensitive" when:

(a) The method minimum level (ML) is at or below the level of the applicable water quality criterion or the effluent limit established by the permit for the measured pollutant or pollutant parameter; or

(b) The method ML is above the applicable water quality criterion or the effluent limit established by the permit, but the amount of the pollutant or pollutant parameter actually measured is high enough that the method detects and quantifies the level of the pollutant or pollutant parameter; or

(c) Demonstration is made showing that the method used has the lowest ML of the approved methods for the measured pollutant or pollutant parameter in the sample/matrix being analyzed. (Documentation supporting this demonstration is to be submitted with reported data and shall include narrative justification for why the method chosen is believed to have the lowest ML of all approved methods identified in 40 CFR part 136 (2018). The Director shall determine whether the submitted information demonstrates sufficient method sensitivity.)

Note: When there is no analytical method that has been approved under 40 C.F.R. part 136 (2018) or required under 40 C.F.R. chapter I, subchapter N or O (2018), and a specific method is not otherwise required by the Director, the applicant may use any suitable method but shall provide a description of the method. When selecting a suitable method, factors such as a method's precision, accuracy, or resolution must be considered when assessing the performance of the method.

(9) Standard operating procedures for making stream and wet weather conveyance determinations (hydrologic determinations)

(a) General

1. Because a primary purpose of the Water Quality Control Act is to protect the ~~Waters of the State~~ waters of the state for the public, and since streams receive a higher level of protection than wet weather conveyances, anyone desiring to alter a watercourse who wishes to avoid unnecessary expense and delay, may request the department to process a permit application or issue an authorization under a general permit with the presumption that the watercourse is a stream. In that instance, a full hydrologic determination would not be performed under these rules. However, nothing shall preclude an applicant from subsequently seeking a wet weather conveyance determination.

2. The procedures detailed in this rule are intended to be used in situations where there is some question whether a watercourse is a stream or wet weather conveyance. In situations where it is obvious that a watercourse is a stream, such as named rivers or streams with watersheds larger than a square mile, or spring-fed streams with consistent flow greater than one cubic foot per second, it is not necessary to conduct a detailed hydrologic determination.

3. It is the purpose of this rule to set out the framework for making stream and wet weather conveyance determinations taking into consideration all relevant and necessary information on the biology, geology, geomorphology, precipitation, hydrology, and other scientifically based principles. Staff of the Department and certified hydrologic professionals not employed by the Department who are making a submission pursuant to T.C.A. § 69-3-108(r) shall follow these rules and the Guidance for Making Hydrologic Determinations (Guidance) which contains the instructions and examples for proper application of these rules to situations in the field that has been developed pursuant to T.C.A. § 69-3-107(25) in making these determinations.

4. The format for documenting these determinations is provided in the Hydrologic Determination Field Data Sheet (Data Sheet) in the Guidance. All available field characteristics necessary to make an accurate determination shall be evaluated, and all evidence utilized in making a determination shall be documented using the Data Sheet or as an addendum. Applicants may choose to submit additional hydrological or geotechnical data not included in the standard procedure in support of a hydrologic determination. Any additional relevant information submitted to the Department shall be considered by the Division in its determination.

5. Any significant revision to the Data Sheet or Guidance shall be subject to a 30-day public comment period prior to adoption. The Department shall advertise its intent to modify the Data Sheet or Guidance by posting notice of proposed changes on the Department's internet web site and by sending to the permit mailing list. Significant modifications include the addition or deletion or substantive modification of either the primary or secondary indicators or a change in the scoring system. The Department shall consider the need for modifications to the Data Sheet and Guidance periodically and whenever a significant comment is submitted in regard to them.

6. To be classified as a wet weather conveyance, a watercourse must meet all four elements of the definition in T.C.A. § 69-3-103. Therefore, if it is determined that any one of the four elements does not apply to a watercourse, the watercourse is a stream.

7. Because natural variation and human activities can alter hydrologic conditions over time, hydrologic determination will only be considered valid for a maximum of five years or the term of a permit based on it.

8. Because there can be considerable variability within a given reach of a watercourse, wet weather conveyance determinations should not be made on a single point but must also investigate up and down channel and consider the watercourse's landscape context.

9. All of the indicators referred to in these rules and the Guidance are evidence relevant to the presence or absence of one or more of the four elements of the wet weather conveyance definition. The difference between the primary and secondary indicators is that each of the primary indicators is considered presumptive evidence alone regarding one or more of the four elements, and will allow for an immediate hydrologic determination to be made in most cases. Some of the primary indicators involve direct observations of the presence or absence of one or more of the elements. The primary indicators of wet weather conveyances are:

   (i) ~~hydrologic~~ Hydrologic feature exists solely due to a process discharge~~,~~;

   (ii) ~~defined~~ Defined bed and bank absent, watercourse dominated by upland vegetation/ grass~~,~~;

   (iii) ~~watercourse~~ Watercourse dry anytime during February through April 15th under normal precipitation/ ~~ground water~~ groundwater conditions~~,~~; and

   (iv) ~~daily~~ Daily flow and precipitation records showing feature only flows in direct response to rainfall.

10. Primary indicators of streams are:

   (i) ~~presence~~ Presence of multiple populations of obligate lotic organisms with two months or longer aquatic phase~~,~~;

   (ii) ~~presence~~ Presence of fish (except Gambusia)~~,~~;

   (iii) ~~presence~~ Presence of naturally occurring ~~ground water~~ groundwater table connection~~,~~;

(iv) ~~flowing~~ Flowing water in channel seven days or more since the last precipitation in the local watershed~~;~~ and

(v) ~~evidence~~ Evidence watercourse has been used as a supply of drinking water.

11. When primary indicators cannot be observed or documented, then the investigator must evaluate the watercourse using secondary indicators. The secondary indicators are an aggregate set of observations that in total are used to evaluate the presence or absence of one or more of the elements of a wet weather conveyance. Secondary indicators are:

(i) ~~continuous~~ Continuous bed and bank~~;~~

(ii) ~~sinuous~~ Sinuous channel~~;~~

(iii) ~~in~~ In-channel structure, riffle-pool sequences~~;~~

(iv) ~~sorting~~ Sorting of soil textures or other substrate~~;~~

(v) ~~active~~ Active/relic floodplain~~;~~

(vi) ~~depositional~~ Depositional bars or benches~~;~~

(vii) ~~braided~~ Braided channel~~;~~

(viii) ~~recent~~ Recent alluvial deposits~~;~~

(ix) ~~natural~~ Natural levees~~;~~

(x) ~~headcuts~~ Headcuts~~;~~

(xi) ~~grade~~ Grade controls~~;~~

(xii) ~~natural~~ Natural valley ~~draingeway~~ drainageway~~;~~

(xiii) ~~at~~ At least second order channel on United States Geological Survey or Natural Resources Conservation Service map~~;~~

(xiv) ~~subsurface~~ Subsurface flow/discharge into channel~~;~~

(xv) ~~water~~ Water in channel more than forty-eight hours since rain~~;~~

(xvi) ~~leaf~~ Leaf litter in channel~~;~~

(xvii) ~~sediment~~ Sediment on plants or on debris~~;~~

(xviii) ~~organic~~ Organic debris lines or piles (wrack lines)~~;~~

(xix) ~~hydric~~ Hydric soils in channel bed or sides~~;~~

(xx) ~~fibrous~~ Fibrous roots in channel~~;~~

(xxi) ~~rooted~~ Rooted plants in channel~~;~~

(xxii) ~~crayfish~~ Crayfish in channel (exclude in floodplain)~~;~~

(xxiii) ~~bivalves~~ Bivalves/mussels~~;~~

(xxiv) ~~amphibians~~ Amphibians~~;~~

(xxv) ~~macrobenthos~~ Macrobenthos~~,~~;

(xxvi) ~~filamentous~~ Filamentous algae, periphyton~~,~~;

(xxvii) ~~iron~~ Iron-oxidizing bacteria/fungus~~,~~; and

(xxviii) ~~wetland~~ Wetland plants in channel.

12. The secondary indicators shall be scored in accordance with the instructions in the Guidance. Hydrologic determinations will often be made on the basis of secondary indicators because none of the primary indicators ~~is~~ are present at the time of investigation. Any of the primary indicators contained in these rules and the Guidance may be considered conclusive after consideration of appropriate background information including recent weather and precipitation, in the absence of any directly contradictory evidence. However, since hydrologic determinations are required to be made at all times of year, secondary indicators of hydrologic status will be used, in accordance with the Guidance and these rules, as determinant evidence in the absence of primary indicators. The secondary indicators used in the Guidance shall be based on sound scientific principles.

13. Watercourses in which flow is solely a result of process or wastewater discharge or other non-natural sources shall not be regulated as streams even though they may exhibit characteristics of a stream rather than a wet weather conveyance.

(b) The specific procedures outlined herein are intended to consider each of the four elements necessary for a watercourse to be classified as a wet weather conveyance.

1. Because the duration of the flow in a watercourse is the central inquiry of hydrologic determinations, all of the primary and secondary indicators are relevant to evaluating it. Although other factors may also be relevant, at a minimum the following procedures shall be used to determine if a watercourse flows only in direct response to precipitation runoff in its immediate vicinity.

(i) Prior to conducting a field evaluation, the investigator should review recent precipitation patterns for the local area, the longer-term seasonal precipitation trends, and any other available information such as historic land use, regional geology and soil types, or previous hydrologic determinations near the site to be investigated.

(ii) The investigator must decide if the determination is being conducted under "normal weather conditions." The procedure for determining if weather conditions are normal, or either wetter or drier than normal, is contained in the Guidance. If conditions are either wetter or drier than normal the investigator must take this into consideration in making a hydrologic determination.

(iii) The vast majority of wet weather conveyances will generally cease to flow within 48 hours of almost all except some of the largest rain events. This is especially true in urbanized, impervious areas, or other areas with low infiltration rates, such as mowed lawns. The investigator shall document the presence or absence of flow within the watercourse. If in-stream surface flow is observed within the evaluated reach, and it has been at least seven days since the last rainfall event in the upstream watershed, the flow will not be considered a direct storm response, and the investigator shall conclude that the feature is a stream. The investigator shall document the source of the precipitation data. The source used shall be as close as feasible to the watercourse.

(iv) When subsurface water discharges such as seeps, interstitial flow, perched water, or interflow are observed and used as indicators of hydrology,

investigators shall consider the influence of recent precipitation events and localized soil and geologic conditions on these features to determine if these features provide adequate hydrology such that the watercourse flows more than in direct response to precipitation. For example, since some such features have more flow when there has been significant recent precipitation, if they are flowing when there has not been much recent precipitation, it is more likely that they flow for sustained periods. In some instances, there may be observable outcroppings of a confining layer such as shale or clay that causes interstitial flow to discharge to a watercourse. In this situation, the capacity of up-gradient conditions such as the permeability and volume of the soils above the confining layer to sustain extended periods of surface flow should be considered. These types of sustained discharges should not be considered a direct response to rainfall. In other instances, such as in areas with a highly karst geology, observed seeps into a watercourse may be not be able to sustain extended periods of flow, and may be considered a more direct response to rainfall.

(v) Field investigations for hydrologic determinations should not be conducted if a one-inch precipitation event in 24 hours has occurred in the area of investigation within the previous 48 hours.

2. The following procedures are to determine if the channel is above the ~~ground water~~ groundwater table at all times. Under the definition of wet weather conveyance in T.C.A. § 69-3-103, if there are any times that the channel is not above the ~~ground water~~ groundwater table, it is a stream.

(i) Since larger streams and rivers are frequently in contact with the ~~ground water~~ groundwater table, the investigator shall review topographic maps to determine if the watercourse is within the floodplain of, or within 20 feet in elevation of a larger stream or river known to carry perennial flow. Flow in such a watercourse should not be considered conclusive evidence of a ~~ground water~~ groundwater table connection, but is contributing evidence to be considered in the determination. Therefore further investigation into additional factors including those listed below is necessary to determine that the watercourse in question is in contact with the ~~ground water~~ groundwater table.

(ii) Since the presence of wetlands often indicates a shallow depth to the ~~ground water~~ groundwater table, the investigator shall search for the presence of wetlands in the immediate vicinity of the watercourse both on topographic maps and in the field. The presence of wetlands in the vicinity of the watercourse being examined should not be considered conclusive evidence of a ~~ground water~~ groundwater table connection, but is contributing evidence to be considered in the determination. Therefore further investigation into other factors including those listed below is necessary to determine that the watercourse in question is in contact with the ~~ground water~~ groundwater table.

(iii) The investigator shall review United States Department of Agriculture soil surveys. Their soil descriptions often contain information on depth to water table. For watercourses whose channels are at a depth that indicates contact with the ~~ground water~~ groundwater table for the soil type in which they are formed, the investigator can conclude that the watercourse is in contact with the water table, absent contradicting field information.

(iv) The investigator shall review site geological characteristics affecting the elevation of the ~~ground water~~ groundwater table with respect to the elevation of the channel, including the presence of karst bedrock features, erodibility of watershed soils, thickness of regolith and channel alluvium, depth to bedrock or laterally persistent silt or clay horizons, land-use disturbances, and other watershed conditions controlling or contributing to the presence or absence of channel base flow.

(v) If data are available from water wells within one mile of and in similar landscape position to a watercourse under investigation, and if the surface elevation of standing water in the well is at or above the elevation of the bottom of the channel of the watercourse, then the investigator can conclude that the watercourse is in contact with the ~~ground water~~ groundwater table.

(vi) The observed emergence of water from the ground is not necessarily water from the ~~ground water~~ groundwater table and should not be considered as conclusive for the purpose of this element. Therefore further investigation into factors including those listed above is necessary to determine the source of the emergent water.

3. The following procedures are to determine if a watercourse is suitable for drinking water supplies. The investigator should note spring boxes, water pipes to carry water from the watercourse to a residence, or other observable evidence the watercourse is being used as a household water supply upstream of or within the segment being evaluated. When these features are noted, the investigator can conclude that the watercourse is a stream absent contradicting information.

4. The following procedures are to determine if a watercourse, under normal weather conditions, due to naturally occurring ephemeral or low flow does not have 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.

(i) The presence of the requisite aquatic life is a primary indicator that the watercourse supports that aquatic life. In order to find that the requisite aquatic life is present, the investigator must document more than one individual of at least two qualifying taxa in the evaluated reach under normal weather conditions. Unhatched eggs or any other stage of a taxon's life cycle that could be found in a wet weather conveyance or lentic habitat (such as a deceased winged adult) should not be considered as a primary indicator that a watercourse is a stream. The specific taxa found should be noted on the Data Sheet. Representative individuals of the taxa used to make this determination should be collected for confirmation of identification. All aquatic life observed should be noted, even if some do not qualify as primary indicators. These organisms may also be relevant as secondary field indicators.

(ii) Indigenous members of taxa within the benthic macroinvertebrate groups listed below are obligate lotic aquatic organisms and thus are primary indicators that a watercourse is a stream when two or more specimens of two or more taxa are documented under normal weather conditions.

(I) Gastropoda: Pleuroceridae, Viviparidae, Valvatidae

(II) Bivalvia: Unionidae

(III) Coleoptera: Dryopidae, Elmidae, Psephenidae, Ptilodactylidae, Staphylinidae

(IV) Diptera: Athericidae, Blephariceridae, Chironomidae (except: Chironomini or red midges), Empididae, Ptychopteridae, Tanyderidae, and some Tipulidae (Antocha, Rhabdomastix, Dicranota, Hexatoma, Limnophila, Tipula)

(V) Ephemeroptera: all members, except: Siphlonuridae, and some Ephemeridae (Hexagenia)

(VI) Megaloptera: all members, except: Chauliodes

(VII) Odonata: Aeshnidae, Calopterygidae, Cordulegastridae, Gomphidae, some Coenagrionidae (Argia, Chromagrion, Amphiagrion), some Libellulidae (Perithemis), and some Corduliidae (Epitheca, Helocordulia, Neurocordulia)

(VIII) Plecoptera: all members

(IX) Trichoptera: all members, except: Molannidae, some Leptoceridae (Nectopsyche, Triaenodes), and some Limnephilidae (Ironoquia, Limnephilus, Hesperophylax)

(X) Oligochaetes: Branchiobdellidae, Lumbriculidae, Sparganophilidae, some Tubificidae (subfamily Naidinae, Ilyodrilus, Rhyacodrilus, Varichaetadrilus), and some Lumbricidae (Eiseniella tetraedra only).

(iii) The presence of any indigenous fish species, other than the Mosquitofish (~~*Gambusia*~~ Gambusia), documented under normal weather conditions, is also a primary indicator that the watercourse is a stream, and constitutes support of the requisite aquatic life.

(iv) There are conditions in which a stream may be dry for a period of weeks or even months, but supports multiple populations of lotic aquatic organisms or fish at other times during a year. In such conditions, an investigator could appropriately determine that there is sufficient water on an annual basis to support such populations even though there were not any present on a particular date. In addition, man-made pollution or other water quality issues may preclude support of these organisms. Therefore, the absence of lotic aquatic organisms at the time of the investigation cannot be the sole basis for a determination that a watercourse meets the fourth element of the definition. When multiple populations of lotic aquatic organisms or fish cannot be documented to occur in a watercourse, then the investigator must consider the hydrologic and biologic factors referred to as secondary indicators in these rules and the Guidance to make a hydrologic determination.

(v) Under normal weather conditions, if the investigator documents the absence of water due to naturally occurring conditions in a watercourse between February 1 and April 15, then the investigator can conclude the watercourse is unable to support fish or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months and is therefore a wet weather conveyance.

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

Rule 0400-40-03-.06 Antidegradation Statement is amended by deleting it in its entirety and substituting instead the following:

(1) General

(a) It is the purpose of Tennessee's standards to fully protect existing uses of all surface waters as established under the Act. Existing uses are those actually attained in the waterbody on or after November 28, 1975. ~~Additionally, the Tennessee Water Quality Standards shall not be construed as permitting the degradation (see definition) of high quality surface waters.~~ Where the quality of Tennessee waters is better than the level necessary to support propagation of fish, shellfish, and wildlife, or recreation in and on the water, that quality will be maintained and protected unless the Department finds, after intergovernmental coordination and public participation, that lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located ~~Sources~~ as established herein. In such waters, there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources

in that stream segment and sources or activities exempted from permit requirements under the Water Quality Control Act in that stream segment should utilize all cost-effective and reasonable best management practices to prevent degradation of waters. Where new or increased temperature alterations are proposed, a successful demonstration as determined by the Department under Section 316(a) of the Clean Water Act, 33 U.S.C. § 1326, shall be considered to be in compliance with this rule.

(b) To apply this antidegradation statement ~~in the permitting context~~ to permits for new or increased discharges, new or increased water withdrawals, or new or expanded habitat alterations, the Department shall first determine if the application is complete. Absent extraordinary circumstances, the Department shall notify the applicant that an application is complete or of any deficiencies within 30 days of receipt of the application. When the Department determines the application is complete, it shall provide notice to the applicant in writing.

1. A complete application will include all of the information requested on the forms provided by the Department. For activities other than new ~~domesic~~ domestic wastewater discharges, a complete application will include the applicant's basis for concluding that the proposed activity:

   (i) ~~will~~ Will not cause measurable degradation (for withdrawals or discharges)~~,~~; ~~or~~

   (ii) ~~will~~ Will only cause de minimis degradation~~,~~; ~~or~~

   (iii) Will cause no significant degradation (for habitat alterations); or

   ~~(iii)~~(iv) ~~will~~ Will cause more than de minimis degradation.

2. If the proposed activity will cause degradation of any available parameter above a de minimis level, or if it is a new discharge of domestic wastewater, a complete application will:

   (i) ~~analyze all reasonable alternatives and describe the level of degradation caused by each of the feasible alternatives~~ Analyze a range of potentially practicable alternatives to prevent or lessen the degradation associated with the proposed activity;

   (ii) ~~discuss the~~ Demonstrate that the proposed degradation is necessary to accommodate important social ~~and~~ or economic ~~consequences of each alternative~~ development in the area in which the waters are located; and

   (iii) ~~demonstrate~~ Demonstrate that the proposed degradation will ~~not violate the~~ maintain water quality ~~criteria for uses~~ sufficient to protect existing uses in the receiving waters ~~and is necessary to accommodate important economic and social development in the area~~.

3. ~~Such alternatives analyses shall include, at a minimum, completed and accurate Worksheets A and B for public sector applicants or Worksheets A and G for private system applicants, or shall provide alternative information subject to approval by the Department. Additionally, to provide information to the Department regarding the applicant's claim of economic or social necessity, public sector applicants shall provide the relevant information from Forms O, P, Q, S, T, U, and AA, found in the EPA guidance document (Economic Guidance); private sector applicants shall provide the relevant information from Forms O, R, V, W, X, Y, Z, and AB, found in the EPA guidance document (Economic Guidance). Either type of applicant shall submit alternative or additional information regarding economic or social necessity as directed by the Department. These forms are found in the EPA guidance document entitled Interim Economic Guidance for Water Quality Standards: Workbook (EPA 823/B-95-002) (Economic Guidance). Reasonable~~ An alternative to degradation is practicable if it is technologically possible, able to be put into practice, and economically viable. Potentially

practicable alternatives ~~for the various activities~~ include, but are not limited to, the following: ~~actions.~~

(i) Alternatives for discharges include connection to an existing collection system, land application, water reuse, water recycling, or other treatment alternatives to prevent or reduce the level of degradation. For small domestic discharges, connection to an existing system or land application will be considered preferable.

(ii) For water withdrawals, alternatives include water conservation, water reuse or recycling, off-stream impoundments, water harvesting during high flow conditions, regionalization, withdrawing water from a larger waterbody, use of ~~ground water~~ groundwater, connection to another water supply with available capacity, and pricing structures that encourage a reduction in consumption.

(iii) For activities that cause habitat alterations, alternatives that avoid or minimize degradation should be explored and explained by the applicant. These avoidance or minimization activities could include maintaining or enhancing buffer zones, bridging a stream rather than culverting it, altering the footprint of a project instead of relocating a stream, or using a culvert without a bottom, instead of one that is fully concreted.

4. To demonstrate that greater than de minimis degradation is necessary to accommodate important social or economic development in the area in which the waters are located, the applicant shall provide a written justification to include, as applicable, a description of the project, the number of jobs anticipated to be created (including salaries/benefits, duration, and type), tax revenue to be generated, impact of the proposed degradation to development potential in the area, other social/cultural impacts, and any other justification. Applicants shall submit alternative or additional information regarding economic or social necessity as directed by the Department. The justification should demonstrate an overall benefit to the local community, not just a benefit to the applicant.

(c) ~~When the Department determines that a permit application is complete, it shall notify~~ The Department shall propose a permit action by notifying the applicant ~~by letter or email~~ in writing and ~~shall notify~~ by notifying the public and the state and federal agencies with jurisdiction over fish, wildlife, shellfish, plant and wildlife resources, parks, and historic preservation by posting a notice on the Department's web site and sending email to persons who have asked to be notified of permit actions. In the case of new or expanded habitat alterations or new or increased water withdrawals this public notice shall be a part of the public notice ~~of a permit application~~ under paragraph (4) of Rule 0400-40-07-.04 and shall contain the information required by, and be governed by the procedures of, that paragraph of the rules. For a new or increased discharge, the public notice shall summarize the information given by the applicant pursuant to subparagraph (b) of this paragraph and shall contain the information required by, and be governed by the procedures of, Rule 0400-40-05-.06. Public notices should also include the Department's preliminary determination of the level of degradation and the antidegradation category of the affected waters.

(d) ~~Next,~~ After completion of the public notice and comment period, the Department shall ~~determine~~ make a final determination of the level of degradation that would occur as a result of the proposed activity. Not all activities cause an addition of pollutants, diminish flows, or impact habitat.

1. In the case of discharges, if the ~~department~~ Department determines that no measurable degradation will occur as a result of the activity, no further review under this rule is required regardless of the antidegradation classification of the receiving stream, unless the activity:

(i) ~~is~~ Is a new domestic wastewater discharge~~,~~; ~~or~~

(ii) ~~introduces~~ Introduces a parameter identified as bioaccumulative~~,~~; ~~or~~

(iii) ~~introduces~~ Introduces a parameter with a criterion below the current method detection level for that substance~~,~~; or

(iv) ~~is~~ Is proposed to occur in an ONRW.

2. In the case of water withdrawals requiring permits from waters other than ONRWs, if the Department determines that no measurable degradation will occur, no further review under this rule is required regardless of the antidegradation classification of the receiving stream.

3. In the case of habitat alterations, if the ~~department~~ Department determines that no ~~degradation or only~~ more than de minimis degradation will occur, no further review under the rule is required regardless of the antidegradation classification of the receiving stream.

(e) If the steps described in subparagraphs (b), (c) and (d) of this paragraph do not conclude the review under this rule, the Department shall ~~determine~~ make a final determination whether the waters impacted by the activity are ones with available parameters, unavailable parameters, Exceptional Tennessee Waters, or ~~Outstanding National Resource Waters~~ ONRWs, or if they are in more than one category. For example, a stream segment may be unavailable for one parameter and be available for others and Exceptional Tennessee Waters may also be unavailable for certain parameters. If an activity is proposed in a waterbody that is in more than one category, it must meet all of the applicable requirements.

(2) Waters with unavailable parameters

Unavailable parameters exist where water quality is at, or fails to meet, the levels specified in water quality criteria in Rule 0400-40-03-.03, even if caused by natural conditions. In the case of a criterion that is a single response variable or is derived from measurement of multiple ~~responsible~~ response variables, the unavailable parameters shall be the agents causing water quality to be at or failing to meet the levels specified in criteria. For example, if the biological integrity criterion (derived from multiple response variables) is violated, the unavailable parameters shall be the pollutants causing the violation, not the response variables.

(a) In waters with unavailable parameters, new or increased discharges that would cause measurable degradation of the parameter that is unavailable shall not be authorized. Nor will discharges be authorized in such waters if they cause additional loadings of unavailable parameters that are bioaccumulative or that have criteria below current method detection levels.

(b) In waters with unavailable parameters, no new or ~~expanded~~ increased water withdrawals that will cause additional measurable degradation of the unavailable parameter shall be authorized.

(c) Where one or more of the parameters comprising the habitat criterion are unavailable, ~~activities~~ habitat alterations that cause ~~additional~~ significant degradation ~~of the unavailable parameter or parameters above the level of de minimis~~ shall not be authorized.

(3) Waters with available parameters

Available parameters exist where water quality is better than the levels specified in water quality criteria in Rule 0400-40-03-.03.

(a) In waters with available parameters, new or increased discharges that would cause degradation above the level of de minimis for any available parameter for any criterion, or a new domestic wastewater discharge, will only be authorized if the applicant has demonstrated to the Department that ~~reasonable~~ there are no practicable alternatives to prevent or lessen degradation ~~are not feasible~~ associated with the proposed activity and the degradation is necessary to accommodate important economic or social development in the area and the degradation will not violate the water quality criteria for uses existing in the receiving waters. If one or more

practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

(b) In waters with available parameters, new or ~~expanded~~ increased water withdrawals that would cause degradation above the level of de minimis will only be authorized if the applicant has demonstrated to the Department that ~~reasonable~~ there are no practicable alternatives to prevent or lessen degradation ~~are not feasible~~ associated with the proposed activity and the degradation is necessary to accommodate important economic or social development in the area and will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

(c) In waters with available parameters, an activity that would cause degradation of habitat above the level of de minimis will only be authorized if the applicant has demonstrated to the Department that ~~reasonable~~ there are no practicable alternatives to prevent or lessen degradation ~~are not feasible~~ associated with the proposed activity and the degradation is necessary to accommodate important economic or social development in the area and will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

(4) Exceptional Tennessee Waters

(a) Exceptional Tennessee Waters are surface waters other than wet weather conveyances that are in any one of the following categories:

1. Waters within state or national parks, wildlife refuges, forests, wilderness areas, or natural areas;

2. State ~~Scenic Rivers~~ scenic rivers or ~~Federal~~ federal Wild and Scenic Rivers;

3. Federally-designated critical habitat or other waters with documented non-experimental populations of ~~state~~ State or federally-listed threatened or endangered aquatic or semi-aquatic plants~~,~~ or ~~aquatic~~ animals;

4. Waters within areas designated as Lands Unsuitable for Mining pursuant to the federal Surface Mining Control and Reclamation Act where such designation is based in whole or in part on impacts to water resource values;

5. Waters with naturally reproducing trout;

6. Waters with exceptional biological diversity as evidenced by a score of 40 or 42 on the Tennessee Macroinvertebrate Index (or a score of 28 or 30 in subecoregion 73a) using protocols found in ~~TDEC's 2011~~ the Department's 2017 Quality System Standard Operating Procedure for Macroinvertebrate Stream Surveys, provided that the sample is considered representative of overall stream conditions; or

7. Other waters with outstanding ecological, or recreational value as determined by the Department. When application of this provision is a result of a request for a permit, such preliminary determination is to be made within 30 days of receipt of a complete permit application.

(b) The Department will maintain a list of waterbodies that have been reviewed and are known to have one or more of the above characteristics on its website and will make paper copies of that list available upon request.

(c) Authorization of Activities in Exceptional Tennessee Waters

1. In waters identified as Exceptional Tennessee Waters new or increased discharges that

would cause degradation of any available parameter above the level of de minimis and ~~discharges of~~ new domestic wastewater discharges will only be authorized if the applicant has demonstrated to the Department that ~~reasonable~~ there are no practicable alternatives to prevent or lessen degradation ~~are not feasible~~ associated with the proposed activity, ~~are not feasible and~~ the degradation is necessary to accommodate important economic or social development in the area, and the discharge will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation. At the time of permit renewal, previously authorized discharges, including upstream discharges, which presently degrade Exceptional Tennessee Waters above a de minimis level, will be subject to a review of updated analysis of alternatives ~~analysis~~ information provided by the applicant, but not to a determination of economic/social necessity. Public participation for these existing discharges will be provided in conjunction with permitting activities. ~~Sources exempted from permit requirements under the Water Quality Control Act should utilize all cost-effective and reasonable best management practices.~~

2. In waters identified as Exceptional Tennessee Waters, new or increased water withdrawals that would cause degradation of any available parameter above the level of de minimis will only be authorized if the applicant has demonstrated to the Department that ~~reasonable~~ there are no practicable alternatives to prevent or lessen degradation ~~are not feasible~~ associated with the proposed activity and the degradation is necessary to accommodate important economic or social development in the area and will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

3. In waters identified as Exceptional Tennessee Waters, an activity that would cause degradation of habitat above the level of de minimis will only be authorized if the applicant has demonstrated to the Department that ~~reasonable~~ there are no practicable alternatives to prevent or lessen degradation ~~are not feasible~~ associated with the proposed activity, and the degradation is necessary to accommodate important economic or social development in the area and will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

(d) Determination of Economic/Social Necessity - The Department's determination that degradation above a de minimis level of Exceptional Tennessee Waters resulting from a proposed new or increased discharge, new or expanded habitat alteration, or new or increased water withdrawal is, or is not, necessary to accommodate important economic ~~and~~ or social development in the area shall be subject to review by the Board of Water Quality, Oil and Gas under the following procedures.

1. If the Department determines after completion of the public notice and comment procedures established in subparagraph (1)(c) of this rule that an activity that would cause degradation above a de minimis level of Exceptional Tennessee Waters is necessary to accommodate important economic or social development in the area, it shall give notice to the applicant, the public, and federal and ~~state~~ State agencies with jurisdiction over fish, wildlife, shellfish, plant and wildlife resources, parks, and advisory councils for historic preservation. ~~In the case of an application for a discharge, this notice may be combined with the notice of a draft permit under this rule. In the case of an application for a habitat alteration or water withdrawal, this~~ This notice shall be given by being posted on the Department's ~~web site~~ website and by sending email to persons who have asked to be notified of permit actions. Within 30 days after the date of the notification, any affected intergovernmental coordination agency or affected third person may petition the Board for a declaratory order under T.C.A. § 4-5-223, and the Board shall convene a contested case. After the Board has convened a contested case in response to a declaratory order petition under this part, the Department shall within ~~5~~ five

business days thereafter transmit the petition to the Administrative Procedures Division of the Secretary of State so the contested case may be docketed and an administrative law judge may be assigned to the case. If a declaratory order petition is timely filed, the Department shall not proceed further in processing the permit application until the petition has been resolved before the Board. In the contested case, the petitioner shall have the burden of proof, and the Department's determination shall carry no presumption of correctness before the Board. The applicant is a necessary party to the declaratory order contested case, and if the applicant does not participate in the contested case, the Board shall render a decision that degradation is not necessary to accommodate important economic or social development in the area. If no intergovernmental coordination agency or third person petitions for a declaratory order within 30 days of the notification date, or if one is filed after the 30 days expires, then the Department shall proceed with processing the permit application.

2. A declaratory order contested case conducted under this subparagraph shall be subject to the following procedures. Mediation may occur if all the parties agree. Any proposed agreed order resulting from mediation shall be subject to approval by the Board. In order to provide for an expedited proceeding, the contested case is subject to the following time limitations. The time periods specified in this part shall commence on the day after the contested case has been docketed by the Administrative Procedures Division of the Secretary of State and an administrative law judge has been assigned to the case. Any alteration of the time periods set out in this part shall be granted only upon agreement of all the parties, or when there have been unforeseen developments that would cause substantial prejudice to a party, or when the parties have agreed to mediation. Within 20 days, the parties shall confer to try and develop a proposed agreed scheduling order. If the parties are unable to agree, then each party shall submit a proposed scheduling order, and the administrative law judge, after a hearing, shall enter a scheduling order. All discovery shall be completed no later than 20 days prior to the date the hearing before the Board is to begin. Within 120 days, the hearing before the Board shall begin, but the Board on its own initiative may exceed 120 days to complete the hearing and render its final decision. In order for degradation of Exceptional Tennessee Waters to proceed pursuant to these rules, the Board must make a finding approving degradation by a majority vote of the members of the Board present and voting.

3. If the Department determines that degradation is not necessary to accommodate important economic or social development in the area, it will notify the applicant, the federal and state agencies with jurisdiction over fish, wildlife, shellfish, plant and wildlife resources, parks, and advisory councils for historic preservation, and third persons who have asked to be notified of permit actions. The Department also will issue a tentative decision to deny the permit because degradation is not necessary. In accordance with paragraph (4) of this rule, the Department will provide the public with notice of and an opportunity to comment on its tentative denial decision. If no public hearing is requested within the 30 day public comment period, and if the Department does not alter its tentative decision to deny, the Department shall notify the applicant of its final decision to deny the permit because degradation is not necessary. Within 30 days after receiving notice of the final decision to deny the permit, the applicant may seek review of the decision that the degradation is not necessary to accommodate important economic or social development in the area in a contested case before the Board in accordance with T.C.A. § 69-3-105(i). Within ~~5~~ five business days after the Department receives an applicant's written request for a contested case hearing before the Board, the Department shall transmit the written request to the Administrative Procedures Division of the Secretary of State so the contested case may be docketed and an administrative law judge may be assigned to the case. In the contested case, the applicant shall have the burden of proof, and the Department's determination shall carry no presumption of correctness before the Board. The federal and state intergovernmental coordination agencies, and third persons who requested notification of the Department's degradation determination will be notified by the Department of the applicant's permit appeal. The intergovernmental coordination agencies and third persons may seek to intervene in the contested case in accordance with T.C.A. § 4-5-310.

(5) Outstanding National Resource Waters

(a) The following streams or portions of streams are designated as ONRW:

	WATERBODY	PORTION DESIGNATED AS ONRW
1.	Little River	Portion within Great Smoky Mountains National Park.
2.	Abrams Creek	Portion within Great Smoky Mountains National Park.
3.	West Prong Little Pigeon River	Portion within Great Smoky Mountains National Park upstream of Gatlinburg
4.	Little Pigeon River	From the headwaters within Great Smoky Mountains National Park downstream to the confluence of Mill Branch.
5.	Big South Fork Cumberland River	Portion within Big South Fork National River and Recreation Area.
6.	Reelfoot Lake	Tennessee portion of the lake and its associated wetlands.

7. The portion of the Obed River that is designated as a federal wild and scenic river as of June 22, 1999, is designated as ONRW, provided however, that if the current search for a regional water supply by the Cumberland Plateau Regional Water Authority results in a determination that it is necessary to utilize the Obed River as its source of drinking water, for that purpose the Obed shall be designated as an Exceptional Tennessee Water and any permit issued for that project, whether state, federal, or otherwise, shall be considered under the requirements for Exceptional Tennessee Waters.

(b) The Department may recommend to the Board of Water Quality, Oil and Gas that certain waterbodies be designated as ~~Outstanding National Resource Waters (~~ONRWs~~)~~. These shall be high quality waters which constitute an outstanding national resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance. Designation of ONRWs must be made by the Board of Water Quality, Oil and Gas and will be accomplished in accordance with T.C.A. § 69-3-105(a)(1) of the Tennessee Water Quality Control Act and through the appropriate rulemaking process.

1. In surface waters designated by the Board of Water Quality, Oil and Gas as ONRWs, no new discharges, expansions of existing discharges, water withdrawals or mixing zones will be permitted unless such activity will not result in either measurable degradation or discernible effect. At the time of permit renewal, previously authorized discharges, including upstream discharges and withdrawals, which presently degrade an ONRW, will be subject to an analysis of alternatives ~~analysis~~. Public participation for these existing discharges will be provided in conjunction with permitting activities.

2. In waters designated by the Board of Water Quality, Oil and Gas as ONRWs, no new or ~~increased~~ expanded habitat alteration that would cause degradation of habitat above the level of de minimis or degrade water chemistry for more than a short duration will be authorized.

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

Chapter 0400-40-04
Use Classifications For Surface Waters

Amendments

Chapter 0400-40-04 Use Classifications For Surface Waters is amended by deleting it in its entirety and substituting instead the following:

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0400-40-04-.01 Memphis Area Basin
0400-40-04-.02 Hatchie River Basin
0400-40-04-.03 Obion-Forked Deer Basin
0400-40-04-.04 Tennessee River Basin–Western Valley
0400-40-04-.05 Duck River Basin
0400-40-04-.06 Elk River Basin (including Shoal Creek)
0400-40-04-.07 Lower Tennessee River Basin (including Conasauga Basin)
0400-40-04-.08 Upper Tennessee River Basin
0400-40-04-.09 Clinch River Basin
0400-40-04-.10 French Broad River Basin
0400-40-04-.11 Holston River Basin
0400-40-04-.12 Lower Cumberland River Basin
0400-40-04-.13 Upper Cumberland River Basin
0400-40-04-.14 Barren River Basin

Abbreviations for Designated Uses and Trout Streams:

Domestic Water Supply	DOM
Industrial Water Supply	IWS
Fish and Aquatic Life	FAL
Trout Stream	TS
Naturally Reproducing Trout Stream	NRTS
Recreation	REC
Livestock Watering and Wildlife	LWW
Irrigation	IRR
Navigation	NAV

0400-40-04-.01 MEMPHIS AREA BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Mississippi River	Mississippi-Tennessee State Line (Mile 714.0) to Upstream End of Loosahatchie Bar (Mile 741.0)		X	X	X	X	X	X		
McKellar Lake	Mouth on Mississippi R. to Origin		X	X	X			X		
Nonconnah Creek	Mile 0.0 to Origin			X	X	X	X			
Wolf River	Mile 0.0 to 6.7 (L & N Railroad Bridge)			X	X	X	X			
Cypress Creek	Mile 0.0 to Origin			X	X	X	X			
Wolf River	Mile 6.7 to Miss.-TN State Line (Mile 77.0)		X	X	X	X	X	X		
Loosahatchie River	Mile 0.0. to 20.9 (Austin Peay Hwy Bridge)			X	X	X	X			
Big Creek	Mile 0.0 to Origin			X	X	X	X			
North Fork Creek	Mile 0.0 to Origin			X	X	X	X			
Crooked Creek	Mile 0.0 to Origin			X	X	X	X			
Trib. to Mile 3.0 of Crooked Creek	Mile 0.0 to Origin			X	X	X	X			
Loosahatchie River	Mile 20.9 (Austin Peay Hwy) to 30.7			X	X	X	X			
Clear Creek Canal	Mile 0.0 to Origin at Mile 2.6 (Confluence of Hall Creek and Cypress Creek Canal)			X	X	X	X			
Cypress Creek Canal	Mile 0.0 to Origin			X	X	X	X			
Loosahatchie River	Mile 30.7 to 45.5			X	X	X	X			
Middle Beaver Creek	Mile 0.0 to Origin			X	X	X	X			
West Beaver Creek	Mile 0.0 to Origin			X	X	X	X			
East Beaver Creek	Mile 0.0 to Origin			X	X	X	X			
Little Cypress Creek Canal	Mile 0.0 to Origin			X	X	X	X			
Loosahatchie River	Mile 45.5 to 50.2			X	X	X	X			
Davis Creek	Mile 0.0 to Origin			X	X	X	X			
Town Branch	Mile 0.0 to Origin			X	X	X	X			
Loosahatchie River	Mile 50.2 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
All other surface waters named and unnamed in the Memphis Area Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X		X	X		

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

0400-40-04-.02 HATCHIE RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Mississippi River	Mile 741.0 to 820.0	X	X	X	X	X	X	X		
Hatchie River	Mile 0.0 to Mile 129.0	X	X	X	X	X	X			
Town Creek	Mile 0.0 to Origin			X	X	X	X			
Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Alston Creek	Mile 0.0 to Origin			X	X	X	X			
Big Muddy Canal	Mile 0.0 to Origin			X	X	X	X			
Unnamed Trib. to Mile 3.1 of Big Muddy Canal	Mile 0.0 to Origin			X	X	X	X			
Sugar Creek	Mile 0.0 to Origin			X	X	X	X			
Mill Creek	Mile 2.0 to Origin			X	X	X	X			
Pugh Creek South	Mile 0.0 to Origin			X	X	X	X			
Mill Creek	Mile 2.0 to Origin			X	X	X	X			
Hatchie River	Mile 129.0 to Mile 131.0		X	X	X	X	X			
Hatchie River	Mile 131.0 to Miss-Tenn State Line (Mile 188.5)	X	X	X	X	X	X			
Spring Creek	Mile 0.0 to Origin			X	X	X	X			
Cypress Creek	Mile 0.0 to Origin			X	X	X	X			
Tuscumbia River	Mile 0.0 to Miss-Tenn State Line (Mile 10.5)	X		X	X	X	X			
Cypress Creek	Mile 0.0 to 14.2			X	X	X	X			
Cypress Creek	Mile 14.2 to 15.2			X	X	X	X			
Cypress Creek	Mile 15.2 to Origin			X	X	X	X			
All other surface waters named and unnamed in the Hatchie Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.03 OBION-FORKED DEER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Mississippi River	Mile 820.0 to Mile 905.0 (Kentucky State Line)	X	X	X	X	X	X	X		
Obion River	Mile 0.0 to Confluence of North and			X	X	X	X			
	South Fork Obion River (Mile 71.8)			X	X	X	X			
Running Reelfoot Bayou	Mile 0.0 to Reelfoot Lake Spillway			X	X	X	X			
Reelfoot Lake	Entirety			X	X	X	X			
Biffle Creek	Mile 0.0 to Origin			X	X	X	X			
Reeds Creek	Mile 0.0 to Origin			X	X	X	X			
Cool Springs Branch	Mile 0.0 to Origin			X	X	X	X			
North Fork Obion River	Mile 0.0 to Origin			X	X	X	X			
Hoosier Creek	Mile 0.0 to Origin			X	X	X	X			
First Creek	Mile 0.0 to Origin			X	X	X	X			
Grove Creek	Mile 0.0 to Origin			X	X	X	X			
Harris Fork Creek	Mile 0.0 to Kentucky-Tennessee State Line			X	X	X	X			
Walnut Fork Creek	Mile 0.0 to Origin			X	X	X	X			
Trib. to Mile 3.8 of Walnut Fork Creek	Mile 0.0 to Origin			X	X	X	X			
South Fork Obion River	Mile 0.0 to 38.9 (Formed at Confluence of Beaver Creek and Crooked Creek)			X	X	X	X			
Mud Creek	Mile 0.0 to Origin			X	X	X	X			
Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Trib. to Mile 9.8 of Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Trib. to Mile 11.0 of Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Brassfield Creek	Mile 0.0 to Origin			X	X	X	X			
Trib. to Mile 0.5 of Brassfield Creek	Mile 0.0 to Origin			X	X	X	X			
Rutherford Fork	Mile 0.0 to Origin			X	X	X	X			
Carroll Creek	Mile 0.0 to Origin			X	X	X	X			
Wolf Creek	Mile 0.0 to Origin			X	X	X	X			
E. Fork Wolf Creek	Mile 0.0 to Origin			X	X	X	X			
Trib. to Mile 27.7 of Rutherford Fork	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Middle Fork Obion River	Mile 0.0 to Origin			X	X	X	X			
Buckor Ditch	Mile 0.0 to Origin			X	X	X	X			
Spring Creek	Mile 0.0 to Origin			X	X	X	X			
Pritchett Branch	Mile 0.0 to Origin			X	X	X	X			
Bradford Creek	Mile 0.0 to Origin			X	X	X	X			
Reedy Creek	Mile 0.0 to Origin			X	X	X	X			
Lick Creek	Mile 0.0 to Origin			X	X	X	X			
Clear Creek	Mile 0.0 to Origin			X	X	X	X			
Beaver Creek	Mile 0.0 to Origin		X	X	X	X	X			
Crooked Creek	Mile 0.0 to Origin		X	X	X	X	X			
Guins Creek	Mile 0.0 to Origin		X	X	X	X	X			
Trib. to Mile 9.7 of Guins Creek	Mile 0.0 to Origin			X	X	X	X			
Forked Deer River	Mouth at Obion River Mile 3.3 to Mile 20.3 at Confluence of North and South Fork			X	X	X	X	X		
South Fork Forked Deer	Mile 0.0 to 48.8			X	X	X	X	X		
Nixon Creek	Mile 0.0 to Origin			X	X	X	X			
Little Nixon Creek	Mile 0.0 to Origin			X	X	X	X			
Old Channel Forked Deer-Trib. at Mile 35.8	Mile 0.0 to Origin			X	X	X	X			
South Fork Forked Deer River	Mile 48.8 to 70.3			X	X	X	X	X		
North Fork of South Fork Forked Deer River	Mile 0.0 to Origin			X	X	X	X			
Johnson Creek	Mile 0.0 to Origin			X	X	X	X			
Anderson Branch	Mile 0.0 to Origin			X	X	X	X			
Turkey Creek	Mile 0.0 to 1.2			X	X	X	X			
Trib. to Mile 1.0 of Turkey Creek	Mile 0.0 to Origin			X	X	X	X			
Turkey Creek	Mile 1.2 to Origin			X	X	X	X			
South Fork Forked Deer River	Mile 70.3 to Origin			X	X	X	X			
Sugar Creek	Mile 0.0 to Origin			X	X	X	X			
North Fork Forked Deer River	Mile 0.0 to 5.8			X	X	X	X	X		

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
North Fork Forked Deer River	Mile 5.8 to 33.9			X	X	X	X			
Middle Fork Forked Deer River	Mile 0.0 to Origin			X	X	X	X			
Mosquito Creek	Mile 0.0 to Origin			X	X	X	X			
Moize Creek	Mile 0.0 to Origin			X	X	X	X			
Dyer Creek	Mile 0.0 to Origin			X	X	X	X			
North Mud Creek	Mile 0.0 to Origin			X	X	X	X			
Cow Creek	Mile 0.0 to Origin			X	X	X	X			
Sand Creek	Mile 0.0 to Origin			X	X	X	X			
North Fork Forked Deer River	Mile 33.9 to Origin			X	X	X	X			
Trib. to Mile 857.5 of Mississippi River	Mile 0.0 to Origin			X	X	X	X			
Harris Ditch	Mile 0.0 to Origin			X	X	X	X			
All other surface waters named and unnamed in the Obion-Forked Deer Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.04 TENNESSEE RIVER BASIN - WESTERN VALLEY.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Tennessee River	Mile 49.1 (Tenn-Ky Line) to 215.1 (Tn-Miss Line)	X	X	X	X	X	X	X		
Big Sandy River	Mile 0.0 to 15.1		X	X	X	X	X	X		
Big Sandy River	Mile 15.1 to Origin		X	X	X	X	X			
West Sandy Creek	Mile 0.0 to Origin			X	X	X	X			
Holly Fork Creek	Mile 0.0 to Origin			X	X	X	X			
Bailey Fork Creek	Mile 0.0 to Origin			X	X	X	X			
Town Creek	Mile 0.0 to Origin			X	X	X	X			
Big Beaver Creek	Mile 0.0 to Origin			X	X	X	X			
Little Beaver Creek	Mile 0.0 to Origin			X	X	X	X			
Little Beaver Creek	Mile 0.0 to Origin			X	X	X	X			
Hurricane Creek	Mile 0.0 to Origin			X	X	X	X		X	
S. Fk Hurricane Cr	Mile 0.0 to Origin			X	X	X	X			
Beaverdam Creek	First bridge above mouth to origin.			X	X	X	X		X	
Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Trace Creek	Mile 0.0 to Origin			X	X	X	X			
Cypress Creek	Mile 0.0 to Origin			X	X	X	X			
Cane Creek	Mile 0.0 to Origin			X	X	X	X			
North Indian Creek	Mile 0.0 to Origin			X	X	X	X			
Birdsong Creek	Mile 0.0 to Origin			X	X	X	X			
Wolf Creek	Mile 0.0 to Origin			X	X	X	X			
Eagle Creek	Mile 0.0 to Origin			X	X	X	X			
Morgan Creek	Mile 0.0 to Origin			X	X	X	X			
Beech River	Mile 0.0 to 7.2	X	X	X	X	X	X	X		
Beech River	Mile 7.2 to 27.4	X	X	X	X	X	X			
Beech River	Mile 27.4 to 30.4		X	X	X	X	X			
Beech River	Mile 30.4 to Origin	X	X	X	X	X	X			
Rushing Creek	Mile 0.0 to Origin			X	X	X	X			
Harmon Creek	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Bear Creek	Mile 0.0 to Origin			X	X	X	X			
Wolf Creek	Mile 0.0 to Origin			X	X	X	X			
Doe Creek	Mile 0.0 to Origin			X	X	X	X			
East Prong Doe Creek	Mile 0.0 to Origin			X	X	X	X			
White Oak Creek	Mile 0.0 to Origin			X	X	X	X			
Little Hurricane Creek	Mile 0.0 to Origin			X	X	X	X			
Horse Creek	Mile 0.0 to Origin			X	X	X	X			
Beason Creek	Mile 0.0 to Origin			X	X	X	X			
South Fork Beason Creek	Mile 0.0 to Origin			X	X	X	X			
Dollar Creek	Mile 0.0 to Origin			X	X	X	X			
Beech Creek	Mile 0.0 to Origin			X	X	X	X			
Leatherwood Creek	First bridge to origin			X	X	X	X		X	
E. Fork Leatherwood Cr	Mile 0.0 to second tributary			X	X	X	X		X	
N. Fork Leatherwood Cr	Mile 0.0 to second tributary			X	X	X	X		X	
Town Branch	Mile 0.0 to Origin			X	X	X	X			
Chambers Creek	Mile 0.0 to Origin			X	X	X	X			
All other surface waters named and unnamed in the Western Valley Tennessee River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.05 DUCK RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Duck River	Mile 0.0 to 67.0	X	X	X	X	X	X			
Blue Creek	Mile 0.0 to 14.0	X	X	X	X	X	X			
Blue Creek	Mile 14.0 to 16.2		X	X	X	X	X			
Blue Creek	Mile 16.2 to Origin			X	X	X	X			
Buffalo River	Mile 0.0 to 24.0	X	X	X	X	X	X			
Cane Creek	Hickman Co. line to Lewis Co. line			X	X	X	X		X	
Buffalo River	Mile 24.0 to 26.0		X	X	X	X	X			
Buffalo River	Mile 26.0 to 38.0	X	X	X	X	X	X			
Hurricane Creek	Mile 0.0 to Origin			X	X	X	X			X
Sinking Creek	Mile 0.0 to Origin			X	X	X	X		X	
Buffalo River	Mile 38.0 to 41.1		X	X	X	X	X			
Buffalo River	Mile 41.1 to Origin	X	X	X	X	X	X			
Green River	Mile 0.0 to 9.0	X	X	X	X	X	X			
Green River	Mile 9.0 to 11.7		X	X	X	X	X			
Green River	Mile 11.7 to Origin	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Rockhouse Creek	Mile 0.0 to 6.0	X	X	X	X	X	X			
Rockhouse Creek	Mile 6.0 to 9.5		X	X	X	X	X			
Rockhouse Creek	Mile 9.5 to Origin	X	X	X	X	X	X			
Little Buffalo River	Mile 0.0 to Origin			X	X	X	X		X	
Hurricane Creek	Mile 0.0 to Origin			X	X	X	X		X	
Beaverdam Creek	Highway 100 to Sulfur Fork Cr			X	X	X	X			X
Sulfur Fork Creek	Mile 0.0 to Origin			X	X	X	X			X
Piney River	Mile 0.0 to Origin	X	X	X	X	X	X			X
Mill Creek	Mile 0.0 to Origin	X		X	X	X	X		X	
Little Spring Creek	Mile 0.0 to Origin			X	X	X	X		X	
Big Spring Creek	Mile 0.0 to Origin			X	X	X	X			X
Garner Creek	Mile 0.0 to Origin			X	X	X	X		X	
Bear Creek	Mile 0.0 to Origin			X	X	X	X			X
East Piney River	Mile 0.0 to 4.0	X	X	X	X	X	X			
East Piney River	Mile 4.0 to 6.1		X	X	X	X	X			
East Piney River	Mile 6.1 to Origin	X	X	X	X	X	X			
Defeated Camp Creek	Mile 0.0 to 4.4		X	X	X	X	X			
Defeated Camp Creek	Mile 4.4 to Origin			X	X	X	X			
Defeated Branch	Mile 0.0 to Origin			X	X	X	X			
Duck River	Mile 67.0 to 71.5		X	X	X	X	X			
Duck River	Mile 71.5 to 123.2	X	X	X	X	X	X			
Big Bigby Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Sugar Fork	Mile 0.0 to 1.9	X	X	X	X	X	X			
Sugar Fork	Mile 1.9 to 2.9		X	X	X	X	X			
Sugar Creek	Mile 0.0 to 0.7		X	X	X	X	X			
Sugar Creek	Mile 0.7 to Origin	X	X	X	X	X	X			
Quality Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Big Swan Creek	Mile 0.0 to Origin	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Little Swan Creek	Mile 0.0 to Origin			X	X	X	X		X	
Cathey's Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Duck River	Mile 123.2 to 127.2		X	X	X	X	X			
Little Bigby Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Rutherford Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Duck River	Mile 127.2 to 217.0	X	X	X	X	X	X			
Big Rock Creek	Mile 0.0 to 14.0	X	X	X	X	X	X			
Big Rock Creek	Mile 14.0 to 16.9		X	X	X	X	X			
Big Rock Creek	Mile 16.9 to Origin	X	X	X	X	X	X			
Duck River	Mile 217.0 to 221.3		X	X	X	X	X			
Duck River	Mile 221.3 to 244.0	X	X	X	X	X	X			
Duck River	Mile 244.0 to 248.6 (Normandy Dam)	X		X	X	X	X		X	
Duck River	Mile 248.6 to 266.5	X	X	X	X	X	X			
Garrison Fork Creek	Mile 0.0 to 2.7	X	X	X	X	X	X			
Garrison Fork Creek	Mile 2.7 to 3.3		X	X	X	X	X			
Garrison Fork Creek	Mile 3.3 to Origin	X	X	X	X	X	X			
Duck River	Mile 266.5 to 268.5		X	X	X	X	X			
Duck River	Mile 268.5 to Origin	X	X	X	X	X	X			
Little Duck River	Mile 0.0 to Origin	X	X	X	X	X	X			
All other surface waters named and unnamed in the Duck River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.06 ELK RIVER BASIN (INCLUDING SHOAL CREEK).

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Shoal Creek	Tenn-Ala State Line (Mile 20.6) to Mile 56.9	X	X	X	X	X	X			
Clack Branch	Mile 0.0 to Origin		X	X	X	X	X			
Loretto Branch	Mile 0.0 to Origin		X	X	X	X	X			
Little Shoal Creek	Mile 0.0 to Origin		X	X	X	X	X			
Shoal Creek	Mile 56.9 to Origin (Jct of B. Dry Branch & Beeler Fk)		X	X	X	X	X		X	
Factory Creek	Mile 0.0 to Origin	X		X	X	X	X		X	
Chisholm Creek	Mile 0.0 to Origin			X	X	X	X		X	
Crowson Creek	Mile 0.0 to Origin			X	X	X	X			X
Elk River	Tenn-Ala State Line (Mile 33.6) to 36.3	X	X	X	X	X	X	X		
Elk River	Mile 36.3 to 90.5	X	X	X	X	X	X			
Richland Creek	Mile 0.0 to 20.0		X	X	X	X	X			
Buchannan Creek	Mile 0.0 to Origin			X	X	X	X			
Richland Creek	Mile 20.0 to 23.3			X	X		X			
Richland Creek	Mile 23.3 to Origin	X	X	X	X	X	X			
Pigeon Roost Creek	Mile 0.0 to Origin		X	X	X	X	X			
Robertson Fork	Mile 0.0 to Origin		X	X	X	X	X			
Town Creek	Mile 0.0 to Origin		X	X	X	X	X			
Holland Creek	Mile 0.0 to Origin		X	X	X	X	X			
Elk River	Mile 90.5 to 119.0	X	X	X	X	X	X			
Mulberry Creek	Mile 0.0 to Origin		X	X	X	X	X			
East Fork Mulberry Cr.	Mile 0.0 to 11.1		X	X	X	X	X			
East Fork Mulberry Cr.	Mile 11.1 to Origin	X	X	X	X	X	X			
Spring Branch	Mile 0.0 to Origin	X	X	X	X	X	X			
Elk River	Mile 119.0 to 133.3 (Tims Ford Dam)	X	X	X	X	X	X		X	
Elk River	Mile 133.3 to Origin	X	X	X	X	X	X			
Beans Creek	Mile 0.0 to Origin		X	X	X	X	X			
Factory Branch	Mile 0.0 to Origin		X	X	X	X	X			
Mathias Branch	Mile 0.0 to Origin		X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Hurricane Creek	Mile 0.0 to Origin		X	X	X	X	X			
Boiling Fork Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Wagner Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Rock Creek	Mile 0.0 to Origin		X	X	X	X	X			
Rollins Creek	Mile 0.0 to 2.5	X	X	X	X	X	X			
Rollins Creek	Mile 2.5 to Origin			X	X	X	X			
Mud Creek	Mile 0.0 to Origin		X	X	X	X	X			
Caldwell Creek	Mile 0.0 to Origin		X	X	X	X	X			
All other surface waters named and unnamed in the Elk River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.07 LOWER TENNESSEE RIVER BASIN (INCLUDING CONASAUGA RIVER).

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Tennessee River	Tenn-Ala State Line (Mile 416.5) to the POT Light (Mile 448.0)	X	X	X	X	X	X	X		
Unnamed Tributary	At Tenn. River Mile 417.5; Mile 0.0 to Origin			X	X	X	X			
Battle Creek	Mile 0.0 to 17.3 (Martin Spring)	X	X	X	X	X	X		X	
Swedens Creek	Mile 0.0 to Origin			X	X	X	X		X	
Big Fiery Gizzard	Mile 0.0 to 4.5			X	X	X	X			
Little Fiery Gizzard	Mile 0.0 to Origin			X	X	X	X			
Unnamed Trib.	At Little Fiery Gizzard Mile 0.6; Mile 0.0 to Origin			X	X	X	X			
Big Fiery Gizzard	Mile 4.5 to 5.5			X	X	X	X		X	
Big Fiery Gizzard	Mile 5.5 to Origin			X	X	X	X			
Battle Creek	Mile 17.3 to Origin	X	X	X	X	X	X			
Sequatchie River	Mile 0.0 to 3.5	X	X	X	X	X	X	X		

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Little Sequatchie River	Mile 0.0 to confluence of Sawmill Creek			X	X	X	X			
Little Sequatchie River	Confluence of Sawmill Creek to confluence of Grays Creek		X	X	X	X		X		
Little Sequatchie River	Confluence of Grays Creek to Origin			X	X	X	X			
Pocket Creek	Mile 0.0 to Origin			X	X	X	X		X	
Clifty Creek	Mile 0.0 to Origin			X	X	X	X			
Sewanee Creek	Mile 0.0 to 4.0			X	X	X	X			
Sewanee Creek	Mile 4.0 to Origin	X		X	X	X	X			
Holywater Creek	Mile 0.0 to Origin	X		X	X	X	X			
Scott Creek	Mile 0.0 to Origin	X		X	X	X	X			
Coops Creek	Mile 0.0 to Origin			X	X	X	X			
Sequatchie River	Mile 41.0 to 43.9			X	X	X	X			
Sequatchie River	Mile 43.9 to 74.0	X	X	X	X	X	X			
Sequatchie River	Mile 74.0 to 78.4			X	X	X	X			
Sequatchie River	Mile 78.4 to 105.9	X	X	X	X	X	X			
Sequatchie River	Mile 105.9 to 108.9	X	X	X	X	X	X		X	
Sequatchie River	108.8 to Origin			X	X	X	X			
Tennessee River	Mile 448.0 to 460.6 (Chattanooga Creek)		X	X	X	X	X	X		
Shoal Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At Tenn. River Mile 458.7; Mile 0.0 to Origin			X	X	X	X			
Lookout Creek	Mile 0.0 to Georgia-Tenn State Line		X	X	X	X	X			
Black Creek	Mile 0.0 to Origin			X	X	X	X			
Chattanooga Creek	Mile 0.0 to Georgia-Tenn State Line		X	X	X	X	X			
Tennessee River	Mile 460.6 to 499.4 (Hiwassee)	X	X	X	X	X	X	X		
Citico Creek	Mile 0.0 to Origin			X	X	X	X			
South Chickamauga Creek	Mile 0.0 to Georgia-Tenn State Line		X	X	X	X	X			
Friar Branch	Mile 0.0 to Origin			X	X	X	X			
West Chickamauga Creek	Mile 0.0 to Georgia-Tenn State Line		X	X	X	X	X			
Spring Creek	Mile 0.0 to Georgia-Tenn State Line		X	X	X	X	X			
Mackey Branch	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Ryall Springs Br.	Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At Tenn. River Mile 469.2; Mile 0.0 to Origin			X	X	X	X			
North Chickamauga Creek	Mile 0.0 to 13.2			X	X	X	X			
Unnamed Tributary	At N. Chickamauga Creek Mile 0.7; Mile 0.0 to Origin			X	X	X	X			
North Chickamauga Creek	Mile 13.2 to 15.0			X	X	X	X		X	
North Chickamauga Creek	Mile 15.0 to Origin			X	X	X	X			
Wolftever Creek	Mile 0.0 to Origin			X	X	X	X			
Sale Creek	Mile 0.0 to Origin			X	X	X	X			
Roaring Creek	Mile 0.0 to Origin			X	X	X	X			
Brush Creek	Mile 0.0 to Origin			X	X	X	X			
Hiwassee River	Mile 0.0 to 23.9	X	X	X	X	X	X	X		
Candies Creek	Mile 0.0 to Origin			X	X	X	X			
South Mouse Creek	Mile 0.0 to Origin			X	X	X	X			
Chatata Creek	Mile 0.0 to Origin			X	X	X	X			
Little Chatata Cr.	Mile 0.0 to Origin			X	X	X	X			
Chestuee Creek	Mile 0.0 to Origin			X	X	X	X			
Middle Creek	Mile 0.0 to 1.9			X	X	X	X			
Middle Creek	Mile 1.9 to Origin	X		X	X	X	X			
Ocoee River	Mile 0.0 to Benton Station Bridge	X	X	X	X	X	X		X	
Ocoee River	Benton Station Bridge to mile 17.0	X	X	X	X	X	X			
Sylco Creek	Mile 0.0 to Origin			X	X	X	X		X	
Dutch Creek	Mile 0.0 to Origin			X	X	X	X		X	
Greasy Creek	Mile 0.0 to Origin			X	X	X	X			
Rock Creek	Mile 0.0 to Origin			X	X	X	X		X	
Clear Creek	Mile 0.0 to Origin			X	X	X	X		X	
Ocoee River	Mile 17.0 to Ocoee #3 Powerhouse		X	X	X	X	X			
Caney Creek (East Fork)	Mile 0.0 to Origin			X	X	X	X		X	
Big Creek	Mile 0.0 to Origin			X	X	X	X			X
Goforth Creek	Mile 0.0 to Origin			X	X	X	X		X	

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Ocoee River	Ocoee #3 Powerhouse to Rock Creek		X	X	X	X	X		X	
Rock Creek	Mile 0.0 to Origin			X	X	X	X		X	
Ocoee River	Rock Creek to Mile 37.9 (Georgia-Tenn State Line)		X	X	X	X	X			
Rough Creek	Mile 0.0 to Origin			X	X	X	X			X
West Fork Rough Creek	Mile 0.0 to Origin			X	X	X	X			X
North Potato Creek	Mile 0.0 to North Carolina-Tenn State Line			X	X	X	X			
Burra Creek	Mile 0.0 to 1.5			X	X	X	X			
Brush Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Belcher Creek	Mile 0.0 to Origin			X	X	X	X			
Deweese Creek	Mile 0.0 to Origin	X		X	X	X	X			
Conasauga Creek	Mile 0.0 to Cog Hill Mill Dam			X	X	X	X		X	
Conasauga Creek	Cog Hill Mill Dam to Ruralville Mill			X	X	X	X			
Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	Mile 0.0 to Origin			X	X	X	X			
Crockett Spring Cr	Mile 0.0 to Origin			X	X	X	X			
Conasauga Creek	Ruralville Mill to Origin			X	X	X	X		X	
Gee Creek	Mile 0.0 to Origin			X	X	X	X			X
Spring Creek	Mile 0.0 to Origin			X	X	X	X			
Yellow Creek	Mile 0.0 to Origin			X	X	X	X		X	
Big Lost Creek	Mile 0.0 to Origin			X	X	X	X		X	
Little Lost Creek	Mile 0.0 to Origin			X	X	X	X		X	
Smith Creek	Mile 0.0 to Origin			X	X	X	X		X	
Wolf Creek	Mile 0.0 to Origin			X	X	X	X			X
Turtletown Creek	Mile 0.0 to N. Carolina Line			X	X	X	X		X	
Brushy Creek	Mile 0.0 to N. Carolina Line			X	X	X	X		X	
Coker Creek	Joe Brown Highway to Origin			X	X	X	X		X	
Hiwassee River	Mile 23.9 to 34.4	X	X	X	X	X	X	X		
North Mouse Creek	Mile 0.0 to 10.0	X	X	X	X	X	X			
Spring Creek	Mile 0.0 to 18.7		X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Spring Creek	Mile 18.7 to Origin			X	X	X	X			
Dry Valley Creek	Mile 0.0 to Origin			X	X	X	X			
North Mouse Creek	Mile 10.0 to 30.1		X	X	X	X	X			
Little North Mouse Cr.	Mile 0.0 to 4.1			X	X	X	X			
Little North Mouse Cr.	Mile 4.1 to Origin			X	X	X	X			
North Mouse Creek	Mile 30.1 to Origin			X	X	X	X			
Oostanaula Creek	Mile 0.0 to 26.0	X	X	X	X	X	X			
Oostanaula Creek	Mile 26.0 to 28.0		X	X	X	X	X			
Oostanaula Creek	Mile 28.0 to 33.8		X	X	X	X	X			
Oostanaula Creek	Mile 33.8 to 37.5	X	X	X	X	X	X			
Oostanaula Creek	Mile 37.5 to Origin			X	X	X	X			
Hiwassee River	Mile 34.4 to 64.9 (North Carolina Line)	X	X	X	X	X	X		X	
All other surface waters named and unnamed in the Lower Tennessee River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.08 UPPER TENNESSEE RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Tennessee River	Mile 499.4 (Hiwassee) to 567.8 (Clinch)	X	X	X	X	X	X	X		
Richland Creek	Mile 0.0 to Origin		X	X	X	X	X			
Little Richland Creek	Mile 0.0 to Origin		X	X	X	X	X			
Broyles Branch	Mile 0.0 to Origin		X	X	X	X	X			
Piney River	Mile 0.0 to 5.5		X	X	X	X	X	X		
Piney River	Mile 5.5 to 6.5 (U.S. Hwy. 27 Bridge)	X	X	X	X	X	X			
Piney River	Mile 6.5 to Origin		X	X	X	X	X			
Town Creek	Mile 0.0 to Origin		X	X	X	X	X			
Whites Creek	Mile 0.0 to 5.1			X	X	X	X	X		
Whites Creek	Mile 5.1 to Origin			X	X	X	X			
Black Creek	Mile 0.0 to Origin			X	X	X	X			
Caney Creek	Mile 0.0 to Origin			X	X	X	X			
Post Oak Creek	Mile 0.0 to Origin			X	X	X	X			
Cardiff Creek	Mile 0.0 to Origin			X	X	X	X			
Clear Creek	Mile 0.0 to 3.0			X	X	X	X		X	
Tennessee River	Mile 567.8 to 601.1	X	X	X	X	X	X	X		
Martin Branch	Mile 0.0 to Origin			X	X	X	X			
Stamp Creek	Mile 0.0 to Origin			X	X	X	X			
Greenbriar Branch	Mile 0.0 to Origin			X	X	X	X			
Hines Creek	Mile 0.0 to Origin			X	X	X	X			
Sweetwater Creek	Mile 0.0 to 9.4	X	X	X	X	X	X			
Bacon Creek	Mile 0.0 to Origin			X	X	X	X			
Sweetwater Creek	Mile 9.4 to 19.0			X	X	X	X			
Sweetwater Creek	Mile 19.0 to 21.0	X		X	X	X	X			
Sweetwater Creek	Mile 21.0 to Origin	X	X	X	X	X	X			
Unnamed Spring Branch	Mile 0.0 to Origin			X	X	X	X			
Little Tennessee River	Mile 0.0 to 19.0	X	X	X	X	X	X	X		
Fork Creek	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Unnamed Tributary	Mile 0.0 to Origin			X	X	X	X			
Bat Creek	Mile 0.0 to Origin			X	X	X	X			
Tellico River	Mile 0.0 to 5.0	X	X	X	X	X	X	X		
Tellico River	Mile 5.0 to 28.0	X	X	X	X	X	X			
Ballplay Creek	Upper 7 miles			X	X	X	X		X	
Cane Creek	Mile 0.0 to Origin			X	X	X	X		X	
Tellico River	Mile 28.0 to 41.0	X		X	X	X	X		X	
Wildcat Creek	Mile 0.0 to Origin			X	X	X	X		X	
Turkey Creek	Mile 0.0 to Origin			X	X	X	X		X	
Bald River	Mile 0.0 to Origin			X	X	X	X			X
Kirkland Creek	Mile 0.0 to Origin			X	X	X	X			X
Henderson Creek	Mile 0.0 to Origin			X	X	X	X			X
Barrett Branch	Mile 0.0 to Origin			X	X	X	X			X
Service Branch	Mile 0.0 to Origin			X	X	X	X			X
Brookshire Branch	Mile 0.0 to Origin			X	X	X	X			X
North River	Mile 0.0 to Origin			X	X	X	X			X
Long Branch	Mile 0.0 to Origin			X	X	X	X		X	
Hemlock Branch	Mile 0.0 to Origin			X	X	X	X		X	
McNabb Creek	Mile 0.0 to Origin			X	X	X	X			X
Laurel Branch	Mile 0.0 to Origin			X	X	X	X			X
Big Cove Branch	Mile 0.0 to Origin			X	X	X	X			X
Round Mountain Br	Mile 0.0 to Origin			X	X	X	X			X
Service Tree Br	Mile 0.0 to Origin			X	X	X	X			X
Sugar Cove Br	Mile 0.0 to Origin			X	X	X	X			X
Meadow Branch	Mile 0.0 to Origin			X	X	X	X			X
Roaring Br	Mile 0.0 to Origin			X	X	X	X			X
Indian Creek	Mile 0.0 to Origin			X	X	X	X			X
Panther Branch	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Tellico River	Mile 41.0 to 50.0 (TN - NC Line)	X	X	X	X	X	X			X
Sycamore Creek	Mile 0.0 to Origin			X	X	X	X			X
Rough Ridge Creek	Mile 0.0 to Origin			X	X	X	X			X
Little Tennessee River	Mile 19.0 to 30.0	X	X	X	X	X	X	X	X	
Citico Creek	Mile 4.5 to 16.0			X	X	X	X		X	
Jakes Creek	Mile 0.0 to 3.0			X	X	X	X			X
Slide Hollow	Mile 0.0 to 2.0			X	X	X	X		X	
Little Citico Creek	Mile 0.0 to 3.5			X	X	X	X			X
Jake Best Creek	Mile 0.0 to Origin			X	X	X	X			X
Doublecamp Creek	Mile 0.0 to Origin			X	X	X	X			X
Mill Branch	Mile 0.0 to Origin			X	X	X	X			X
Flint Branch	Mile 0.0 to Origin			X	X	X	X			X
Crowder Branch	Mile 0.0 to Origin			X	X	X	X			X
Citico Creek	Mile 16.0 to Origin			X	X	X	X			X
N. Fk Citico Creek	Mile 0.0 to Origin			X	X	X	X			X
Indian Valley Br	Mile 0.0 to Origin			X	X	X	X			X
South Fork Citico Creek	Mile 0.0 to Origin			X	X	X	X			X
Ike Camp Branch	Mile 0.0 to Origin			X	X	X	X			X
Falls Branch	Mile 0.0 to Origin			X	X	X	X			X
Cochran Creek	Mile 0.0 to mile 2.0			X	X	X	X		X	
Abrams Creek	Mile 0.0 to Origin			X	X	X	X			X
Panther Creek	Mile 0.0 to Origin			X	X	X	X			X
Mill Creek	Mile 0.0 to Origin			X	X	X	X			X
Bell Cove Branch	Mile 0.0 to Origin			X	X	X	X		X	
Kingfisher Creek	Mile 0.0 to Origin			X	X	X	X		X	
Buckshank Branch	Mile 0.0 to Origin			X	X	X	X		X	
Rabbit Creek	Mile 0.0 to Origin			X	X	X	X			X
Hannah Branch	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Peckerwood Br	Mile 0.0 to Origin			X	X	X	X			X
Wilson Branch	Mile 0.0 to Origin			X	X	X	X		X	
Stony Branch	Mile 0.0 to Origin			X	X	X	X		X	
Arbutus Branch	Mile 0.0 to Origin			X	X	X	X		X	
Mill Creek	Mile 0.0 to Origin			X	X	X	X			X
Forge Creek	Mile 0.0 to Origin			X	X	X	X			X
Coalen Ground Br	Mile 0.0 to Origin			X	X	X	X		X	
Bower Creek	Mile 0.0 to Origin			X	X	X	X			X
Tipton Sugar Cove	Mile 0.0 to Origin			X	X	X	X		X	
Ekanneetlee Br	Mile 0.0 to Origin			X	X	X	X			X
Tater Branch	Mile 0.0 to Origin			X	X	X	X		X	
McCaulley Branch	Mile 0.0 to Origin			X	X	X	X		X	
Rowans Branch	Mile 0.0 to Origin			X	X	X	X			X
Anthony Creek	Mile 0.0 to Origin			X	X	X	X			X
Shop Creek	Mile 0.0 to Origin			X	X	X	X			X
Tabcat Creek	Mile 0.0 to Origin			X	X	X	X			X
Parson Branch	Mile 0.0 to Origin			X	X	X	X			X
Bible Creek	Mile 0.0 to Origin			X	X	X	X			X
Slickrock Creek	Tennessee portion			X	X	X	X			X
Little Slickrock Cr	Mile 0.0 to Origin			X	X	X	X			X
Little Tennessee River	Mile 30.0 to 49.7 (TN.-N.C. Line)	X	X	X	X	X	X		X	
Morgan Branch	Mile 0.0 to Origin			X	X	X	X			
Abrams Branch	Mile 0.0 to Origin			X	X	X	X			
First Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Tennessee River	Mile 601.1 to 636.6 (Little River)	X	X	X	X	X	X	X		
Town Creek	Mile 0.0 to Origin			X	X	X	X			
Gallagher Creek	Mile 0.0 to Origin			X	X	X	X			
Turkey Creek	Mile 0.0 to Origin			X	X	X	X			
Sinking Creek #1	Mile 0.0 to Origin	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Ten Mile Creek	From Sink to Origin			X	X	X	X			
Sinking Creek #2	Mile 0.0 to Origin			X	X	X	X			
Unnamed Trib.	Mile 0.0 to Origin			X	X	X	X			
Lackey Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	Mile 0.0 to Origin			X	X	X	X			
Little River	Mile 0.0 to 33.0	X	X	X	X	X	X			
Polecat Branch	Mile 0.0 to Origin			X	X	X	X			
Stock Creek	Mile 0.0 to Origin			X	X	X	X			
McCall Branch	Mile 0.0 to Origin			X	X	X	X			
Russell's Branch	Mile 0.0 to Origin			X	X	X	X			
Pistol Creek	Mile 0.0 to Origin			X	X	X	X			
Duncan Branch	Mile 0.0 to Origin			X	X	X	X			
Culton Creek	Mile 0.0 to Origin			X	X	X	X			
Tedford Br	Mile 0.0 to Origin			X	X	X	X			
Hesse Creek	Upper 5 miles			X	X	X	X		X	
Cane Creek	Upper 2.0 miles			X	X	X	X		X	
Beard Cane Cr	Upper 1.5 miles			X	X	X	X		X	
Little River	Mile 33.0 to Origin	X		X	X	X	X			X
M. Pr. Little River	Mile 0.0 to Origin			X	X	X	X			X
W. Prong Little R.	Mile 0.0 to Origin			X	X	X	X			X
Laurel Creek	Mile 0.0 to Origin			X	X	X	X			X
Meadow Br	Mile 0.0 to Origin			X	X	X	X			X
Spruce Flats Br	Mile 0.0 to Origin			X	X	X	X			X
Sams Creek	Mile 0.0 to Origin			X	X	X	X			X
Thunderhead Pr	Mile 0.0 to Origin			X	X	X	X			X
Shut-in Cr	Mile 0.0 to Origin			X	X	X	X			X
Lynn Camp Prong	Mile 0.0 to Origin			X	X	X	X			X
Marks Creek	Mile 0.0 to Origin			X	X	X	X			X
Meigs Creek	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Little Greenbriar Creek	Mile 0.0 to Origin			X	X	X	X			X
Mannis Branch	Mile 0.0 to Origin			X	X	X	X			X
Blanket Creek	Mile 0.0 to Origin			X	X	X	X			X
Shields Branch	Mile 0.0 to Origin			X	X	X	X			X
Jakes Creek	Mile 0.0 to Origin			X	X	X	X			X
Newt Prong	Mile 0.0 to Origin			X	X	X	X			X
Laurel Branch	Mile 0.0 to Origin			X	X	X	X			X
Fish Camp Prong	Mile 0.0 to Origin			X	X	X	X			X
Goshen Prong	Mile 0.0 to Origin			X	X	X	X			X
Silers Prong	Mile 0.0 to Origin			X	X	X	X			X
Rich Branch	Mile 0.0 to Origin			X	X	X	X			X
Rough Creek	Mile 0.0 to Origin			X	X	X	X			X
Meigs Post Prong	Mile 0.0 to Origin			X	X	X	X			X
Grouse Creek	Mile 0.0 to Origin			X	X	X	X			X
Tennessee River	Mile 636.6 to 638.6	X	X	X	X	X	X	X		
Tennessee River	Mile 638.6 to 640.0		X	X	X	X	X	X		
Tennessee River	Mile 640.0 to 643.4	X	X	X	X	X	X	X		
Tennessee River	Mile 643.4 to 646.4		X	X	X	X	X	X		
Tennessee River	Mile 646.4 to 652.2	X	X	X	X	X	X	X		
Knob Creek	Mile 0.0 to Origin			X	X	X	X			
Flenniken Branch	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	Mile 0.0 to Origin			X	X	X	X			
Fourth Creek	Mile 0.0 to Origin			X	X	X	X			
Third Creek	Mile 0.0 to 4.9			X	X	X	X			
Third Creek	Mile 4.9 to Origin	X	X	X	X	X	X			
Second Creek	Mile 0.0 to Origin		X	X	X	X	X			
First Creek	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
All other surface water named and unnamed in the Upper Tennessee River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.09 CLINCH RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Clinch River	Mile 0.0 to 4.4 (Emory River)	X	X	X	X	X	X	X		
Emory River	Mile 0.0 to Origin	X	X	X	X	X	X			
Little Emory River	Mile 0.0 to Origin	X	X	X	X	X	X			
Middle Fork Little Emory River	Mile 0.0 to Origin			X	X	X	X			
Davis Branch	Mile 0.0 to 0.2			X	X	X	X			
Unnamed Tributary	At Emory River (Mile 16.4); Mile 0.0 to 1.0			X	X	X	X			
Crooked Fork Creek	Mile 0.0 to 4.9			X	X	X	X			
Unnamed Tributary	At Crooked Fork Creek (Mile 4.9); Mile 0.0 to Origin			X	X	X	X			
Crooked Fork Creek	Mile 4.9 to Origin	X		X	X	X	X			
Flat Fork Creek	Mile 0.0 to Origin	X		X	X	X	X		X	
Unnamed Tributary	At Flat Fork (Mile 2.3); Mile 0.0 to Origin			X	X	X	X		X	
Stockstill Creek	Mile 0.0 to Origin			X	X	X	X			
Obed River	Mile 0.0 to 40.1			X	X	X	X			
Daddy's Creek	Mile 0.0 to Origin			X	X	X	X			
Basses Creek	Mile 0.0 to Origin			X	X	X	X			
Fox Creek	Mile 0.0 to Origin			X	X	X	X			
Scantling Branch	Mile 0.0 to Origin			X	X	X	X			
Unnamed Trib.	At Scantling Branch (Mile 1.2); Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At Obed River (Mile 34.6); Mile 0.0 to Origin			X	X	X	X			
Obed River	Mile 40.1 to Origin	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Unnamed Tributary	At Obed River (Mile 45.4); Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 4.4 to 12.0 (Poplar Creek)	X	X	X	X	X	X	X		
Poplar Creek	Mile 0.0 to 0.5		X	X	X	X	X			
Poplar Creek	Mile 0.5 to Origin			X	X	X	X			
East Fork Poplar Creek	Mile 0.0 to Origin			X	X	X	X			
Bear Creek	Mile 0.0 to Origin			X	X	X	X			
Indian Creek	At Poplar Creek (Mile 14.3); Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 12.0 to 20.0	X	X	X	X	X	X			
White Oak Creek	Mile 0.0 to Origin			X	X		X			
Melton Branch	Mile 0.0 to Origin			X	X		X			
Clinch River	Mile 20.0 to 39.6	X	X	X	X	X	X	X		
Beaver Creek	Mile 0.0 to 8.4	X	X	X	X	X	X			
Beaver Creek	Mile 8.4 to 10.4		X	X	X	X	X			
Beaver Creek	Mile 10.4 to 17.5	X	X	X	X	X	X			
Beaver Creek	Mile 17.5 to 17.9		X	X	X	X	X			
Beaver Creek	Mile 17.9 to 21.6	X	X	X	X	X	X			
Beaver Creek	Mile 21.6 to 23.6			X	X	X	X			
Beaver Creek	Mile 23.6 to 29.4	X	X	X	X	X	X			
Beaver Creek	Mile 29.4 to 31.4			X	X	X	X			
Beaver Creek	Mile 31.4 to Origin	X	X	X	X	X	X			
Unnamed Tributary	At Beaver Creek (Mile 44.1); Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 39.6 to 41.1	X	X	X	X	X	X	X		
Scarboro Creek	Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 41.1 to 46.7	X	X	X	X	X	X	X		
Bull Run Creek	Mile 0.0 to 1.0			X	X	X	X			
Bull Run Creek	Mile 1.0 to Origin	X		X	X	X	X			
Nelson Branch	Mile 0.0 to Origin			X	X	X	X			
Blaze Branch	At Nelson Branch (Mile 5.0); Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 46.7 to 47.8	X	X	X	X	X	X	X		
Worthington Branch	At Clinch River (Mile 47.8); Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Clinch River	Mile 47.8 to 50.7	X	X	X	X	X	X	X		
Braden Branch	At Clinch River (Mile 50.7); Mile 0.0 to 1.7			X	X		X			
Braden Branch	Mile 1.7 to Origin			X	X	X	X			
Clinch River	Mile 50.7 to 51.1	X	X	X	X	X	X	X		
Unnamed Tributary	At Clinch River (Mile 51.1); Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 51.1 to 61.5	X	X	X	X	X	X	X		
Clinch River	Mile 61.5 to 66.2	X	X	X	X	X	X			
Hinds Creek	At Clinch River (Mile 65.0); Mile 0.0 to Origin			X	X	X	X			
Buffalo Creek	Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 66.2 to 79.8	X	X	X	X	X	X		X	
Cane Creek	At Clinch River (Mile 71.3); Mile 0.0 to Origin			X	X	X	X			
Blowing Spring Fork	At Cane Creek (Mile 1.9); Mile 0.0 to Origin			X	X	X	X			
Coal Creek	At Clinch River (Mile 75.0); Mile 0.0 to Origin			X	X	X	X		X	
Unnamed Tributary	At Coal Creek (Mile 8.6); Mile 0.0 to Origin			X	X	X	X			
Clinch River	Mile 79.8 to 202.1 (Virginia Stateline)	X	X	X	X	X	X			
Cove Creek	Mile 0.0 to 15.1	X	X	X	X	X	X			
Unnamed Tributary	At Cover Creek (Mile 13.7); Mile 0.0 to Origin			X	X	X	X			
Cove Creek	Mile 15.1 to 16.1		X	X	X	X	X			
Cove Creek	Mile 16.1 to Origin	X	X	X	X	X	X			
Bruce (Brush) Creek	Mile 0.0 to Origin			X	X	X	X			
Dog Creek	At Bruce Creek (Mile 0.9); Mile 0.0 to Origin			X	X	X	X			
Unnamed Trib.	At Dog Creek (Mile 2.0); Mile 0.0 to Origin			X	X	X	X			
Big Creek	At Clinch River (Mile 83.0); Mile 0.0 to 15.6	X	X	X	X	X	X			
Big Creek	Mile 15.6 to 17.6		X	X	X	X	X			
Big Creek	Mile 17.6 to Origin			X	X	X	X			
Ollis Creek	At Big Creek (Mile 20.4); Mile 0.0 to Origin	X	X	X	X	X	X			
Powell River	At Clinch River (Mile 88.8); Mile 0.0 to 115.7	X	X	X	X	X	X			
Gap Creek	At Powell River (Mile 57.7); Mile 0.0 to Origin			X	X	X	X			
Unnamed Spring Br.	From Sinkhole to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Russell Creek	At Powell River (Mile 82.4); Mile 0.0 to Origin			X	X	X	X			
Clear Creek	Mile 0.0 to 2.0			X	X	X	X		X	
White Creek	Mile 0.0 to 2.0			X	X	X	X		X	
Mill Creek	At Clinch River (Mile 98.0); Mile 0.0 to Origin			X	X	X	X			
Byram's Creek	At Mill Creek (Mile 0.5); Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At Byram's Creek (Mile 2.3); Mile 0.0 to Origin			X	X	X	X			
Ball Creek	Mile 0.0 to Origin	X		X	X	X	X		X	
Poorland Creek	At Clinch River (Mile 104.2); Mile 0.0 to Origin			X	X	X	X			
Dry Tributary	At Poorland Creek (Mile 2.5); Mile 0.0 to Waste Outfall			X	X		X			
Hunting Creek	At Clinch River (Mile 118.3); Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At Hunting Creek (Mile 2.0); Mile 0.0 to Origin			X	X	X	X			
Big War Creek	At Clinch River (Mile 164.4); Mile 0.0 to 8.0			X	X	X	X			
Flat Gap Creek	At Big War Branch (Mile 7.0); Mile 0.0 to Origin			X	X	X	X			
Big War Creek	Mile 8.0 to Origin			X	X	X	X			
North Fork Clinch River	At Clinch River (Mile 192.0); Mile 0.0 to 2.2			X	X	X	X		X	
All other surface waters named and unnamed in the Clinch River Basin, with the exception of wet weather conveyances, which have not been specifically treated shall be classified				X	X	X	X			

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

0400-40-04-.10 FRENCH BROAD RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
French Broad River	Mile 0.0 to 102.2 (N. Carolina-Tenn Line)	X	X	X	X	X	X			
Hines Creek	Mile 0.0 to Origin		X	X	X	X	X			
Unnamed Tributary	At Hines Creek (Mile 1.7)			X	X		X			
Unnamed Tributary	At Hines Creek (Mile 3.7)			X	X		X			
Cement Mill Creek	Mile 0.0 to Origin		X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Boyds Creek	Mile 0.0 to Origin		X	X	X	X	X			
Unnamed Tributary	At Boyds Creek (Mile 9.7)			X	X		X			
Unnamed Tributary	At Boyds Creek (Mile 11.5)			X	X		X			
Little Pigeon River	Mile 0.0 to 2.9	X	X	X	X	X	X			
Gist (Guess) Creek	Mile 0.0 to Origin			X	X	X	X			
Little Pigeon River	Mile 2.9 to 4.8		X	X	X	X	X			
W. Prong Little Pigeon R.	Mile 0.0 to 4.5	X	X	X	X	X	X			
W. Prong Little Pigeon R.	Mile 4.5 to 7.9	X	X	X	X	X	X		X	
W. Prong Little Pigeon R.	Mile 7.9 to 8.8		X	X	X	X	X		X	
W. Prong Little Pigeon R.	Mile 8.8 to 13.0	X	X	X	X	X	X		X	
W. Prong Little Pigeon R.	Mile 13.0 to 14.0		X	X	X	X	X		X	
W. Prong Little Pigeon R.	Mile 14.0 to 19.0		X	X	X	X	X		X	
Dudley Creek	Mile 0.0 to Origin			X	X	X	X		X	
Little Dudley Creek	Mile 0.0 to Origin			X	X	X	X		X	
Roaring Fork Creek	Mile 0.0 to Origin			X	X	X	X			X
Baskins Creek	Mile 0.0 to Origin			X	X	X	X		X	
Norton Creek	Mile 0.0 to Origin			X	X	X	X			X
Leconte Creek	Mile 0.0 to Origin			X	X	X	X		X	
W. Prong Little Pigeon R.	Mile 19.0 to Origin	X		X	X	X	X			X
Twomile Creek	Mile 0.0 to Origin			X	X	X	X			X
Fighting Creek	Mile 0.0 to Origin			X	X	X	X			X
Sugarland Branch	Mile 0.0 to Origin			X	X	X	X			X
Big Branch	Mile 0.0 to Origin			X	X	X	X			X
Road Prong	Mile 0.0 to Origin			X	X	X	X			X
Cole Branch	Mile 0.0 to Origin			X	X	X	X			X
Alum Cave Creek	Mile 0.0 to Origin			X	X	X	X			X
Walker Camp Pr	Mile 0.0 to Origin			X	X	X	X			X
Little Pigeon River	Mile 4.8 to 20.3	X	X	X	X	X	X			
Little Pigeon River	Mile 20.3 to Origin	X		X	X	X	X		X	
E.F. Little Pigeon R.	Mile 0.0 to Origin	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Dunn Creek	Mile 0.0 to 15.8	X	X	X	X	X	X		X	
Dunn Creek	Mile 15.8 to Origin	X	X	X	X	X	X			X
Ogle Springs Br	Mile 0.0 to Origin			X	X	X	X			
Bird Creek	Mile 0.0 to Origin			X	X	X	X			
Webb Creek	Mile 0.0 to Great Smoky Mtns Pk Boundary (Mile 5.8)			X	X	X	X		X	
Soak Ash Creek	Mile 0.0 to Origin			X	X	X	X			X
Timothy Creek	Mile 0.0 to Origin			X	X	X	X			X
Redwine Creek	Mile 0.0 to Origin			X	X	X	X			X
Noisy Creek	Mile 0.0 to Origin			X	X	X	X			X
Texas Creek	Mile 0.0 to Origin			X	X	X	X			X
Webb Creek	Great Smoky Mts boundary to origin			X	X	X	X			X
Copeland Creek	Mile 0.0 to Origin			X	X	X	X		X	
Injun Creek	Mile 0.0 to Origin			X	X	X	X		X	
Rhododendron Creek	Mile 0.0 to Origin			X	X	X	X		X	
Porters Creek	Mile 0.0 to Origin			X	X	X	X		X	
False Gap Prong	Mile 0.0 to Origin			X	X	X	X		X	
Kalanu Prong	Mile 0.0 to Origin			X	X	X	X		X	
Long Branch	Mile 0.0 to Origin			X	X	X	X		X	
Cannon Creek	Mile 0.0 to Origin			X	X	X	X		X	
Lowes Creek	Mile 0.0 to Origin			X	X	X	X		X	
Boulevard Prong	Mile 0.0 to Origin			X	X	X	X		X	
Shutts Prong	Mile 0.0 to Origin			X	X	X	X		X	
Middle Prong Little Pigeon	Mile 0.0 to Origin			X	X	X	X		X	
Ramsey Prong	Mile 0.0 to Origin			X	X	X	X		X	
Chapman Prong	Mile 0.0 to Origin			X	X	X	X		X	
Eagle Rocks Branch	Mile 0.0 to Origin			X	X	X	X		X	
Lost Prong	Mile 0.0 to Origin			X	X	X	X		X	
Buck Fork	Mile 0.0 to Origin			X	X	X	X		X	
Muddy Creek	Mile 0.0 to Origin			X	X	X	X			
Clear Creek	Mile 0.0 to Origin	X		X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
City Spring Tributary	Mile 0.0 to Origin			X	X	X	X			
Indian Creek	Mile 0.0 to Origin			X	X	X	X			
Ball Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At Ball Creek (Mile 2.9); Mile 0.0 to Origin			X	X		X			
Leadvale Creek	Mile 0.0 to Origin			X	X	X	X			
Clear Creek	Mile 0.0 to Origin			X	X	X	X			
Nolichucky River	Mile 0.0 to 5.3	X	X	X	X	X	X			
Long Creek	Mile 0.0 to Origin			X	X	X	X			
Sinking Creek	Mile 0.0 to Origin			X	X	X	X			
Nolichucky River	Mile 5.3 to 7.7		X	X	X	X	X			
Nolichucky River	Mile 7.7 to 100.8 (N. Carolina-Tenn Line)	X	X	X	X	X	X			
Slate Creek	Mile 0.0 to Origin			X	X	X	X			
Bent Creek	Mile 0.0 to Origin			X	X	X	X			
Mud Creek	Mile 0.0 to Origin			X	X	X	X			
Williams Branch	Mile 0.0 to Origin			X	X	X	X			
Lick Creek	Mile 0.0 to 49.0		X	X	X	X	X			
Lick Creek	Mile 49.0 to Origin	X	X	X	X	X	X			
Black Creek	Mile 0.0 to Origin			X	X	X	X			
War Branch	Mile 0.0 to 0.5			X	X	X	X			
Unnamed Tributary	At Lick Creek (Mile 36.1); Mile 0.0 to Origin			X	X		X			
Little Chucky Creek	Mile 0.0 to Origin			X	X	X	X			
Mosheim Branch	Mile 0.0 to Origin			X	X	X	X			
Unnamed Trib.	At Mosheim Branch (Mile 2.0); Mile 0.0 to Origin			X	X		X			
Unnamed Tributary	At Little Chucky Creek (Mile 17.2); Mile 0.0 to Origin			X	X	X	X			
Gap Creek	Mile 0.0 to Origin			X	X	X	X			
Furness Branch	Mile 0.0 to Origin			X	X	X	X			
Cove Creek	Mile 0.0 to Origin			X	X	X	X			
Flag Branch	Mile 0.0 to Origin			X	X	X	X			
Richland Creek	Mile 0.0 to Origin		X	X	X	X	X			
Crazy Creek	Sinkhole to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Unnamed Tributary	At Crazy Creek (Mile 1.3); Mile 0.0 to 0.5			X	X	X	X			
Unnamed Tributary	Mile 0.5 to Origin			X	X		X			
Camp Creek	Mile 0.0 to Origin		X	X	X	X	X			X
Jennings Creek	Mile 0.0 to Origin			X	X	X	X			X
Dry Creek	Mile 0.0 to 1.3			X	X	X	X			
Dry Creek	Mile 1.3 to Origin			X	X	X	X			X
Davis Creek	Mile 0.0 to Origin			X	X	X	X			X
College Creek	Mile 0.0 to Origin			X	X	X	X			
Moon Creek	Mile 0.0 to Origin			X	X	X	X			
Sinking Creek	Mile 0.0 to Origin			X	X	X	X			
Little Limestone Creek	Mile 0.0 to Origin			X	X	X	X			
Horse Creek	Mile 0.0 to Origin			X	X	X	X			X
Squibb Branch	Mile 0.0 to Origin			X	X	X	X			X
Cassi Creek, East and West Fork	Mile 0.0 to Origin			X	X	X	X			X
Painter Creek	Mile 0.0 to Origin			X	X	X	X			X
Clarks Creek	Mile 0.0 to Origin			X	X	X	X			X
Devil Fork Branch	Mile 0.0 to Origin			X	X	X	X			X
Long Arm Branch	Mile 0.0 to Origin			X	X	X	X			X
Chigger Branch	Mile 0.0 to Origin			X	X	X	X			X
Dry Creek	Mile 0.0 to Origin			X	X	X	X			X
Ramsey Creek	Mile 0.0 to Origin			X	X	X	X			X
Briar Creek	Mile 0.0 to Origin			X	X	X	X			X
Straight Creek	Mile 0.0 to Origin			X	X	X	X			X
Bumpus Cove Creek	Mile 0.0 to Origin			X	X	X	X			X
Broad Shoal Creek	Mile 0.0 to Origin			X	X	X	X			X
California Creek	Mile 0.0 to Origin			X	X	X	X			X
North Indian Creek	Upstream of Erwin	X	X	X	X	X	X			X
Rock Creek	Mile 0.0 to Origin			X	X	X	X			X
Duck Creek	Mile 0.0 to Origin			X	X	X	X			X
Red Fork Creek	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Clear Fork Branch	Mile 0.0 to Origin			X	X	X	X			X
South Indian Creek	Mile 0.0 to Origin			X	X	X	X			X
Mill Creek	Mile 0.0 to Origin			X	X	X	X			X
Granny Lewis Creek	Mile 0.0 to Origin			X	X	X	X			X
Lower Higgins Creek	Mile 0.0 to Origin			X	X	X	X			X
Birchfield Camp Br	Mile 0.0 to Origin			X	X	X	X			X
Big Branch	Mile 0.0 to Origin			X	X	X	X			X
Spivey Creek	Mile 0.0 to Origin			X	X	X	X			X
Coffee Ridge Cr	Mile 0.0 to Origin			X	X	X	X			X
Watts Branch	Mile 0.0 to Origin			X	X	X	X			X
Tumbling Creek	Mile 0.0 to Origin			X	X	X	X			X
Rocky Fork Creek	Mile 0.0 to Origin			X	X	X	X			X
Flint Creek	Mile 0.0 to Origin			X	X	X	X			X
Devil Fork Creek	Mile 0.0 to Origin			X	X	X	X			X
Sams Creek	Mile 0.0 to Origin			X	X	X	X			X
Upper Higgins Creek	Mile 0.0 to Origin			X	X	X	X			X
E. Fk Higgins Cr	Mile 0.0 to Origin			X	X	X	X			X
Rice Creek	Mile 0.0 to Origin			X	X	X	X			X
Jones Creek	Mile 0.0 to Origin			X	X	X	X			X
Long Branch	Mile 0.0 to Origin			X	X	X	X			X
Pigeon River	Mile 0.0 to 25.9 (Tenn-N. Car. Line)		X	X	X	X	X			
Matthew Creek	Mile 0.0 to Origin			X	X	X	X		X	
Sinking Creek	Mile 0.0 to 5.2		X	X	X	X	X			X
Sinking Creek	Mile 5.2 to Origin	X		X	X	X	X		X	
Cosby Creek	Mile 0.0 to 4.3			X	X	X	X		X	
Cosby Creek	Mile 4.3 to Origin			X	X	X	X			X
N. Fork Bogard Cr	Mile 0.0 to Origin			X	X	X	X		X	
Indian Camp Creek	Mile 0.0 to Origin			X	X	X	X			X
Mill Creek	Mile 0.0 to Origin			X	X	X	X			X
Big Creek	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Gulf Fork Big Creek	Mile 0.0 to Origin			X	X	X	X			X
Trail Fork Big Creek	Mile 0.0 to Origin			X	X	X	X		X	
Dry Fork Creek	Mile 0.0 to Origin			X	X	X	X			X
Bailey Branch	Mile 0.0 to Origin			X	X	X	X		X	
Bear Branch	Mile 0.0 to Origin			X	X	X	X		X	
Laurel Fork Creek	Mile 0.0 to Origin			X	X	X	X			X
Moss Camp Creek	Mile 0.0 to Origin			X	X	X	X			X
Deep Gap Creek	Mile 0.0 to Origin			X	X	X	X			X
M. Prong Gulf Fork	Mile 0.0 to Origin			X	X	X	X			X
Laurel Creek	Mile 0.0 to Origin			X	X	X	X			X
Brown Gap Creek	Mile 0.0 to Origin			X	X	X	X			X
Tom Creek	Mile 0.0 to Origin			X	X	X	X		X	
Wolf Creek	Mile 0.0 to 2.0			X	X	X	X		X	
Wolf Creek	Mile 2.0 to Origin			X	X	X	X			X
Brush Creek	Mile 0.0 to 1.0			X	X	X	X		X	
Paint Creek	Mile 0.0 to Origin			X	X	X	X			X
All other surface waters named and unnamed in the French Broad River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.11 HOLSTON RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Holston River	Mile 0.0 to 131.5 (Church Hill Bridge)	X	X	X	X	X	X			
Unnamed Branch	At Holston River (Mile 1.0); Mile 0.0 to Origin			X	X	X	X			
Sand Branch	Mile 0.0 to Origin			X	X	X	X			
Swan Pond Creek	Mile 0.0 to 5.0			X	X	X	X			
Pratt Branch	Mile 0.0 to Origin			X	X	X	X			
Woods Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Holston River (Mile 6.7); Mile 0.0 to Origin			X	X	X	X			
Maccash Branch	At Holston River (Mile 10.8); Mile 0.0 to Origin			X	X	X	X			
Roseberry Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Roseberry Creek (Mile 1.7); Mile 0.0 to 0.5			X	X	X	X			
Unnamed Branch	Mile 0.5 to 0.7			X	X	X	X			
Big Flat Creek	Mile 0.0 to 8.0		X	X	X	X	X			
Little Flat Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Tributary	At L. Flat Creek (Mile 1.3); Mile 0.0 to Origin			X	X	X	X			
Big Flat Creek	Mile 8.0 to Origin			X	X	X	X			
Lyon Creek	Mile 0.0 to 0.3		X	X	X	X	X			
Lyon Creek	Mile 0.3 to 1.9		X	X	X	X	X			
Unnamed Branch	At Lyon Creek (Mile 1.9); Mile 0.0 to Origin			X	X	X	X			
Lyon Creek	Mile 1.9 to Origin			X	X	X	X			
Unnamed Branch	At Lyon Creek (Mile 2.7); Mile 0.0 to Origin			X	X	X	X			
Richland Creek	At Holston River (Mile 27.1); Mile 0.0 to Origin			X	X	X	X			
Beaver Creek	At Holston River (Mile 30.4); Mile 0.0 to Origin			X	X	X	X			
Lost Creek at New Market	Sink at Mile 1.9 to Origin			X	X	X	X			
Buffalo Creek	Below Buffalo Springs			X	X	X	X		X	
Mossy Creek	At Holston River (Mile 52.4); Mile 0.0 to 3.9	X	X	X	X	X	X			
Mossy Creek	Mile 3.9 to Origin		X	X	X	X	X		X	
Unnamed Branch	At Holston River (Mile 55.0); Mile 0.0 to Origin			X	X	X	X			
German Creek	At Holston River (Mile 70.2); Mile 0.0 to 8.1	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
German Creek	Mile 8.1 to Origin			X	X	X	X			
Turkey Creek	At Holston River (Mile 75.2); Mile 0.0 to 1.2	X	X	X	X	X	X			
Turkey Creek	Mile 1.2 to Origin			X	X	X	X			
Spring Creek	At Holston River (Mile 76.0); Mile 0.0 to 1.2	X	X	X	X	X	X			
Spring Creek	Mile 1.2 to Origin			X	X	X	X			
Thompson Creek	Mile 0.0 to Origin			X	X	X	X			
Fall Creek	At Holston River (Mile 80.7); Mile 0.0 to 1.0	X	X	X	X	X	X			
Fall Creek	Mile 1.0 to Origin			X	X	X	X			
Poor Valley Creek	At Holston River (Mile 89.2); Mile 0.0 to 6.8	X	X	X	X	X	X			
Mooresburg Branch	Mile 0.0 to 1.6	X	X	X	X	X	X			
Mooresburg Branch	Mile 1.6 to Origin			X	X	X	X			
Poor Valley Creek	Mile 6.8 to Origin			X	X	X	X			
Beech Creek	At Holston River (Mile 108.8); Mile 0.0 to Origin			X	X	X	X			
Big Creek (Stanley Prong)	Holston River (Mile 109.1); Mile 0.0 to Origin	X	X	X	X	X	X		X	
Forgey Creek	At Holston River (Mile 116.9); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Forgey Creek (Mile 1.1); Mile 0.0 to 1.0			X	X		X			
Stoney Point Creek	At Holston River (Mile 123.0); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Stoney Point Creek (Mile 0.2); Mile 0.0 to Origin			X	X	X	X			
Bradley Creek	At Holston River (Mile 128.8); Mile 0.0 to Origin	X		X	X	X	X			
Holston River	Mile 131.5 to Origin (Mile 142.2)			X	X	X	X			
Alexander Creek	At Holston River (Mile 131.9); Mile 0.0 to 3.4	X	X	X	X	X	X		X	
Unnamed Branch	At Alexander Creek (Mile 3.4); Mile 0.0 to 0.3			X	X	X	X			
Alexander Creek	Mile 3.4 to Origin			X	X	X	X		X	
Smith Creek	At Holston River (Mile 135.5); Mile 0.0 to Origin			X	X	X	X			
Arnott Branch	At Holston River (Mile 137.9); Mile 0.0 to Origin			X	X	X	X			
North Fork Holston River	Mile 0.0 to 5.2 (Tenn-Virginia Line)			X	X		X			
South Fork Holston River	Mile 0.0 to 2.3		X	X	X					
Reedy Creek	Mile 0.0 to 7.1		X	X	X	X	X			
Reedy Creek	Mile 7.1 to Tenn-Virginia Line	X	X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
South Fork Holston River	Mile 2.3 to 5.7		X	X	X					
Horse Creek	Mile 0.0 to 1.3		X	X	X	X	X			
Horse Creek	Mile 1.3 to Origin			X	X	X	X			
Little Horse Creek	At Horse Creek (Mile 3.6); Mile 0.0 to Origin			X	X	X	X			
Dolan Branch	At Little Horse Creek (Mile 2.8); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At S.F. Holston River (Mile 4.0); Mile 0.0 to Origin		X	X	X	X	X			
South Fork Holston River	Mile 5.7 to 19.6	X	X	X	X	X	X		X	
Kendrick Creek	Mile 0.0 to 1.0			X	X	X	X		X	
Kendrick Creek	Mile 1.0 to Origin			X	X	X	X			
Fall Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At S. F. Holston River (Mile 13.6); Mile 0.0 to Origin			X	X	X	X			
Sinking Creek	At S. F. Holston River (Mile 14.1); Mile 0.0 to Origin			X	X	X	X			
Ford Creek	Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Ford Creek (Mile 1.3); Mile 0.0 to Origin		X	X	X	X	X			
Cedar Creek	At S. F. Holston (Mile 18.0); Mile 0.0 to 2.3			X	X	X	X			
Unnamed Branch	At Cedar Creek (Mile 2.3); Mile 0.0 to Origin			X	X	X	X			
Cedar Creek	Mile 2.3 to Origin			X	X	X	X			
Watauga River	At S. F. Holston (Mile 19.6); Mile 0.0 to 15.0	X	X	X	X	X	X			
Boone's Creek	Mile 0.0 to Origin			X	X	X	X			
Knob Creek	Mile 0.0 to Origin			X	X	X	X			
Watauga River	Mile 15.0 to 16.4		X	X	X	X	X			
Brush Creek	Mile 0.0 to Origin			X	X	X	X			
Lick Creek	Mile 0.0 to Origin			X	X	X	X			
Watauga River	Mile 16.4 to 18.0	X	X	X	X	X	X		X	
Watauga River	Mile 18.0 to 25.8		X	X	X	X	X		X	
Buffalo Creek	At Watauga River (Mile 22.1); Mile 0.0 to Origin			X	X	X	X			X
Toll Branch	Mile 0.0 to 0.1			X	X	X	X			X
Toll Branch	Mile 0.1 to Origin			X	X	X	X			X
Unnamed Branch	Mile 0.2 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Dry Creek	At Buffalo Creek (Mile 3.3); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Buffalo Creek (Mile 3.0); Mile 0.0 to 0.2			X	X	X	X			
Campbell Creek	At Watauga River (Mile 25.7); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Campbell Creek (Mile 1.6): Mile 0.0 to Origin			X	X	X	X			
Campbell Branch	Mile 1.6 to Origin			X	X	X	X			
Watauga River	Mile 25.8 to 55.1 (N.C.-Tenn. Line)	X	X	X	X	X	X			X
Stony Creek	Mile 0.0 to Origin			X	X	X	X			X
Little Stony Creek	Mile 0.0 to Origin			X	X	X	X			X
Pierce Branch	Mile 0.0 to Origin			X	X	X	X		X	
Bartree Branch	Mile 0.0 to Origin			X	X	X	X		X	
Mill Creek	Mile 0.0 to Origin			X	X	X	X			X
North Fork Stony Creek	Mile 0.0 to Origin			X	X	X	X			X
Upper Hinkle Branch	Mile 0.0 to Origin			X	X	X	X			
Doe River	Mile 0.0 to 21.0	X	X	X	X	X	X		X	
Laurel Fork Creek	At Doe River (Mile 7.0); Mile 0.0 to Origin			X	X	X	X			X
Little Laurel Fork	Mile 0.0 to Origin			X	X	X	X			X
Wagner Branch	Mile 0.0 to Origin			X	X	X	X			X
Simerly Creek	Mile 0.0 to Origin			X	X	X	X			X
Clarke Creek	Mile 0.0 to Origin			X	X	X	X			X
Tiger Creek	Mile 0.0 to Origin			X	X	X	X			X
Roaring Creek	Mile 0.0 to Origin			X	X	X	X			X
Georges Creek	Mile 0.0 to Origin			X	X	X	X			X
Buck Creek	At Doe River (Mile 20.9); Mile 0.0 to Origin			X	X	X	X			X
Shell Creek	Mile 0.0 to Origin			X	X	X	X			X
Hampton Creek	Mile 0.0 to Origin			X	X	X	X		X	
L. Prong Hampton Creek	Mile 0.0 to Origin			X	X	X	X			X
Sugar Hollow Creek	Mile 0.0 to Origin			X	X	X	X		X	
Hampton Creek	Mile 0.0 to Origin			X	X	X	X		X	
L. Prong Hampton Creek	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Shell Creek	Mile 0.0 to Origin			X	X	X	X			X
Cove Creek	Mile 0.0 to Origin			X	X	X	X			X
Laurel Fork Creek	At Doe River (Mile 7.0); Mile 0.0 to Origin			X	X	X	X			X
Little Laurel Fork	Mile 0.0 to Origin			X	X	X	X			X
Wagner Branch	Mile 0.0 to Origin			X	X	X	X			X
Buck Creek	At Doe River (Mile 20.9); Mile 0.0 to Origin			X	X	X	X			X
Doe River	Mile 21.0 to Origin	X	X	X	X	X	X			X
Little Stony Creek	Mile 0.0 to Origin			X	X	X	X			X
Elk River	At Watauga (Mile 46.8); Mile 0.0 to 14.5 (Stateline)			X	X	X	X		X	
Black Branch	Mile 0.0 to Origin			X	X	X	X			X
Row Branch	Mile 0.0 to Origin			X	X	X	X			X
Heaton Branch	Mile 0.0 to Origin			X	X	X	X			X
Little Laurel Branch	Mile 0.0 to Origin			X	X	X	X			X
Cobb Branch	Mile 0.0 to Origin			X	X	X	X		X	
Cress Branch	Mile 0.0 to Origin			X	X	X	X			X
Roan Creek	At Watauga River (Mile 45.5); Mile 0.0 to 16.7	X	X	X	X	X	X			X
Doe Creek	At Roan Creek (Mile 10.9); Mile 0.0 to Origin			X	X	X	X			X
Spruce Branch	At Doe Creek (Mile 10.9); Mile 0.0 to Origin			X	X	X	X			
Timothy Branch	Mile 0.0 to Origin			X	X	X	X		X	
Campbell's Creek	Mile 0.0 to Origin			X	X	X	X			X
Roan Creek	Mile 16.7 to 17.7			X	X	X	X		X	
Mill Creek	Mile 0.0 to Origin			X	X	X	X			X
Stout Branch	Mile 0.0 to Origin			X	X	X	X			X
Vaught Creek	Mile 0.0 to Origin	X		X	X	X	X			X
Town Creek	At Roan Creek (Mile 17.7); Mile 0.0 to 0.2			X	X	X	X			
Town Creek	Mile 0.2 to Origin			X	X	X	X			
Furnace Creek	At Town Creek (Mile 3.0); Mile 0.0 to Origin			X	X	X	X			X
Goose Creek	At Town Creek (Mile 3.0); Mile 1.5 to Origin			X	X	X	X			X
Patrick Creek	At Goose Creek (Mile 2.6); Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Roan Creek	Mile 17.7 to Origin	X		X	X	X	X			X
Corn Creek	Mile 0.0 to Origin			X	X	X	X			X
Forge Creek	Mile 0.0 to Origin			X	X	X	X			X
Brush Fork Creek	Mile 0.0 to Origin			X	X	X	X		X	
Big Dry Run Creek	Mile 0.0 to Origin			X	X	X	X			X
Buffalo Creek	Mile 0.0 to Origin			X	X	X	X		X	
Gap Creek	Mile 0.0 to Origin			X	X	X	X		X	
South Fork Holston River	Mile 19.6 to 35.5 (above Bluff City)	X	X	X	X	X	X			
Muddy Creek	At S. F. Holston (Mile 25.5); Mile 0.0 to 2.6			X	X	X	X			
Booher Creek	At Muddy Creek (Mile 2.6); Mile 0.0 to Origin			X	X	X	X			
Muddy Creek	Mile 2.6 to Origin			X	X	X	X			
Unnamed Branch	At Muddy Creek (Mile 4.9); Mile 0.0 to Origin			X	X	X	X			
Beaver Creek	At S. F. Holston (Mile 29.6); Mile 0.0 to 9.1		X	X	X	X	X			
Back (Beck) Creek	At Beaver Creek (Mile 6.1); Mile 0.0 to Origin			X	X	X	X			
Univac Branch	At Back Creek (Mile 0.5); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Beaver Creek (Mile 7.3); Mile 0.0 to Origin			X	X	X	X			
Cedar Creek	At Beaver Creek (Mile 7.9); Mile 0.0 to Origin			X	X	X	X			
Beeler Road Branch	At Cedar Creek (Mile 3.2); Mile 0.0 to Origin			X	X	X	X			
Raytheon Branch	At Beeler Road Branch (Mile 1.2); Mile 0.0 to 0.2			X	X		X			
Beaver Creek	Mile 9.1 to 15.3 (Tenn-Virginia Line)		X	X	X	X	X			
Steele Creek	At Beaver Creek (Mile 11.0); Mile 0.0 to Origin			X	X	X	X			
Indian Creek	At S. F. Holston (Mile 35.0); Mile 0.0 to Origin			X	X	X	X			
Booher Creek	At Indian Creek (Mile 3.7); Mile 0.0 to Origin			X	X	X	X			
Unnamed Branch	At Booher Creek (Mile 0.6); Mile 0.0 to Origin			X	X	X	X			
South Fork Holston River	Mile 35.5 to South Holston Dam	X	X	X	X	X	X		X	
Unnamed Branch	At S. F. Holston (Mile 39.1); Mile 0.0 to Origin			X	X	X	X			
South Fork Holston River	South Holston Dam to mile 62.8 (Virginia Line)	X	X	X	X	X	X			
Big Creek	Mile 0.0 to Origin			X	X	X	X			X
Kendrick Creek	Mile 0.0 to Origin			X	X	X	X		X	

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Fishdam Creek	Mile 0.0 to Origin			X	X	X	X			X
Sulphur Springs Branch	Mile 0.0 to Origin			X	X	X	X			X
Sharps Creek	Mile 0.0 to Origin			X	X	X	X		X	
Little Jacobs Creek	Mile 0.0 to Origin	X		X	X	X	X			X
Jacobs Creek	At S. F. Holston (Mile 59.8); Mile 0.0 to 3.4	X	X	X	X	X	X			X
Jacobs Creek	Mile 3.4 to 3.6		X	X	X	X	X			X
Jacobs Creek	Mile 3.6 to Origin			X	X	X	X			X
Harpers Creek	Mile 0.0 to Origin			X	X	X	X			X
Rockhouse Run Creek	Mile 0.0 to Origin			X	X	X	X			X
Laurel Creek	Stateline to Origin			X	X	X	X			X
Beaverdam Creek	Stateline to Origin			X	X	X	X			X
London Bridge Br	Stateline to Origin			X	X	X	X		X	
Reservoir Branch	Mile 0.0 to Origin			X	X	X	X		X	
Stillhouse Branch	Mile 0.0 to Origin			X	X	X	X			X
Chalk Branch	Mile 0.0 to Origin			X	X	X	X			X
Chestnut Branch	Mile 0.0 to Origin			X	X	X	X			X
Haunted Hollow Br.	Mile 0.0 to Origin			X	X	X	X			X
Fagall Branch	Mile 0.0 to Origin			X	X	X	X			X
Birch Branch	Mile 0.0 to Origin			X	X	X	X			X
Parks Branch	Mile 0.0 to Origin			X	X	X	X			X
David Blevin Branch	Mile 0.0 to Origin			X	X	X	X		X	
Johnson Branch	Mile 0.0 to Origin			X	X	X	X			X
Jim Wright Branch	Mile 0.0 to Origin			X	X	X	X			X
Ledford Branch	Mile 0.0 to Origin			X	X	X	X		X	
W. Fk Beaverdam	Mile 0.0 to Origin			X	X	X	X			X
M. Fk Beaverdam	Mile 0.0 to Origin			X	X	X	X			X
E. Fk Beaverdam	Mile 0.0 to Origin			X	X	X	X			X
Lyons Branch	Mile 0.0 to Origin			X	X	X	X			X
Gentry Creek	Mile 0.0 to Origin			X	X	X	X			X

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Dry Branch	Mile 0.0 to Origin			X	X	X	X			X
Grindstone Branch	Mile 0.0 to Origin			X	X	X	X			X
Flatwood Branch	Mile 0.0 to Origin			X	X	X	X			X
Corum Branch	Mile 0.0 to Origin			X	X	X	X			X
West Fork Laurel Creek	Mile 0.0 to Origin			X	X	X	X			X
All other surface tributaries named and unnamed in the Holston River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.12 LOWER CUMBERLAND RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Cumberland River	Mile 74.6 (Ky-Tenn Line) to 118.3 (Cummings Cr.)	X	X	X	X	X	X	X		
Saline Creek	Mile 0.0 to Hwy 120		X	X	X	X	X			
Saline Creek	Hwy 120 to Fort Campbell boundary		X	X	X	X	X		X	
Saline Creek	Fort Campbell Boundary to Origin		X	X	X	X	X			
Bear Creek	Mile 0.0 to Origin			X	X	X	X			
Long Creek	Highway 49 to Origin			X	X	X	X		X	
Elk Creek	Mile 0.0 to Origin			X	X	X	X			
Wells Creek	Mile 0.0 to Origin			X	X	X	X			
Yellow Creek	Mile 3.4 to Ruskin Cave			X	X	X	X		X	
Cumberland River	Mile 118.3 to 125.3 (Red River)	X	X	X	X	X	X	X		
Cumberland River	Mile 125.3 to 175.7 (Richland Creek)	X	X	X	X	X	X	X		
Red River	Mile 0.0 to 2.0		X	X	X	X	X	X		
Red River	Mile 2.0 to 15.0	X	X	X	X	X	X	X		
Red River	Mile 15.0 to 51.2 (Ky-Tenn Line)	X	X	X	X	X	X			
South Fork Red River	Mile 20.4 (Ky-Tenn Line) to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Big West Fork	Mile 0.0 to 14.6 (Ky-Tenn Line)		X	X	X		X	X		
Little West Fork	Mile 0.0 to 10.4		X	X	X	X	X			
Sulphur Fork	Mile 0.0 to 26.6	X	X	X	X	X	X			
Sulphur Fork	Mile 26.6 to 28.6		X	X	X	X	X			
Sulphur Fork	Mile 28.6 to Origin	X	X	X	X	X	X			
Carr Creek	Mile 0.0 to Origin			X	X	X	X			
Red River	Mile 81.0 (Ky-Tenn Line) to Origin	X	X	X	X	X	X			
Summers Branch	Mile 0.0 to Origin			X	X	X	X			
Hurricane Creek	Mile 0.0 to Origin			X	X	X	X			
Sulphur Springs Cr	Mile 0.0 to Origin			X	X	X	X			
Harpeth River	Mile 0.0 to 10.3	X	X	X	X	X	X			
Jones Creek	Mile 0.0 to Origin		X	X	X	X	X			
Town Branch	Mile 0.0 to Origin		X	X	X	X	X			
Harpeth River	Mile 10.3 to 52.8	X	X	X	X	X	X			
Trace Creek	Mile 0.0 to Origin		X	X	X	X	X			
Turnbull Creek	Mile 0.0 to Origin	X	X	X	X	X	X			
Sullivans Branch	Mile 0.0 to Origin		X	X	X	X	X			
Beaver Dam Creek	Mile to 0.0 to Origin		X	X	X	X	X			
Gin Branch	Mile 0.0 to Origin		X	X	X	X	X			
Brush Creek	Mile 0.0 to Origin		X	X	X	X	X			
Harpeth River	Mile 52.8 to 55.8		X	X	X	X	X			
Harpeth River	Mile 55.8 to 57.8		X	X	X	X	X			
Harpeth River	Mile 57.8 to 61.9 (Little Harpeth)	X	X	X	X	X	X			
Little Harpeth River	Mile 0.0 to Origin		X	X	X	X	X			
Harpeth River	Mile 61.9 to 68.3 (Cartwright Creek)		X	X	X	X	X			
Cartwright Creek	Mile 0.0 to Origin			X	X	X	X			
Harpeth River	Mile 68.3 to 79.0	X	X	X	X	X	X			
West Harpeth River	Mile 0.0 to Origin	X	X	X	X	X	X			
Harpeth River	Mile 79.0 to 85.2		X	X	X	X	X			
Spencer Creek	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Harpeth River	Mile 85.2 to Origin	X	X	X	X	X	X			
Sycamore Creek	Mile 0.0 to 10.0	X	X	X	X	X	X			
Sycamore Creek	Mile 10.0 to Origin	X		X	X	X	X			
Marrowbone Creek	Mile 0.0 to 3.0	X	X	X	X	X	X			
Marrowbone Creek	Mile 3.0 to Origin	X		X	X	X	X			
Cumberland River	Mile 175.7 to 189.5	X	X	X	X	X	X	X		
Richland Creek	Mile 0.0 to Origin			X	X	X	X			
Whites Creek	Mile 0.0 to Origin		X	X	X	X	X			
Ewing Creek	Mile 0.0 to Origin		X	X	X	X	X			
Cumberland River	Mile 189.5 to 216.2 (Old Hickory Dam)	X	X	X	X	X	X	X		
Mill Creek	Mile 0.0 to 11.5		X	X	X	X	X			
Mill Creek	Mile 11.5 to 23.0			X	X	X	X			
Mill Creek	Mile 23.0 to Origin			X	X	X	X			
Stones River	Mile 0.0 to 6.8	X	X	X	X	X	X			
Stoners Creek	Mile 0.0 to Origin			X	X	X	X			
McCrory Creek	Mile 0.0 to Origin			X	X	X	X			
Stones River (Percy Priest Res.)	Mile 6.8 to 38.7 (Confluence-East & West Fork)	X	X	X	X	X	X			
Suggs Creek	Mile 0.0 to Origin			X	X	X	X			
Smith Springs Creek	Mile 0.0 to Origin			X	X	X	X			
Hurricane Creek	Mile 0.0 to Origin			X	X	X	X			
Stewart Creek	Mile 0.0 to Origin			X	X	X	X			
Harts Branch	Mile 0.0 to Origin			X	X	X	X			
Fall Creek & Tributaries	Mile 0.0 to Origin			X	X	X	X			
East Fork Stones River	Mile 0.0 to 44.5 (Near Woodbury)	X	X	X	X	X	X			
Bradley Creek	Mile 0.0 to Origin			X	X	X	X			
Cripple Creek	Mile 0.0 to Origin			X	X	X	X			
East Fork Stones River	Mile 44.5 to 45.2		X	X	X	X	X			
East Fork Stones River	Mile 45.2 to Origin	X	X	X	X	X	X			
West Fork Stones River	Mile 0.0 to 10.0	X	X	X	X	X	X			
Overall Creek	Mile 0.0 to Origin			X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
West Fork Stones River	Mile 10.0 to 15.2		X	X	X	X	X			
West Fork Stones River	Mile 15.2 to Origin	X	X	X	X	X	X			
Lytle Creek	Mile 0.0 to Origin			X	X	X	X			
Middle Fork Stones	Mile 0.0 to Origin	X	X	X	X	X	X			
Christmas Creek	Mile 0.0 to Origin			X	X	X	X			
Cumberland River	Mile 216.2 to 309.2 (Caney Fork River)	X	X	X	X	X	X	X		
Drakes Creek	Mile 0.0 to 4.9	X	X	X	X	X	X	X		
Drakes Creek	Mile 4.9 to Origin			X	X	X	X			
Smiths Creek	Mile 0.0 to Origin			X	X	X	X			
Cedar Creek	Mile 0.0 to 2.0	X	X	X	X	X	X	X		
Cedar Creek	Mile 2.0 to Origin			X	X	X	X			
Spencer Creek	Mile 0.0 to 2.8	X	X	X	X	X	X	X		
Spencer Creek	Mile 2.8 to Origin			X	X	X	X			
Bartons Creek	Mile 0.0 to Origin			X	X	X	X			
Sinking Creek	Mile 0.0 to Origin			X	X	X	X			
Big Goose Creek	Mile 0.0 to Origin			X	X	X	X			
Little Goose Creek	Mile 0.0 to Origin			X	X	X	X			
Round Lick Creek	Mile 0.0 to Origin			X	X	X	X			
All other surface waters named and unnamed in the Lower Cumberland River Basin (and Green River Basin), with the exception of wet weather conveyances, which have not been specifically noted shall be classified.				X	X	X	X			

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

0400-40-04-.13 UPPER CUMBERLAND RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Cumberland River	Mile 309.2 to 385.5 (Ky-Tenn Line)	X	X	X	X	X	X	X		
Caney Fork River	Mile 0.0 to 25.4	X	X	X	X	X	X	X	X	
Mulherrin Creek	Mile 0.0 to Origin			X	X	X	X			
Hickman Creek	Mile 0.0 to Origin			X	X	X	X			
Smith Fork Creek	Mile 0.0 to Mile 3.0			X	X	X	X		X	
Smith Fork Creek	Mile 3.0 to Origin			X	X	X	X			
Dry Creek	Mile 0.0 to Origin			X	X	X	X		X	
Jones Fork	Mile 0.0 to Origin			X	X	X	X		X	
Caney Fork River	Mile 25.4 to Origin	X	X	X	X	X	X			
Mine Lick Creek	Mile 0.0 to 5.0	X		X	X	X	X			
Mine Lick Creek	Mile 5.0 to Origin			X	X	X	X			
Falling Water River	Mile 0.0 to 39.0	X		X	X	X	X			
Falling Water River	Mile 39.0 to Origin			X	X	X	X			
Cane Creek	Mile 0.0 to Origin			X	X	X	X			
Pigeon Roost Creek	Mile 0.0 to Origin			X	X	X	X			
Fall Creek	Mile 0.0 to Origin			X	X	X	X			
Pine Creek	Mile 2.4 to Origin			X	X	X	X		X	
Turner Branch	Mile 0.0 to 0.5			X	X	X	X		X	
Sink Creek	Mile 4.6 to Origin			X	X	X	X		X	
Collins River	Mile 0.0 to 43.0	X	X	X	X	X	X			
Mountain Creek	Mile 0.0 to 6.0			X	X	X	X		X	
Charles Creek	Mile 0.0 to 9.0			X	X	X	X		X	
Barren Fork River	Mile 0.0 to 4.5			X	X	X	X			
Barren Fork River	Mile 4.5 to Origin	X	X	X	X	X	X		X	
Hickory Creek	Mile 19.0 to 24.0			X	X	X	X		X	
W.F. Hickory C	Mile 0.0 to Origin			X	X	X	X			
Keel Branch	Mile 0.0 to Origin			X	X	X	X			
Hills Creek	Mile 0.0 to Origin			X	X	X	X		X	
Collins River	Mile 43.0 to 49.0	X		X	X	X	X		X	

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Big Creek	Mile 0.0 to 6.0	X		X	X	X	X			
Big Creek	Mile 6.0 to Origin			X	X	X	X			
Collins River	Mile 49.0 to Origin			X	X	X	X			
Caney Fork River	Mile 92.2 to Origin	X	X	X	X	X	X			
Rocky River	Mile 0.0 to 9.0	X	X	X	X	X	X			
Rocky River	Mile 9.0 to 13.0	X	X	X	X	X	X		X	
Rocky River	Mile 13.0 to Origin	X	X	X	X	X	X			
Calfkiller River	Mile 0.0 to 14.1	X	X	X	X	X	X			
Calfkiller River	Mile 14.1 to 30.8	X	X	X	X	X	X			
Town Creek	Mile 0.0 to Origin			X	X	X	X			
Calfkiller River	Mile 30.8 to Origin	X	X	X	X	X	X		X	
Cane Creek	Mile 1.0 to 8.0	X	X	X	X	X	X		X	
Falls Creek	Mile 0.0 to Origin			X	X	X	X			
Cane Creek	Mile 8.0 to Origin	X	X	X	X	X	X			
Bee Creek	Mile 0.0 to 7.3			X	X	X	X			
Bee Creek	Mile 7.3 to Origin	X		X	X	X	X			
Wilkerson Creek	Mile 0.0 to Origin			X	X	X	X			
Frey Branch	Mile 0.0 to Origin			X	X	X	X			
Roaring River	Mile 0.0 to 29.9			X	X	X	X			
Roaring River	Mile 29.9 to Origin	X		X	X	X	X			
Spring Creek	Mile 0.0 to Origin			X	X	X	X			
Bear Creek	Mile 0.0 to Origin			X	X	X	X			
Carr Creek	Mile 0.0 to 4.2			X	X	X	X			
Carr Creek	Mile 4.2 to Origin	X		X	X	X	X			
Town Creek	Mile 0.0 to Origin			X	X	X	X			
Goose Creek	Mile 0.0 to 12.0			X	X	X	X		X	
Flynns Creek	Mile 0.0 to 5.0			X	X	X	X		X	
Obey River	Mile 0.0 to 7.3	X	X	X	X	X	X		X	
Neely Creek	Mile 0.0 to Origin (3.3 miles)			X	X	X	X		X	
Wolf River	Mile 0.0 to Ky State Line		X	X	X	X	X			

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
Wolf River	Ky State Line to Origin			X	X	X	X		X	
Town Creek	Mile 0.0 to Origin			X	X	X	X			
Obey River	Mile 7.3 to confluence of East and West Forks	X	X	X	X	X	X			
West Fork Obey River	Mile 0.0 to Origin			X	X	X	X			
East Fork Obey River	Mile 0.0 to Origin	X		X	X	X	X			
Buffalo Cove Creek	Mile 0.0 to Origin			X	X	X	X			
Rock Castle Creek	Mile 0.0 to Origin			X	X	X	X			
Big South Fork Cumberland River	Mile 55.5 (Ky-Tenn Line) to Origin (Mile 77.0)	X	X	X	X	X	X			
No Business Creek	Upper 4.0 miles			X	X	X	X		X	
Parch Corn Creek	Upper 1.5 miles			X	X	X	X		X	
Station Camp Creek	Upper 4.8 miles			X	X	X	X		X	
Laurel Fork Creek	Upper 4.9 miles			X	X	X	X		X	
North White Oak Creek	Upper 3.9 miles			X	X	X	X		X	
Williams Creek	Upper 7.6 miles			X	X	X	X		X	
Pine Creek	Mile 0.0 to 10.5			X	X	X	X			
Pine Creek	Mile 10.5 to Origin	X		X	X	X	X			
New River	Mile 0.0 to 15.0			X	X	X	X			
New River	Mile 15.0 to Origin	X		X	X	X	X			
Clear Fork River	Mile 0.0 to Origin			X	X	X	X			
Elk Fork Creek	Mile 1.8 (KY Line) to Origin	X		X	X	X	X			
All other surface waters named and unnamed, within the Upper Cumberland River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

0400-40-04-.14 BARREN RIVER BASIN.

STREAM	DESCRIPTION	DOM	IWS	FAL	REC	LWW	IRR	NAV	TS	NRTS
West Fork Drakes Creek	Mile 33.0 (stateline) to Origin			X	X	X	X			
Caney Fork Creek	Mile 0.0 to Origin			X	X	X	X			
Dry Fork Creek	Mile 0.0 to Origin			X	X	X	X			
Middle Fork Drakes Creek	Mile 22.2 (stateline) to Origin	X		X	X	X	X			
Sulphur Fork Creek	Mile 9.0 (stateline) to Origin			X	X	X	X			
Dutch Creek	Mile 0.0 to Origin			X	X	X	X			
Trammel Creek	Mile 30.7 (stateline) to Origin			X	X	X	X			
Little Trammel Creek	Mile 4.7 (stateline) to Origin			X	X	X	X			
Long Creek	Mile 14.6 (stateline) to Origin			X	X	X	X			
West Fork Long Creek	Mile 0.0 to Origin			X	X	X	X			
Puncheon Creek	Mile 4.3 (stateline) to Origin			X	X	X	X			
Unnamed Tributary (Adams Spring)	Mile 0.0 to Origin	X		X	X	X	X			
Little Puncheon Creek	Mile 0.0 to Origin			X	X	X	X			
Spring Creek	Mile 0.0 to Origin	X		X	X	X	X			
Salt Lick Creek	Mile 4.7 (stateline) to mile 6.8			X	X	X	X			
Salt Lick Creek	Mile 6.8 to mile 9.9			X	X	X	X		X	
Salt Lick Creek	Mile 9.9 to Origin			X	X	X	X			
Long Fork	Mile 4.5 (stateline) Origin			X	X	X	X			
White Oak Creek	Mile 4.1 (stateline) to Origin			X	X	X	X			
Long Hungry Creek	Mile 0.0 to Origin			X	X	X	X			
Line Creek	Mile 14.2 (stateline) to Origin			X	X	X	X			
Trace Creek	Mile 0.0 to Origin			X	X	X	X			
Little Trace Creek	Mile 0.0 to Origin			X	X	X	X			
All other surface waters named and unnamed, within the Barren River Basin, with the exception of wet weather conveyances, which have not been specifically noted shall be classified				X	X	X	X			

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

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Dr. Gary G. Bible (Oil and Gas Industry)	X				
Elaine Boyd (Commissioner's Designee, Department of Environment and Conservation)	X				
James W. Cameron III (Small Generator of Water Pollution representing Automotive Interests)	X				
Jill E. Davis (Municipalities)		X			
Mayor Kevin Davis (Counties)	X				
Derek Gernt (Oil or Gas Property Owner)	X				
C. Monty Halcomb (Environmental Interests)				X	
Charlie R. Johnson (Public-at-large)				X	
Judy Manners (Commissioner's Designee, Department of Health)		X			
John McClurkan (Commissioner's Designee, Department of Agriculture)	X				
Frank McGinley (Agricultural Interests)	X				
D. Anthony Robinson (Manufacturing Industry)	X				

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Board of Water Quality, Oil and Gas on 10/16/2018, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 05/03/18

Rulemaking Hearing(s) Conducted on: (add more dates). 06/27/18

CAROL L. GRICE STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY, TENN.

Date: October 17, 2018

Signature: James W. Cameron III

Name of Officer: James W. Cameron III

Title of Officer: Chairman

Subscribed and sworn to before me on: October 17, 2018

Notary Public Signature: Carol L. Grice

My commission expires on: March 3, 2020

Agency/Board/Commission: Board of Water Quality, Oil and Gas

Rule Chapter Number(s): 0400-40-03 0400-40-04

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III

Herbert H. Slatery III
Attorney General and Reporter

6/10/2019

Date

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Department of State Use Only

Filed with the Department of State on: 6/13/19

Effective on: 9/11/19

Tre Hargett

Tre Hargett
Secretary of State

Public Hearing Comments

One copy of a document that satisfies T.C.A. § 4-5-222 must accompany the filing.

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	State Board of Accountancy
DIVISION:	Regulatory Boards
SUBJECT:	Continuing Education
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 62-1-105(e)
EFFECTIVE DATES:	September 4, 2019 through June 30, 2020
FISCAL IMPACT:	None
STAFF RULE ABSTRACT:	This proposed rule amends Rule 0020-05-.01 by adding definitions for "technical fields of study" and "non-technical fields of study" which describe the technical subjects and non-technical subjects that were previously listed individually throughout the continuing professional education (CPE) requirement section of the rules. By placing the individual subjects under the categories of "technical fields of study" and "non-technical fields of study" the Board can be more consistent throughout the CPE rules. The definition also helps the Board align with the terminology of the national organization, which will promote consistency for licensees registered in other jurisdictions. Providing a definition of "technical fields of study" and "non-technical fields of study" in the definitions section of the Rules will make it easier for licensees to see what subjects will qualify for specific CPE requirements. The amendments to Rule 0020-05-.03 change the specific list of qualifying subject matters into "technical fields of study" as consistent with the change to the Definitions section. The amendments to this Rule also change the licensee's responsibility for record-keeping of CPE certificates. Previously, licensees were only required to maintain a list of completed CPE courses. The amendment to Rule 0020-05-.03 provides that licensees are now required to submit certificates of completed CPE courses when requested by the Board.

The amendments to Rule 0020-05-.04 clarify the sources of qualifying learning activities that must meet the Statements on Standards for Continuing Education Programs which has been jointly approved by NASBA and AICPA. The amendments to this rule also add technical reviewer to the list of those participants who are eligible to receive CPE credit for specific service. The amendments to this Rule also corrects the misspelling of the word "ensure" from the previous Rule.

The amendment to Rule 0020-05-.07 corrects the spelling of the word "Extension" in the title of the Rule.

The amendment to Rule 0020-05-.08 utilizes the new addition of the definition for "technical fields of study" in place of the specifically listed subjects.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

(1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

The Tennessee State Board of Accountancy ("Board") governs over 2,000 registered firms. While a vast majority of those firms are small businesses, they will neither bear the cost of nor directly benefit from the proposed amendments to Rules 0020-05-.01, 0020-05-.03, 0020-05-.04, 0020-05-.07, and 0020-05-.08 because the proposed amendments promote consistency throughout the rules.

(2) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

The proposed amendments to Rules 0020-05-.01, 0020-05-.03, 0020-05-.04, 0020-05-.07, and 0020-05-.08 will not impose any additional reporting, recordkeeping, and other administrative costs required for compliance. All licensees, without exception, must comply with Continuing Professional Education ("CPE") requirements. The proposed amendments further clarify the types of CPE courses that may be submitted for approval. All licensees are required to timely manage their CPE courses and corresponding approval.

(3) A statement of the probable effect on impacted small businesses and consumers.

The amendments to Rules 0020-05-.01, 0020-05-.03, 0020-05-.04, 0020-05-.07, and 0020-05-.08 will likely reduce confusion among licensees, small businesses, and consumers about CPE requirements. Consumers will also be better protected because the proposed amendments better explain what is required of licensees to maintain their CPE hours.

Consumers and small businesses will likely benefit because the proposed amendments to the rules clarify the existing rules and promote consistency of the terms "technical fields of study" and "non-technical fields of study." Accordingly, the proposed amendments will not have any negative effect on small businesses and consumers.

The proposed amendments to the Rules will benefit consumers because the amendments enhance the Board's ability to oversee CPE programs and requirements. The Board's oversight of these programs is essential for ensuring that licensees are properly educated on changes to existing practices.

(4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

The Board avers that the proposed amendments to Rules 0020-05-.01, 0020-05-.03, 0020-05-.04, 0020-05-.07, and 0020-05-.08 are not burdensome, intrusive, or costly to small businesses.

(5) A comparison of the proposed rule with any federal or state counterparts.

There are no known federal or state counterparts to the rules.

(6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Exemption from Rules 0020-05-.01, 0020-05-.03, 0020-05-.04, 0020-05-.07, and 0020-05-.08 would not benefit small businesses because all licensees, even those working for a small business, must maintain their CPE hours. The proposed amendments do not impose any new requirements on small businesses. Rather, the proposed amendments only clarify which courses a licensee can submit for his or her CPE hours. CPE hours are vital in ensuring that licensees remain knowledgeable about current trends and important changes in the profession.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

This rule will not have a projected impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The amendments to Rule 0020-05-.01 add a definition for "technical fields of study" and "non-technical fields of study" which describe the technical subjects and non-technical subjects that were previously listed individually throughout the CPE requirement section of the rules. By placing the individual subjects under the categories of "technical fields of study" and "non-technical fields of study" the Board can be more consistent throughout the CPE rules. The definition also helps the Board align with the terminology of the national organization, which will promote consistency for licensees registered in other jurisdictions. Providing a definition of "technical fields of study" and "non-technical fields of study" in the definitions section of the Rules will make it easier for licensees to see what subjects will qualify for specific CPE requirements.

The amendments to Rule 0020-05-.03 change the specific list of qualifying subject matters into "technical fields of study" as consistent with the change to the Definitions section. The amendments to this Rule also change the licensee's responsibility for record-keeping of CPE certificates. Previously, licensees were only required to maintain a list of completed CPE courses. The amendment to Rule 0020-05-.03 provides that licensees are now required to submit certificates of completed CPE courses when requested by the Board.

The amendments to Rule 0020-05-.04 clarify the sources of qualifying learning activities that must meet the Statements on Standards for Continuing Education Programs which has been jointly approved by NASBA and AICPA. The amendments to this rule also add technical reviewer to the list of those participants who are eligible to receive CPE credit for specific service. The amendments to this Rule also edit the misspelling of the word ensure from the previous Rule.

The amendment to Rule 0020-05-.07 corrects the spelling of the word Extension in the title of the Rule.

The amendment to Rule 0020-05-.08 utilizes the new addition of the definition for "technical fields of study" in place of the specifically listed subjects

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

There are no known federal laws or regulations mandating promulgation of these rules. T.C.A. 62-1-105(e) authorizes the Board to adopt rules to enforce the Tennessee Accountancy Act of 1998.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The proposed amendments to Rules 0020-05-.01, 0020-05-.03, 0020-05-.04, 0020-05-.07, and 0020-05-.08 will impact all licensed CPAs. Their position, however, is unknown to the Board. NASBA, the AICPA, and the TSCPA, the largest CPA professional organizations, are in support of this rule package.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

There are no known attorney general opinions or judicial rulings that directly relate to these rules.

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

These rules are not expected to have an increase or decrease in state and local government revenues and expenditures

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Wendy Garvin – Executive Director of the Tennessee State Board of Accountancy

Anthony Glandorf – Chief Counsel
TN Department of Commerce and Insurance

Maria P. Bush – Assistant General Counsel
TN Department of Commerce and Insurance

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Wendy Garvin – Executive Director of the Tennessee State Board of Accountancy

Anthony Glandorf – Chief Counsel
TN Department of Commerce and Insurance

Maria P. Bush – Assistant General Counsel
TN Department of Commerce and Insurance

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Wendy Garvin – Executive Director of the Tennessee State Board of Accountancy
500 James Robertson Parkway
Nashville, Tennessee 37243
(615) 741-2550,
wendy.garvin@tn.gov

Anthony Glandorf – Chief Counsel
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Nashville, TN 37243
615-741-3072
anthony.glandorf@tn.gov

Maria P. Bush – Assistant General Counsel
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Nashville, TN 37243
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maria.p.bush@tn.gov

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None.

Department of State
Division of Publications
312 Rosa L. Parks Ave., 8th Floor, Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615-741-2650
Email: publications.information@tn.gov

For Department of State Use Only

Sequence Number: 06-05-19
Rule ID(s): 8943
File Date: 6/6/19
Effective Date: 9/4/19

Proposed Rule(s) Filing Form

Proposed rules are submitted pursuant to Tenn. Code Ann. §§ 4-5-202, 4-5-207, and 4-5-229 in lieu of a rulemaking hearing. It is the intent of the Agency to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within ninety (90) days of the filing of the proposed rule with the Secretary of State. To be effective, the petition must be filed with the Agency and be signed by ten (10) persons who will be affected by the amendments, or submitted by a municipality which will be affected by the amendments, or an association of ten (10) or more members, or any standing committee of the General Assembly. The agency shall forward such petition to the Secretary of State.

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee State Board of Accountancy
Division:	Department of Commerce and Insurance Regulatory Boards Division
Contact Person:	Maria P. Bush
Address:	500 James Robertson Parkway, Nashville, TN
Zip:	37243
Phone:	615-741-3072
Email:	maria.p.bush@tn.gov

Revision Type (check all that apply):
X Amendment
___ New
___ Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0020-05	Continuing Education
Rule Number	**Rule Title**
0020-05-.01	Definitions
0020-05-.03	Basic Requirements
0020-05-.04	Qualifying Programs
0020-05-.07	Extension of Time
0020-05-.08	Failure to Meet CPE Requirements

Tennessee State Board of Accountancy
Chapter 0020-05
Continuing Education
Amendments

Rule 0020-05-.01 Definitions is amended by adding subparagraphs (c) through (i) following subparagraph (b).

(1) For the purpose of this Chapter, unless the context otherwise requires:

(a) Continuing professional education (CPE) hours and CPE credits shall be considered synonymous;

(b) "License holder" means a certified public accountant or public accountant who holds a license as defined in Rule 0020-1-.01(i).

(c) "Technical fields of study" shall be considered technical subjects that contribute to the maintenance and/or improvement of the competence of a CPA in the profession of accountancy and that directly relate to the CPA's field of business. These fields of study include, but are not limited to:

1. Accounting;
2. Accounting (Government);
3. Auditing;
4. Auditing (Government);
5. Business Law;
6. Economics;
7. Finance;
8. Information Technology;
9. Management Services;
10. Regulatory Ethics;
11. Specialized Knowledge;
12. Statistics; and
13. Taxes.

(d) "Non-technical fields of study" shall be considered subjects that contribute to the maintenance and/or improvement of the competence of a CPA in areas that indirectly relate to the CPA's field of business. These fields of study include, but are not limited to:

1. Behavioral Ethics;
2. Business Management & Organization;
3. Communications and Marketing;
4. Computer Software & Applications;

taken in excess of the forty (40) hour requirement for the initial licensing period may be applied towards the requirement of the next succeeding two (2) year renewal. Licensees seeking to renew an initial certificate issued less than one (1) year prior to expiration will be exempt from CPE requirements for that renewal period.

(3) Upon application supported by such evidence as the Board may require, those licensees not practicing in Tennessee, who do not perform or offer to perform for the public one (1) or more kinds of services involving the use of accounting or auditing skills, including the issuance of reports on financial statements or one or more kinds of management advisory, financial advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters, may be exempted from any continuing professional education requirements provided that:

(a) For purposes of disciplinary action, the board shall retain jurisdiction over all certificate holders whose license is in inactive status.

(b) Certificate holders who are granted inactive status by the board shall be required to place the word "inactive" adjacent to their CPA or PA designation when using such designation for any lawful purpose, including, but not limited to use of such designation on any business card, letterhead, resume, or biography.

(c) A certificate holder who has been granted inactive status may not for compensation perform or offer to perform for the public, including the providing of any accounting service from a licensed accounting firm, any of the following services: any accounting or auditing service which involves the issuance of reports on financial statements (including opinions, reviews, compilations, or attest engagements), any consulting engagement which would constitute the attest function, or furnishing advice on tax matters.

(d) A certificate holder who has been granted inactive status may perform the services set forth in (c) above if:

1. The services are provided without compensation to the certificate holder;

2. The services are performed solely for the certificate holder's employer and such employer is not a licensed accounting firm; or

3. The certificate holder does not use the CPA or PA designation in association with his or her name while providing such lawful services.

(e) A certificate holder who is 65 years old or older and possesses a certificate in inactive status shall not be required to pay the biennial license renewal fee required for licensees as set forth in these rules.

(f) Certificate holders who are granted inactive status must complete eighty (80) hours of CPE in technical fields of study ~~areas of accounting, accounting ethics, attest, taxation, or management advisory services~~ during the twenty-four (24) month period preceding the date of their request for reactivation of their license. The CPE hours required to reactivate a license may also be used as credit toward the renewal requirement so long as those hours are completed within the two (2) year window prior to the licensee's next December 31 renewal date.

(4) Licensees who surrender their licenses in good standing may reactivate a license by complying with ~~this subsection.~~ the requirements of rule 0020-05-.03(3)(f).

(5) Upon application supported by such evidence as the Board may require, licensees ~~age seventy (70) and over,~~ disabled for more than six (6) months or in active military service may be exempted from payment of a license renewal fee and/or CPE requirements so long as they do not practice public accountancy or offer accounting services to the public.

(6) An applicant for renewal whose license has expired as set forth in Rule 0020-01-.08(7) shall complete no less than eighty (80) hours of CPE in technical fields of study ~~areas of accounting, accounting ethics, attest, taxation, or management advisory services~~ during the six (6) month period preceding the date of

5. Personal Development;

6. Personnel/Human Resources; and

7. Production.

(e) "Blended learning program" means an educational program incorporating multiple learning formats.

(f) "Group program" means any live or internet-based group program.

(g) "Independent study" means an educational process designed to permit a participant to learn a given subject under a learning contract with a CPE program sponsor.

(h) "Nano-learning program" means a tutorial program designed to permit a participant to learn a given subject in a ten-minute timeframe through the use of electronic media and without interaction with a real-time instructor. A nano-learning program is typically focused on a single learning objective and is not paper-based.

(i) "Self-study program" means an educational program completed individually without the assistance or interaction of a real-time instructor.

Authority: T.C.A. §§ 62-1-105(e)(3), 62-1-107, 62-1-108(a)(1)(C)(i), 62-1-109(c), and 62-1-111.

Rule 0020-05-.03 Basic Requirements is amended by deleting the rule in its entirety and substituting the rule with the following language so that as amended the rule shall read:

(1) A license holder seeking regular biennial renewal shall, as a prerequisite for such renewal, show that he or she has completed no less than eighty (80) hours of qualified continuing professional education during the two (2) year period immediately preceding renewal, with a minimum of twenty (20) hours in each year with specifications as follows:

(a) All license holders shall complete at least forty (40) hours in technical fields of study ~~the subject areas of accounting, accounting ethics, attest, taxation, or management advisory services~~;

(b) All license holders shall complete a board-approved two (2) hour state-specific ethics course designed to familiarize the licensee with accountancy law and rules as well as professional ethics;

(c) License holders engaged in the attest function~~,~~ shall biennially complete at least twenty (20) hours in the subject areas of attest and accounting theory and practice in fulfilling the above requirements;

(d) License holders engaged to testify in a Tennessee court(s) as expert witnesses in areas of accounting, attest, management ~~advisory~~ services, or tax shall have completed, within the current or most recent renewal period, at least twenty (20) hours in the subject area(s) (as noted in this paragraph) concerning such expert testimony; and

(e) Up to twenty-four (24) CPE hours taken in excess of the eighty (80) hour requirement for each two (2) year period may be applied to the requirement of the next succeeding two (2) year renewal cycle. License holders must submit certificates ~~maintain a list~~ of completed CPE courses which will be used for carry forward ~~and must submit that listing~~ as requested by the Board. Failure to do so will result in the disallowance of carry-forward hours.

(2) A license holder seeking to renew an initial certificate issued less than two (2) years but more than one (1) year prior to expiration must provide evidence of having completed at least forty (40) hours of continuing education, of which twenty (20) hours shall be in technical fields of study ~~subject areas of accounting, accounting ethics, attest, tax, or management advisory services~~. Up to twelve (12) CPE hours

reapplication. The CPE hours required to reinstate an expired license are considered penalty hours and may not be used to offset the CPE hours required for renewal of a license.

(7) A non-resident licensee seeking renewal of a license in this state shall meet the CPE requirement of this rule by meeting the CPE requirements for renewal of a license in the state in which the licensee's principal office is located.

(a) Non-resident applicants for renewal shall demonstrate compliance with the CPE renewal requirements of the state in which the licensee's principal office is located by signing a statement certifying to that effect on the renewal application of this state.

(b) If the state in which a non-resident licensee's principal office is located has no CPE requirements for renewal of a license, the non-resident licensee must comply with all CPE requirements for renewal of a license in this state.

(c) If the state in which a non-resident licensee's principal office is located does not require a course in ethics, the non-resident licensee shall complete the ethics requirement for this state as set forth in rule 0020-05-.03(1)(b).

Authority: T.C.A. §§ 62-1-105, 62-1-107, and 62-1-111.

Rule 0020-05-.04 Qualifying Programs is amended by deleting the rule in its entirety and substituting the rule with the following language so that as amended the rule shall read:

(1) In order to qualify for credit toward satisfaction of the requirements of rule 0020-05-.03, a continuing education program must be a learning opportunity that contributes to the licensee's knowledge, ability, and/or competence to perform his or her professional responsibilities.

~~(a) Be a program of learning which contributes directly to the professional competence of the licensee; and~~

~~(b) Meet the Statements on Standards for Continuing Professional Education jointly approved by NASBA and AICPA.~~

(2) The following learning activities shall qualify for CPE credit:

(a) A learning activity that complies with the Statements on Standards for Continuing Professional Education Programs jointly approved by the National Association of State Boards of Accountancy (NASBA) and the American Institute of Certified Public Accountants (AICPA), and is coordinated and presented by a qualifying CPE program sponsor as set forth in Rule 0020-05-.05. The sources of qualifying learning activities include, but are not limited to, the following:

1. Group Programs;

2. Self-Study Programs;

3. Blended Learning Programs;

4. Nano-Learning Programs;

5. Instructor/Developer of CPE programs in 1 through 4 above or in (b) or (d) below;

6. Technical Reviewer of CPE programs in 1 through 4 above or in (b) or (d) below; and

7. Independent Study.

(b) A college or university course that is coordinated and presented by a qualifying university or college as set forth in Rule 0020-05-.05(3)(b) in a technical or non-technical field of study;

(c) Participation and work on a technical committee of an international, national, or state professional association, council or member organization, or a governmental entity that supports professional services or industries that require unique and specific knowledge in technical fields of study;

(d) A group learning activity that is coordinated and presented as an organized in-firm or in-house (includes any company that gives training for their employees and others) educational program for employees and others without charge; and

(e) Programs of other organizations (accounting, industrial, professional, etc.) recognized by the Board.

~~(2)~~(3) Programs requiring attendance may be considered for credit if:

(a) An outline is prepared and preserved;

(b) The program is at least one (1) credit hour [one (1) credit hour = fifty (50) minute period];

(c) The program is conducted by a qualified instructor, discussion leader, or lecturer; and

(d) A record of registration or attendance is maintained.

~~(3) Subject to compliance with paragraphs 1 and 2 of this rule, the following are deemed to be qualifying programs:~~

~~(a) Professional development programs of the AICPA, and state accounting societies and their chapters;~~

~~(b) Technical sessions at meetings of the AICPA, NASBA, and state accounting societies and their chapters;~~

~~(c) University or college courses provided that:~~

~~1. For credit courses, each semester hour credit shall equal fifteen (15) continuing education credit hours, and each quarter hour credit shall equal (10) continuing education credit hours;~~

~~2. For non-credit short courses, continuing education credit shall equal actual time in class;~~

~~(d) Organized in-firm or in-house (includes any company that gives training for their employees and others) educational programs presented for employees and others without charge; and~~

~~(e) Programs of other organizations (accounting, industrial, professional, etc.) recognized by the Board.~~

(4) Formal correspondence or other ~~individual~~ self-study programs, including those administered via computer which require registration and provide evidence of satisfactory completion, may qualify for continuing education credit. ~~The number of credit hours of continuing education will be determined by the Board.~~ Such programs ~~taken after January 1, 1999~~, excluding those offered by the AICPA and state CPA societies, must be approved by the Board or its designee, NASBA's ~~Quality Assurance Program.~~ National Registry of CPE Sponsors.

(5) Continuing education credit will be allowed for service as an instructor/developer, discussion leader, or speaker, at any program for which participants are eligible to receive continuing education credit. Credit for such service will be awarded on the first presentation only, unless a program has been substantially revised. An instructor/developer may receive CPE credit for actual preparation time up to two (2) times the number of CPE credits to which participants would be entitled, in addition to the time for presentation; ~~The amount of credit awarded shall not exceed three times the number of class hours;~~ however, credit

hours awarded under this paragraph shall not exceed fifty percent (50%) of the total number of credit hours required by this chapter within any two-(2) year period. A licensee who receives credit for services as an instructor/developer, discussion leader, or speaker of a CPE course cannot also receive credit for attendance at the same or substantially same course that the licensee served as an instructor/developer, discussion leader, or speaker within the preceding twelve month period.

(6) In the board's discretion, continuing education credit may be allowed for writing articles and books, provided that their preparation contributes to the professional competence of the license holder. Credit for such preparation may be awarded on a self-declaration basis of up to fifty percent (50%) of the two (2) year continuing education requirement. Acceptable evidence may include a copy of the publication that names the licensee as author or contributor; a statement from the licensee supporting the number of CPE credits claimed; and the name and contact information of the independent reviewer(s) or publisher. Additional credit may be awarded in exceptional circumstances, upon the written request of the license holder, accompanied by a copy of the article(s) or books(s) and a statement of justification. No credit shall be given for unpublished book(s) or article(s).

(7) Continuing education credit may be allowed for the reading of professional journals and the taking of an examination related thereto. Credit hours obtained under this paragraph are limited to twenty percent (20%) of the total number of credit hours required by this chapter within any two (2)-year period and may not be used to meet the requirements of subparagraphs (1)(a), (b) and (c) of Rule 0020-05-.03.

(8) CPE credit may be allowed for the successful completion of exams for Certified Management Accountant (CMA), Certified Information Systems Auditor (CISA), as well as other similar exams approved by the Board. Credit will be awarded at a rate of five (5) times the length of each exam taken and limited to fifty percent (50%) of the total CPE required under Rule 0020-05-.03.

(9) To receive credit, any program of continuing education not specifically covered by this rule must be approved by the Board before completion of the course. A licensee, once per reporting period, may submit for approval up to sixteen (16) hours of CPE from courses that are sponsored by organizations that are not registered with NASBA, and are either offered on a limited basis or industry specific. A licensee will not receive credit for attending/completing a program that was not timely approved by the Board in accordance with Rule 0020-05-.04(9).

(10) The Board specifically reserves the right to approve or disapprove credit for all continuing education claimed under this rule.

(11) Acceptable evidence for completion of qualifying learning activities shall include the following:

(a) For program or courses as set forth in Rule 0020-05-.04(2)(a) and (b), acceptable evidence should include a certificate of completion or transcript issued by the qualifying CPE program sponsor.

(b) For programs or courses set forth in Rule 0020-05-.04(2)(d) and (e), acceptable evidence should include a certificate of attendance supplied by the program sponsor.

(c) For activities set forth in Rule 0020-05-.04(2)(c), acceptable evidence should include a certificate of completion supplied by the program sponsor or a written certificate of the licensee setting forth all of the following:

1. The nature of the activity, including items discussed and the materials considered;

2. The dates on which the learning activity occurred; and

3. The number of CPE credits attributed to the learning activity.

Authority: T.C.A. §§ 62-1-105 and 62-1-107.

Rule 0020-05-.06 Control and Reporting System is amended by adding paragraph (4) following paragraph (3).

(1) Each license holder shall biennially, when making application for license renewal, submit on the prescribed form a signed statement setting forth the number of continuing education hours which he or she has completed during the reporting period. Such license holder shall retain documentation supporting such statement for at least five (5) years subsequent to the date of submission.

(2) The Board will verify information submitted by license holders under this rule on a random basis.

(3) If any continuing education hours claimed in a statement submitted by a license holder pursuant to paragraph (1) of this rule are disapproved, the Board shall notify such license holder of the reason for disapproval. The Board may allow a specified period of time, up to six (6) months, for correction of the deficiencies noted.

(4) Each approved CPE course, program, or activity shall be measured by program length, with one fifty (50) minute period equal to one (1) CPE credit. Computation of CPE credits for qualifying CPE programs shall be as follows:

(a) For group programs, independent study, and blended learning programs, a minimum of one credit must be earned initially, but after the first credit has been earned, credits may be earned in one-fifth (1/5) or one-half (1/2) increments.

(b) For self-study, a minimum of one-half (1/2) credit must be earned initially, but after the first credit has been earned, credits may be earned in one-fifth (1/5) or one-half (1/2) increments.

(c) For nano-learning, the credit to be earned for a single nano-learning program is one-fifth (1/5) credit.

(d) For blended learning programs, CPE credit must equal the sum of the CPE credit determination for the various completed components of the program.

(e) A technical reviewer of qualifying CPE programs included in Rule 0020-05-.04(a)(5) may receive CPE credit for actual review time up to the actual number of CPE credits for the learning activity. For repeat technical reviews, CPE credit can be claimed only if it can be demonstrated that the learning activity content was substantially changed and such change required significant additional study or research. Not more than fifty percent (50%) of the total CPE credits required for the CPE reporting period can be claimed for technical reviewer CPE credit.

(f) For courses that are part of the curriculum of a university, college, or other educational institution as permitted in Rule 0020-05-.04(2)(b):

1. Each semester hour credit shall equal fifteen (15) CPE credits, and each quarter hour shall equal ten (10) CPE credits; and

2. For non-credit courses, CPE credit shall equal actual time in class.

Authority: *T.C.A. §§ 62-1-105(e)(3) and 62-1-107.*

Rule 0020-05-.07 Extention of Time is amended by replacing the word "Extention" in the Rule title and instead replacing it with "Extension."

0020-05-.07 Extension~~Extention~~ of Time.

(1) The Board may, upon written request, extend the time up to six (6) months within which license holders must comply with the requirements of this chapter for reasons of poor health, military service, foreign residence, or other good cause.

(2) Any license holder who requests or is granted an extension of time under this rule shall remain subject to rule 0020-05-.06, and shall note such extension on any report required thereunder.

(3) Requests for extension under this rule will be automatically denied if filed later than the December 31 biennial renewal deadline required by these rules.

Authority: T.C.A. §§ 62-1-105 and 62-1-107.

Rule 0020-05-.08 Failure to Meet CPE Requirements is amended by substituting the phrase "technical fields of study" for the phrase "subject areas of accounting, accounting ethics, attest, taxation, or management advisory services" in paragraph (2) and is also amended by deleting the word "additional" from paragraph (3).

(1) A penalty of (8) additional CPE hours will be assessed against those license holders who fail to timely complete the eighty (80) hour two (2) year minimum required by Rule 0020-5-.03, unless an extension of time under Rule 0020-05-.07 is granted by the Board.

(2) A penalty of eight (8) additional CPE hours will be assessed against those license holders who fail to timely complete the forty (40) hour requirement in technical fields of study ~~subject areas of accounting, accounting ethics, attest, taxation, or management advisory services~~ required by Rule 0020-5-.03 unless an extension of time under Rule 0020-05-.07 is granted by the Board.

(3) A penalty of (8) ~~additional~~ CPE hours will be assessed against those license holders who fail to timely complete at least twenty (20) hours in each year of the biennial renewal period as required by Rule 0020-05-.03, unless an extension of time under Rule 0020-05-.07 is granted by the Board.

(4) A penalty of (8) additional CPE hours will be assessed against those license holders who perform the attest function who fail to timely complete the twenty (20) hour requirement in the subject areas of attest and accounting theory and practice required by Rule 0020-05-.03, unless an extension of time under Rule 0020-05-.07 is granted by the Board.

(5) A penalty of eight (8) additional CPE hours will be assessed against those license holders who fail to timely complete the two (2) hour state specific continuing professional education ethics course required by Rule 0020-05-.03, unless an extension of time under Rule 0020-05-.07 is granted by the Board.

(6) A licensee who is assessed a penalty under this rule shall complete such penalty and shall submit proof of completion of such penalty to the Board no later than one hundred and eighty (180) days from the date the Board notifies the licensee of the deficiency.

Authority: T.C.A. §§ 62-1-105, 62-1-107, and 62-1-111.

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Casey M. Stuart, CPA	X				
Stephen M. Eldridge, CPA	X				
Janet Booker-Davis, CPA	X				
Larry Elmore, CPA	X				
Kevin N. Monroe, CPA	X				
Gay Moon, CPA	X				
John G. "Gabe" Roberts, Esq.	X				
Pamela Church, CPA	X				
William "Trey" H. Watkins, III, CPA	X				
Judy Wetherbee	X				
Jack A. Bonner, Jr., CPA.	X				

I certify that this is an accurate and complete copy of proposed rules, lawfully promulgated and adopted by the Tennessee State Board of Accountancy on July 24, 2018, and is in compliance with the provisions of T.C.A. § 4-5-222. The Secretary of State is hereby instructed that, in the absence of a petition for proposed rules being filed under the conditions set out herein and in the locations described, he is to treat the proposed rules as being placed on file in his office as rules at the expiration of ninety (90) days of the filing of the proposed rule with the Secretary of State.

Date: 2/15/2019

Signature: Maria P. Bush

Name of Officer: Maria P. Bush

Title of Officer: Assistant General Counsel

Subscribed and sworn to before me on: February 15, 2019

Notary Public Signature: Carol L McGlynn

My commission expires on: Nov. 5, 2019

CAROL L. McGLYNN
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY
My Commission Expires NOV. 5, 2019

Agency/Board/Commission: Rules of the Tennessee State Board of Accountancy

Rule Chapter Number(s): 0020-05 Continuing Education

All proposed rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III

Herbert H. Slatery III
Attorney General and Reporter

3/27/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/6/19

Effective on: 9/4/19

Tre Hargett
Secretary of State

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PUBLICATIONS

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Commerce and Insurance
DIVISION:	Fire Prevention
SUBJECT:	Electrical Installations
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 68-102-113
EFFECTIVE DATES:	September 18, 2019 through June 30, 2020
FISCAL IMPACT:	None
STAFF RULE ABSTRACT:	This proposed rule removes the list of approved testing laboratories from the rule to make it easier the names and contact information of approved laboratories. The rulemaking changes also remove the requirement that the permit be purchased in the area where the work is to be performed and allows the Department to accept payment for electrical permits by means other than check or money order, which will allow the use of credit cards and electronic checks. Finally, the rule removes language regarding returned checks and instead refers to bad payment.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

1. Types and estimated number of small businesses directly affected:

Small businesses that are issuing agents for electrical permits, contractors, or electricians will be affected by the promulgation of these rules.

2. Projected reporting, recordkeeping, and other administrative costs:

There is no foreseeable alteration in the existing reporting or recordkeeping utilized by small businesses that will result from the promulgation of these rules.

3. Probable effect on small businesses:

Small businesses that are issuing agents for electrical permits, contractors, or electricians may have additional flexibility regarding the means of payment accepted by the Department.

4. Less burdensome, intrusive, or costly alternative methods:

The amended rules are not anticipated to impact small businesses more than the current rules provide. There has not been a less burdensome, intrusive, or costly alternative method identified or recommended for use.

5. Comparison with federal and state counterparts:

There are no federal counterparts to these rules.

6. Effect of possible exemption of small businesses:

There are no possible exemptions for small businesses to the requirements contained in these rules.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

The amended rules are not expected to impact local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The rule removes the list of approved testing laboratories from the rule to make it easier to update the names and contact information of the approved laboratories. The rulemaking changes also remove the requirement that the permit be purchased in the area where the work is to be performed and allows the Department to accept payment for electrical permits by means other than check or money order, which will allow the use of credit cards and electronic checks. Finally, the rule removes language regarding returned checks and instead refers to bad payment.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 68-102-113 authorizes the Commissioner of Commerce and Insurance, under the authority as State Fire Marshal, to promulgate reasonable rules and regulations relative to safeguarding to a reasonable degree of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use of buildings, structures or premises.

T.C.A. § 68-102-143 requires the Commissioner of Commerce and Insurance to provide a program to ensure that electrical inspection services are available throughout the state on a timely basis and authorizes the Commissioner to set maximum inspection fees for services.

T.C.A. § 68-102-150 authorizes the Commissioner of Commerce and Insurance to adopt any reasonable rules or regulations in order to ensure that every person, firm or corporation, or legal entity engaged in the business of installation of electrical wiring, heating, or any electrical devices that require inspection shall pay a fee of twenty-five dollars ($25.00).

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Issuing agents for electrical permits, contractors, or electricians will be affected by the promulgation of these rules.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

None.

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

None.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Michael Morelli, Director of Electrical, Residential, and Marina Inspections Section and the Permits & Licensing

Section, Department of Commerce and Insurance, Division of Fire Prevention
Mary Beth Gribble, Director of Fire Prevention Programs and Policy, Department of Commerce and Insurance

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Michael Morelli, Director of Electrical, Residential, and Marina Inspections Section and the Permits & Licensing Section, Department of Commerce and Insurance, Division of Fire Prevention
Leigh Ferguson, Chief Counsel for Fire Prevention and Law Enforcement, Department of Commerce and Insurance

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Michael Morelli, Director of Electrical, Residential, and Marina Inspections Section and the Permits & Licensing Section, Department of Commerce and Insurance, Division of Fire Prevention: 500 James Robertson Parkway, 9th Floor, Nashville, TN 37243; Michael.Morelli@tn.gov, (615) 532-5750
Leigh Ferguson, Chief Counsel for Fire Prevention and Law Enforcement, Department of Commerce and Insurance: 500 James Robertson Parkway, Nashville, TN 37243; leigh.j.ferguson@tn.gov, (615) 360-4435

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None.

Department of State
Division of Publications
312 Rosa L. Parks Ave., 8th Floor, Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615-741-2650
Email: publications.information@tn.gov

For Department of State Use Only

Sequence Number: 06-25-19
Rule ID(s): 9155
File Date: 6/20/19
Effective Date: 9/18/19

Proposed Rule(s) Filing Form

Proposed rules are submitted pursuant to Tenn. Code Ann. §§ 4-5-202, 4-5-207, and 4-5-229 in lieu of a rulemaking hearing. It is the intent of the Agency to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within ninety (90) days of the filing of the proposed rule with the Secretary of State. To be effective, the petition must be filed with the Agency and be signed by ten (10) persons who will be affected by the amendments, or submitted by a municipality which will be affected by the amendments, or an association of ten (10) or more members, or any standing committee of the General Assembly. The agency shall forward such petition to the Secretary of State.

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Department of Commerce and Insurance
Division:	Division of Fire Prevention
Contact Person:	Leigh Ferguson
Address:	500 James Robertson Pkwy.; Davy Crockett Tower, Nashville, TN
Zip:	37243
Phone:	(615) 360-4435
Email:	Leigh.j.ferguson@tn.gov

Revision Type (check all that apply):
X Amendment
___ New
___ Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below. Please enter only **ONE** Rule Number/Rule Title per row)

Chapter Number	**Chapter Title**
0780-02-01	Electrical Installations
Rule Number	**Rule Title**
0780-02-01-.03	Approval of Electrical Products
0780-02-01-.05	Permits

RULES
OF
DEPARTMENT OF COMMERCE AND INSURANCE
DIVISION OF FIRE PREVENTION

CHAPTER 0780-02-01
ELECTRICAL INSTALLATIONS

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0780-02-01-.01 SCOPE.

(1) The provisions of this chapter shall apply to:

(a) Installation of electrical conductors and equipment within or on public and private buildings or other structures, including manufactured homes, modular building units and recreational vehicles not otherwise exempt under the provisions of Tenn. Code Ann. Title 68, Chapters 102 and 126; and floating buildings and other premises such as yards, carnivals, parking and other lots; and industrial substations.

(b) Installation of conductors that connect to the supply of electricity.

(c) Installations of other outside conductors on the premises.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed July 15, 2003; effective September 28, 2003. Repeal and new rule filed November 14, 2008; effective January 28, 2009.*

0780-02-01-.02 ADOPTION BY REFERENCE.

(1) Unless otherwise provided by applicable law or the provisions of this chapter, the required minimum standards for materials, installations, use of facilities, equipment, devices and appliances conducting, conveying, consuming or using electrical energy in, or in connection with, any building, structure, or any premises located in the State of Tennessee shall be those prescribed in the National Electrical Code, 2017 edition, published by the National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02169, effective October 1, 2018, except that:

(a) Section 110.24, Available Fault Current shall be optional;

(b) Arc Fault Circuit Interrupters (AFCIs) shall be optional for bathrooms, laundry areas, garages, unfinished basements, which are portions or areas of the basement not

(Rule 0780-02-01-.02 continued)

intended as habitable rooms and limited to storage, work or similar area, and for branch circuits dedicated to supplying refrigeration equipment.

Authority: *T.C.A. §§ 68-102-113 and 68-102-143.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed September 22, 1993; effective January 28, 1994. Amendment filed November 4, 1996; effective March 28, 1997. Amendment filed July 13, 1999; effective September 26, 1999. Amendment filed July 15, 2003; effective September 28, 2003. Repeal and new rule filed November 14, 2008; effective January 28, 2009. Amendments filed December 19, 2017; effective March 19, 2018.*

0780-02-01-.03 APPROVAL OF ELECTRICAL PRODUCTS.

(1) Approved Testing Laboratories.

(a) Any materials, equipment, devices or applicants that meet one (1) of the following requirements will be accepted as compliant by the ~~The~~ Commissioner of Commerce and Insurance, or the Commissioner's designee, ~~will accept as satisfactory (~~when properly installed or used~~), materials, equipment, devices, or applicants which~~:

~~1. Display a label, symbol, or other identifying mark of one of the following independent testing laboratories:~~

~~American Gas Association Laboratories~~
~~8501 East Pleasant Valley Road~~
~~Cleveland, Ohio 44131~~

~~Applied Research Laboratories~~
~~5371 Northwest 161 Street~~
~~Miami, Florida 33014~~

~~Canadian Standards Association (CSA)~~
~~Rexdale Boulevard~~
~~Rexdale, Ontario, Canada M9W 1R3~~

~~Detroit Testing Laboratory, Inc.~~
~~8720 Northend Avenue~~
~~Oak Park, Michigan 48237~~
~~(Power-operated dispensing devices for petroleum products only)~~

~~ETL Testing Laboratories, Inc.~~
~~Industrial Park~~
~~Cortland, New York 13045~~

~~FM Approvals LLC~~
~~1151 Boston-Providence Turnpike~~
~~Norwood, Massachusetts 02062~~

~~MET Electrical Testing Company, Inc.~~
~~916 West Patapsco Avenue~~
~~Baltimore, Maryland 21230~~

(Rule 0780-02-01-.03 continued)

~~NSF International~~
~~789 N. Dixboro Road~~
~~Ann Arbor, Michigan 48113~~

~~QPS Evaluation Services Inc.~~
~~81 Kelfield Street, Unit 8,~~
~~Toronto, Ontario, M9W 5A3~~

~~SGS North America Inc.~~
~~620 Old Peachtree Road, Suite 100~~
~~Suwanee, GA 30024~~

~~TÜV Rheinland of North America, Inc.~~
~~12 Commerce Road~~
~~Newtown, CT 06470~~

~~TÜV SÜD America, Inc.~~
~~10 Centennial Drive~~
~~Peabody, Massachusetts 01960~~

~~Underwriters Laboratories, Inc.~~
~~333 Pfingsten Road~~
~~Northbrook, Illinois 60062~~

~~or,~~

1. Bear a label, symbol, or other identifying mark of one (1) of the independent testing laboratories approved by the Commissioner. A list of approved independent testing laboratories shall be maintained and published by the Division of Fire Prevention.

2. ~~Are certified~~ Certification by another independent testing agency or laboratory to meet a standard which, in the judgment of the Commissioner~~'s~~, or the Commissioner's designee~~'s, judgment,~~ provides an adequate level of safety by being:

   (i) Recognized nationally as an electrical product safety standard;

   (ii) Revised periodically to accommodate the latest developments in electrical products and installations; and

   (iii) Developed by the publisher in a manner which affords adequate opportunity for presentation and consideration of views of industry groups, experts, users, consumers, governmental authorities, and others having broad experience in the field involved.

(b) Any standard which is accepted by the American National Standards Institute (ANSI) shall be deemed to satisfy the requirements of ~~part 2 of subparagraph~~ (1)(a)2. above.

(c) Where there is no published standard for a product under consideration which meets the requirements of ~~part 2 of subparagraph~~ (1)(a)2. above, the testing agency or laboratory must identify, and justify the adequacy of, the standard or specifications on which its certification is based.

(d) Components of certified products must be evaluated for compliance with applicable

(Rule 0780-02-01-.03 continued)

safety standards, and determined to be suitable for use in such products.

(2) In lieu of evaluation by a testing agency or laboratory in accordance with paragraph (1)(a) above, the Commissioner of Commerce and Insurance, or designee, may consider other satisfactory evidence that a product meets safe and proper standards.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed November 14, 2008; effective January 28, 2009. Amendment filed September 17, 2010; effective December 16, 2010. Amendments filed September 30, 2014; effective December 29, 2014.*

0780-02-01-.04 INSPECTIONS.

(1) Inspections of electrical installations may be conducted by deputy inspectors appointed under contract with the Commissioner of Commerce and Insurance pursuant to T.C.A. § 68-102-143. In circumstances where the need arises as determined by the Commissioner of Commerce and Insurance, or designee, deputy fire marshals are authorized to conduct inspections of electrical installations.

(a) Fees for such inspections for services, including all circuits connected thereto, based on total ascertainable ampere capacity, are specified in Tenn. Comp. R. & Regs. 0780-02-01-.21. If the total ampere capacity is not ascertainable, the inspector may negotiate the fee based on the estimated number of required inspections; however, any such fee shall be subject to review and approval by the Commissioner of Commerce and Insurance, or designee, prior to issuance of a permit.

(b) Fees charged for additional inspections, including inspections necessitated by rejections and inspections for circuits not previously connected to the service, shall be based on the ascertainable ampere capacity of the service or ascertainable ampere capacity of the previously unconnected circuit, and shall not exceed the maximum amounts specified in Tenn. Comp. R. & Regs. 0780-02-01-.21.

(c) Inspectors may not charge mileage in excess of the standard travel reimbursement rate, as determined by the Tennessee Department of Finance and Administration, per mile each way for any special trip(s) requested by a property owner or contractor. This mileage charge must be approved in advance by the Commissioner of Commerce and Insurance, or designee.

(2) (a) Inspections shall be required on:

1. Complete new installations:

2. HVAC equipment;

3. New services, re-connections, or changes in services to existing installations;

4. Additions to existing installations, such as swimming pools, water well pumps to the wellhead, motor installations, additional rooms or spaces to existing buildings, grain drying equipment and out buildings;

5. Heat cable installations before being concealed by plaster, sheet rock, or other methods;

(Rule 0780-02-01-.04 continued)

6. Conduit or raceways in or under masonry before covering with concrete or other permanent materials;

7. Conductors or raceways installed in all structures. This inspection is required prior to the concealing of such conductors or raceways by wall covering materials or by insulation;

8. Temporary services, which include temporary service poles and temporary service releases; and

9. Electrical signs.

(b) A minimum of two (2) inspections shall be required on wiring installed within or on public and private buildings or other structures. The installer shall notify the electrical inspector in writing whenever any part of a wiring installation is to be hidden from view by insulation or the permanent placement of part of the building. No wiring or raceways shall be concealed until it has been inspected and approved by the inspector. A final inspection shall be requested upon completion of the entire electrical installation.

(3) When the initial ("rough-in") inspection is conducted:

(a) All applicable circuit conductors and outlet boxes shall be installed;

(b) All joints shall be made; and

(c) All grounding connections shall be in compliance with Section 300.10 of the 2017 edition of the National Electrical Code except as set forth in the exceptions enumerated in this subparagraph.

1. Exception No. 1: Where that portion of an installation which constitutes service conductors and equipment is changed or modified.

2. Exception No. 2: Where all wiring or raceway is exposed.

3. Exception No. 3: The requirements of (a) above shall not apply where inspection is performed on raceway systems only.

(4) The electrical contractor, the mechanical contractor, or the permit holder shall be responsible for ensuring the inspector has access to the site for inspection.

(5) The permit holder shall notify the inspector when the electrical installation is ready for inspection.

(6) Except as provided in Tenn. Comp. R. & Regs. 0780-02-01-.05(2) and for installers licensed in accordance with T.C.A. Title 69, Chapter 10, the inspector shall not issue a final certificate of approval on an installation performed by any person, firm, corporation or legal entity not duly licensed in accordance with T.C.A. Title 62, Chapter 6.

(7) It is not intended that electric service to an existing installation be disrupted pending inspection of additions or changes to such service; however, an inspection shall be required within seven (7) days of re-connection by the Power Supplier.

(8) Whenever service equipment has been changed out or upgraded on any existing structures, a safety inspection will be conducted pursuant to T.C.A. § 68-102-143(5).

(9) Inspections shall not be required on:

(Rule 0780-02-01-.04 continued)

(a) Minor repair work, such as replacement of lamps or connection of portable devices to suitable receptacles which have been permanently installed; and

(b) Installation, alteration, or repair of electric wiring or equipment installed by an electrical distribution agency for use in the generation, transmission, distribution, or metering of electrical energy.

(10) The inspector shall not issue a final certificate of approval on an installation if a building permit has not been obtained, if required, plans have not been reviewed and approved by the Department of Commerce and Insurance, if required, or all inspections have not been performed pursuant to Tenn. Comp. R. & Regs. 0780-02-23-.07.

(11) For residential and commercial buildings, electrical power shall be supplied to the building in order for inspector to perform final inspection.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed September 22, 1993; effective January 28, 1994. Amendment filed November 4, 1996; effective March 28, 1997. Amendment filed July 13, 1999; effective September 26, 1999. Amendment filed July 15, 2003; effective September 28, 2003. Amendments filed November 14, 2008; effective January 28, 2009. Amendments filed September 17, 2010; effective December 16, 2010. Amendments filed September 30, 2014; effective December 29, 2014. Amendments filed December 19, 2017; effective March 19, 2018.*

0780-02-01-.05 PERMITS.

(1) No electrical wiring on which an inspection is required by this chapter shall be installed without securing an electrical permit from the power distributor, local building official, Commissioner, or designee, or other issuing agent authorized by the Commissioner, or designee. ~~The permit shall be secured in the area where the work is to be performed; unless, the permit is secured from the Commissioner, or designee.~~ Issuing agents may charge a fee of no more than five dollars ($5.00) for the issuing of a permit. This fee is in addition to all applicable inspection fees in Tenn. Comp. R. & Regs. 0780-02-01-.21.

(2) Residential and Non-residential Property Owner's Permits

(a) Any person may perform electrical work (for which an inspection is required) upon his/her own residence provided he/she first applies for and obtains a residential property owner's electrical permit. This permit shall only extend to the applicant and the immediate members of the applicant's family. The permit shall not authorize assistance by any other person not duly licensed in accordance with T.C.A. Title 62, Chapter 6. A residential property owner's permit shall automatically expire upon completion of the work for which the permit was issued. All work done under such permit shall be subject to regular inspection requirements and fees and other applicable laws and regulations. Only one (1) property owner's permit may be obtained within a twelve (12) month period unless the property owner can establish loss of his/her home by fire, windstorm, etc.; and,

(b) Any non-residential property owner may obtain a permit for electrical work to be performed on his/her property by an employee(s) licensed pursuant to T.C.A. Title 62, Chapter 6, or T.C.A. Title 69, Chapter 10, who will be performing the work in

(Rule 0780-02-01-.05 continued)

accordance with his/her duties as an employee(s) of the property owner. A non-residential property owner's permit shall be limited to the specific property listed on the permit and shall automatically expire upon completion of the work for which the permit was issued. All work done under such permit shall be subject to regular inspection requirements and fees and other applicable laws and regulations.

(3) No permit shall be required for installation of electrical systems by manufacturers of factory manufactured structures, recreational vehicles, or modular building units. This rule does not exempt owners of any manufactured home, recreational vehicle or modular building unit from the required installation permit and inspection governed by this chapter.

(4) When applying for a permit, an applicant shall present:

(a) ~~A check or money order in the amount of the permit fee for inspection(s), payable to the Department of Commerce and Insurance of the State of Tennessee~~ Payment in the amount of the permit fee; and

(b) Except for a residential property owner's permit, proof of licensure pursuant to T.C.A. Title 62, Chapter 6 or T.C.A. Title 69, Chapter 10. For a non-residential property owner's permit, the license number of the employee(s) to perform the work and certification that the employee(s) licensed pursuant to T.C.A. Title 62, Chapter 6 or T.C.A. Title 69, Chapter 10, will be performing the work in accordance with his/her duties as an employee(s) of the property owner.

(5) All electrical permits are non-transferable.

(6) In the event of rejection of an electrical installation by the inspector, a new electrical permit must be applied for and obtained.

(7) Every electrical permit shall expire two (2) years from the date of issue unless:

(a) the inspector determines that substantial progress has been made in the work authorized by the permit; and

(b) the permit holder is granted an exception after submitting a written request to the Director of the Electrical Section of the Division of Fire Prevention.

No electrical work for which a permit is required shall be commenced in any building or premises until a permit to perform such work is obtained.

(8) A copy of the permit shall be placed in the service equipment enclosure as soon as such enclosure is installed.

(9) If a refund for a permit fee for inspection is requested, eighty-five percent (85%) of the permit fee, the fee that would have been paid to the inspector for the inspection, will be refunded. The remaining fifteen percent (15%) of the permit fee is non-refundable to cover administrative and processing costs. Requests for refunds shall be made to the Division of Fire Prevention on the applicable form, completed in full, prior to an inspection being performed.

(10) ~~A returned check~~ Bad payment will result in the revocation of an issued permit. Bad payment includes, but is not limited to, a returned check, dishonored electronic payment, or declined credit card payment.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December*

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0780-02-01-.06 EMERGENCY SITUATIONS.

(1) Power suppliers may energize services under emergency conditions resulting from windstorm, earthquakes or other catastrophic occurrences.

(2) Connections for emergency or delayed inspections shall not be made unless a permit has been obtained.

Authority: *T.C.A. §§ 68-102-113 and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987.*

0780-02-01-.07 SPECIAL OCCUPANCIES.

(1) All lighting fixtures in barns and other outbuildings shall be of the non-conductor type directly fastened to the outlet box. Drop lights shall not be installed in barns or other buildings, unless specifically approved for the purpose used. All convenience receptacles in outbuildings shall be at least three (3) feet above floor level. Wiring in hay mows shall be installed in conduit or otherwise protected against mechanical injury.

(2) Conductors serving swimming pools which originate at a dwelling unit service equipment or sub-panel located on the interior of the dwelling unit may be installed utilizing the appropriate wiring methods contained in Chapter 3 of the 2017 edition of the National Electrical Code. The wiring method shall comply with Article 680, 2017 edition of the National Electrical Code regarding that portion of the installation on the exterior of the dwelling unit.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed November 4, 1996; effective March 28, 1997. Amendment filed June 13, 1999; effective September 26, 1999. Amendment filed July 15, 2003; effective September 28, 2003. Amendment filed November 14, 2008; effective January 28, 2009. Amendments filed December 19, 2017; effective March 19, 2018.*

0780-02-01-.08 METER LOCATION.

(1) The power supplier will determine the physical location of the meter base.

(2) For multi-occupancy structures, metering equipment shall be identified to indicate the occupancy serviced.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed November 4, 1996; effective March 28, 1997.*

0780-02-01-.09 INSTALLATIONS SERVICED BY MULTIPLE SOURCES. Transfer equipment associated with installations served by alternate sources of supply shall be equipped with the necessary equipment to prevent backfeed of power onto the power supplier's system when the power supplier's local system is not energized by its own source of power. Protective equipment and installation of equipment to prevent backfeed shall be approved by the power supplier.

Authority: *T.C.A. §§ 68-102-113 and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987.*

0780-02-01-.10 SERVICE ENTRANCE CONDUCTORS. Service entrance conductors shall be installed in conduit where such conductors serve a structure with exterior walls of brick, stone, masonry, metal or metal-clad.

Authority: *T.C.A. §§ 68-102-113 and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987.*

0780-02-01-.11 DWELLING UNITS.

(1) Where installed as separate units, ovens and cooktop units shall be served by individual circuits.

(2) Only designated circuits shall be energized following a "service release" inspection. Such an inspection shall only be valid for a period of forty-five (45) days from the date of inspection.

(3) All electrical connection, including HVAC equipment, shall be completed and inspected prior to final approval pursuant to T.C.A. §§ 68-102-143(c) and (e), except as defined in paragraph (2) of this section.

(4) No newly constructed one-family or two-family dwelling shall be approved for connection of electric service on a permanent basis under T.C.A. § 68-102-143, unless the dwelling is equipped with a smoke alarm that has been:

(a) Listed in accordance with the standards of Underwriters Laboratories, or another testing agency or laboratory accepted by the state fire marshal; and

(b) Installed in accordance with the building construction safety standards adopted pursuant to T.C.A. § 68-120-101 and in accordance with the manufacturer's directions, unless those directions conflict with applicable standards adopted by the state fire marshal. Notwithstanding the building construction safety standards adopted pursuant to T.C.A. § 68-120-101, battery operated smoke alarms shall be permitted when installed in buildings without commercial power.

(5) Service equipment shall have only one (1) main means of disconnecting services of two hundred twenty-five (225) amps or below.

(6) The installation of receptacles for island counter spaces and peninsular counter spaces below the countertop shall be optional.

(7) Receptacles shall not be required in the wall space behind doors which may be opened fully

(Rule 0780-02-01-.11 continued)

against a wall surface. Wall space measurement shall begin at the edge of the door when fully opened.

(8) Light fixtures in crawl spaces shall have guarded covers.

(9) Occupancy of a dwelling shall be prohibited before final inspection has been completed and approved.

(10) In Article 334.15(C) of the 2017 edition of the National Electrical Code, Nonmetallic-Sheathed Cable shall not be required to be run through bored holes in unfinished basements and crawl spaces with less than four feet (4') and six inches (6") of clearance.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, 68-102-150, and 68-120-111.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed September 22, 1993; effective January 28, 1994. Amendment filed November 4, 1996; effective March 7, 1997. Amendment filed July 13, 1999; effective September 26, 1999. Amendment filed July 15, 2003; effective September 28, 2003. Repeal and new rule filed November 14, 2008; effective January 28, 2009. Amendments filed December 19, 2017; effective March 19, 2018.*

0780-02-01-.12 OVERCURRENT PROTECTION. Circuit breakers used as overcurrent protection for circuits serving devices not requiring a grounded (neutral) conductor, such as a 240V water heater, shall be multipole breakers. Single pole circuit breakers with tie handles shall not be approved for this purpose.

Authority: *T.C.A. §§ 68-102-113 and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990.*

0780-02-01-.13 WORK SPACE ABOUT HVAC EQUIPMENT.

(1) Installation in attic spaces.

(a) Entrance way providing access to equipment shall not be less than the largest piece of equipment to be replaced.

(b) There shall be a vertical clearance of at least four (4) feet and six (6) inches for use by those conducting necessary examination. In addition there shall be a walkway not less than twenty-four (24) inches wide on the ceiling joist running from the attic opening to the equipment, without an obstruction.

(2) Installation in crawl spaces underneath buildings.

(a) Entrance way providing access to equipment shall not be less than the largest piece of equipment to be replaced.

(b) There shall be a vertical clearance of at least four (4') feet and six (6") inches unobstructed crawl space to the unit.

(c) If four (4') feet and six (6") inches of clearance cannot be maintained, the unit shall be located no more than twelve (12') feet from the entrance opening and a clear unobstructed crawl space not less than thirty (30") inches in height and twenty-four

(Rule 0780-02-01.13 continued)

(24") inches in width shall be maintained.

(d) Light fixtures in crawl spaces shall have guarded covers.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed September 22, 1993; effective January 28, 1994. Amendment filed November 4, 1996; effective March 7, 1997. Amendment filed November 14, 2008; effective January 28, 2009.*

0780-02-01-.14 REPEALED.

Authority: *T.C.A. §§ 68-102-113 and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Repeal filed June 27, 1990; effective August 11, 1990.*

0780-02-01-.15 USED MANUFACTURED HOMES.

(1) Manufactured homes shall have listed, enclosed-type service-entrance equipment located inside the manufactured home, with proper rated overcurrent protection for each branch circuit. Overcurrent protection for circuits of twenty (20) amperes or less may be either circuit breakers, or plug fuses and fuse holders of Type "S", and shall be of the time-delay type. The manufactured home disconnecting means located inside shall be fed from an outside location with a feeder from the main service entrance for such manufactured home. If the supply or feeder from the main service to the disconnecting means located inside does not have a grounding conductor as required by Article 550 of the 2017 edition of the National Electrical Code, one shall be installed.

(2) Inspection shall be both visual and mechanical; switch and receptacle plates and light fixtures will be removed to check conductor connections, insulation of splices, boxes, and general code requirements.

(3) After the mechanical test and visual inspections have been made, a safety inspection certificate may be issued as determined by the inspector.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, 68-102-147, and 68-102-150.* ***Administrative History:*** *Original rule certified June 10, 1974. Amendment filed October 24, 1974; effective January 17, 1975. Amendment filed April 20, 1978; effective May 22, 1978. Repeal and new rule filed October 27, 1981; effective December 11, 1981. Repeal and new rule filed June 28, 1984; effective July 28, 1984. Repeal and new rule filed March 12, 1987; effective April 26, 1987. Amendment filed June 27, 1990; effective August 11, 1990. Amendment filed September 22, 1993; effective January 28, 1994. Amendment filed November 4, 1996; effective March 28, 1997. Amendment filed July 13, 1999; effective September 26, 1999. Amendment filed July 15, 2003; effective September 28, 2003. Repeal and new rule filed November 14, 2008; effective January 28, 2009. Amendments filed December 19, 2017; effective March 19, 2018.*

0780-02-01-.16 REPEALED.

Authority: *T.C.A. § 68-102-113.* ***Administrative History:*** *Original rule filed June 27, 1990; effective August 11, 1990. Repeal filed July 15, 2003; effective September 28, 2003.*

0780-02-01-.17 LOCAL ORDINANCES.

No city, county, town, municipal corporation, metropolitan government or political subdivision of this state shall adopt or enforce any ordinance prescribing less stringent electrical standards than those established hereunder as determined by the Division.

Authority: *T.C.A. §§ 68-102-113, 68-102-143, and 68-102-150.* ***Administrative History:*** *Original rule filed June 27, 1990; effective August 11, 1990.*

0780-02-01-.18 PERMIT ISSUING AGENTS.

(1) All individuals, including all business entities, municipalities, and cooperatives, who undertake to issue electrical permits under this chapter must hold a current contract with the Department of Commerce and Insurance, as administered through the Electrical Section of the Division of Fire Prevention.

(2) State deputy electrical inspectors and their immediate families are ineligible to become issuing agents. Additionally, without prior approval from the Department, no individual or business entity in any way related to or financially associated with any Department official will be allowed to become an issuing agent.

Authority: *T.C.A. §§ 68-102-113 and 68-102-143.* ***Administrative History:*** *Original rule filed October 15, 1999; effective December 29, 1999.*

0780-02-01-.19 REPEALED.

Authority: *T.C.A. § 68-102-113.* ***Administrative History:*** *Original rule filed October 15, 1999; effective December 29, 1999. Repeal filed July 15, 2003; effective September 28, 2003.*

0780-02-01-.20 LOCAL GOVERNMENT AUTHORIZATION TO PERFORM ELECTRICAL INSPECTIONS.

(1) (a) Pursuant to T.C.A. § 68-102-143(b)(1), the Commissioner of Commerce and Insurance may authorize a local government to conduct electrical inspections through the local government's appointed deputy inspectors. This inspection authority shall cover all types of electrical installations in accordance with the law, except for state owned or state leased properties which remain under the jurisdiction of the Commissioner.

(b) Deputy inspectors appointed in such a manner are authorized to inspect electrical installations upon receipt of a request from the owner of the property or from any person, association or corporation supplying electrical energy to the installations, or from municipal governing bodies, or from the county legislative body of the county in which the installations are located and the inspectors for their compensation are authorized to charge for and received a fee for each inspection.

(c) If a conflict arises between the state fire marshal and the local government relative to the application or interpretation of the same or substantially identical electrical safety standards, then the determination of the state fire marshal shall supersede the conflicting application or interpretation by the local government.

(d) This rule sets forth the criteria by which local governments may seek authorization to perform electrical inspections and procedures by which the Commissioner, or designee, may review such authorization.

(2) Initial Authorization.

(a) Prior to being authorized to perform electrical inspections, the local government,

(Rule 0780-02-01-.20 continued)

through the county executive, the county commission, the mayor or the city council, shall make a written request to the state fire marshal.

(b) The request shall be completed on a form approved by the state fire marshal and shall contain the following information:

1. The title(s) and edition(s) of the code(s) that will be adopted and enforced;

2. The number and types of inspections of each installation (final, rough-in, temporary, HVAC, service release, re-inspect) that will be conducted;

3. A detailed description of the permit issuance and record-keeping process for all inspection activities;

4. The names of all persons who are employed by the local government to perform electrical inspections and who have successfully completed the respective certification examinations of the International Association of Electrical Inspectors (IAEI- 1 & 2 Family and Electrical General or Electrical Commercial), the International Code Council (ICC- Residential Electrical Inspector and Commercial Electrical Inspector), or any other certification designations approved by the Commissioner, or designee. All necessary certifications shall be obtained prior to performing electrical inspections.

(c) After receipt of the information required in paragraph (2)(b) of this rule, the state fire marshal will schedule a pre-authorization review to take place at the applying local government's office. During this review, the state fire marshal may review any and all records related to the local government's proposed electrical inspection program, including the certification records of persons employed to perform electrical inspections.

(d) If after consideration of the information required in paragraph (2)(b) of this rule and after the pre-authorization review the state fire marshal determines that the local government can adequately enforce electrical codes and conduct electrical inspections, the state fire marshal may authorize the local government to conduct electrical inspections.

(3) The local government's adopted electrical code publication shall be current within seven (7) years of the date of the latest edition thereof, unless otherwise approved by the state fire marshal.

(4) Review of Local Government Authorization.

(a) For any local government that was authorized to conduct electrical inspections before January 1, 2005, the state fire marshal will conduct a review as soon as practicable of the local government's authorization to conduct electrical inspections to determine whether the local government is adequately enforcing the adopted electrical codes and is properly performing inspections.

(b) For any local government that is authorized to conduct electrical inspections on or after January 1, 2005, the state fire marshal will conduct a review of the local government's authorization to conduct electrical inspections to determine whether the local government is adequately enforcing the adopted electrical codes, is properly performing inspections and is otherwise in compliance with the information originally submitted to the state fire marshal for purposes of gaining authorization to perform electrical inspections. The review provided by this paragraph shall take place at least once every three (3) years.

(Rule 0780-02-01.20 continued)

(c) Each local government that is reviewed pursuant to this paragraph will be notified of the review in writing. When a local government is subject to the review provided by this paragraph, the local government shall submit the information required for initial authorization by paragraph (2)(b) of this rule on a form provided by the state fire marshal within thirty (30) days of its receipt of the form.

(d) As part of the review, the state fire marshal may also conduct an on-site visit to the local government to review the electrical permit and inspection process.

(e) The state fire marshal may request any other documentation it deems necessary for the local government to evidence compliance with the requirements for initial authorization set forth in paragraph (2)(b) of this rule.

(f) Report of Review.

1. After conclusion of the review, the state fire marshal will notify the local government in writing whether there are any area(s) in which the local government is not adequately enforcing the adopted electrical codes or properly performing inspections.

2. If the local government is not adequately enforcing the adopted electrical codes or properly performing inspections, the notification will contain recommended corrective action, and the local government will be directed to submit a plan of corrective action to the state fire marshal within thirty (30) days after its receipt of the notification. The plan of corrective action shall be sufficiently detailed so as to ensure compliance with all requirements for initial authorization.

3. Within thirty (30) days after receipt of the local government's plan of corrective action, the state fire marshal shall either approve or disapprove the plan. If the plan is approved, the state fire marshal may conduct periodic follow-up reviews to ensure continued compliance with the plan. If the plan is not approved, the state fire marshal may remove the local government's authorization to conduct electrical inspections.

Authority: *T.C.A. §§ 68-102-113 and 68-102-143(b)(1).* ***Administrative History:*** *Original rule filed March 7, 2005; effective May 21, 2005. Emergency rule filed June 30, 2010; effective through December 27, 2010. Amendments filed September 17, 2010; effective December 16, 2010. Amendments filed December 19, 2017; effective March 19, 2018.*

0780-02-01-.21 INSPECTION FEES.

The inspection fee for each inspection for services shall not exceed the following:

	Fee
Final Inspection	
0-200 ampere capacity	$35.00
201-400 ampere capacity	$40.00
401-600 ampere capacity	$50.00
601-1000 ampere capacity	$90.00
1,001 ampere capacity and above ("Nonstandard permit")	Fee is negotiable; however, any such fee shall be subject to review and approval by the commissioner, or designee.

(Rule 0780-02-01-.21 continued)

Rough-in Inspection	
0-1,000 ampere capacity	$35.00
1,001 ampere capacity and above	$35.00
Re-inspection	
Based on rejection of 0-1,000 ampere capacity	$35.00
Based on rejection of 1,001 ampere capacity and above	$35.00
Inspection of a dwelling unit's heating and/or cooling system (e.g. HVAC)	$35.00
Consultation Inspection (optional/available upon request)	$50.00
Service Release Inspection (valid for 45 days)	Fee is based on ampere capacity of service.
Inspection of Boat Docks and Marinas	Fee is negotiable based upon the number of subpanels, panels and the ampere capacity of service; however, any such fee shall be subject to review and approval by the commissioner, or designee.

Authority: *T.C.A. §§ 68-102-113, 68-102-143(b)(2), 68-102-602, and 68-102-603.* ***Administrative History:*** *Emergency rule filed December 30, 2013; effective through June 28, 2014. Emergency rule filed June 27, 2014 expired effective December 24, 2014. On December 25, 2014, the rule reverted to its previous reserved status. New rule filed September 30, 2014; effective December 29, 2014. Amendments filed March 23, 2017; effective June 21, 2017.*

0780-02-01-.22 BOAT DOCKS AND MARINAS.

(1) Safety inspections of boat docks and marinas shall include, but are not limited to, a review of all sources of electrical supply, including ship-to-shore power pedestals, submergible pumps, and sewage pump-out facilities, that could result in unsafe electrical current in the water for the purpose of ensuring compliance with the standards for maintenance of electrical wiring and equipment that were applicable to the marina at the time of installation.

(2) (a) In the event that a deficiency is found during a safety inspection, any subsequent inspection required for the inspection of repairs made to address such deficiency shall be conducted by a deputy electrical inspector commissioned under T.C.A. § 68-102-143, and in accordance with T.C.A. § 68-102-143 and Tenn. Comp. R. & Regs. 0780-02-01.

(b) The permit fee for inspection of boat docks and marinas are negotiable based upon the number of subpanels, panels and the ampere capacity of service; however, any such fee shall be subject to review and approval by the Commissioner of Commerce and Insurance, or designee.

(3) Any main overcurrent protective device installed or replaced on or after April 1, 2015, that feeds a marina shall have ground-fault protection and meet all requirements in Article 555.3 in the edition of the National Electrical Code adopted in Tenn. Comp. R. & Regs. 0780-02-01-.02.

(Rule 0780-02-01-.22 continued)

(4) Inspections shall be performed in accordance with the adopted electrical code edition effective at the time of installation. If the time of installation cannot be determined, the installation shall be inspected in accordance with the pertinent section related to Marinas and Boatyards, Article 555 in the edition of the National Electrical Code adopted in Tenn. Comp. R. & Regs. 0780-02-01-.02, unless otherwise authorized by the Commissioner of Commerce and Insurance, or designee.

(5) The regulation regarding a maximum of one thousand (1000) volts phase to phase being permitted in yard and pier distribution systems as specified in Article 555.4, Distribution System of the edition of the National Electrical Code adopted in Tenn. Comp. R. & Regs. 0780-02-01-.02, may be exceeded if written documentation is submitted from an engineer licensed in the State of Tennessee approving the additional voltage.

Authority: *T.C.A. §§ 68-102-113, 68-102-143(b)(2), 68-102-602, and 68-102-603.* ***Administrative History:*** *Emergency rule filed December 30, 2013; effective through June 28, 2014. Emergency rule filed June 27, 2014 expired effective December 24, 2014. On December 25, 2014, the rule reverted to its previous reserved status. New rule filed September 30, 2014; effective December 29, 2014. Amendments filed December 19, 2017; effective March 19, 2018.*

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
N/A					

I certify that this is an accurate and complete copy of proposed rules, lawfully promulgated and adopted by the (*board/commission/other authority*) on 05/06/2019 (*date as mm/dd/yyyy*), and is in compliance with the provisions of T.C.A. § 4-5-222. The Secretary of State is hereby instructed that, in the absence of a petition for proposed rules being filed under the conditions set out herein and in the locations described, he is to treat the proposed rules as being placed on file in his office as rules at the expiration of ninety (90) days of the filing of the proposed rule with the Secretary of State.

DENISE M. LEWIS
STATE OF TENNESSEE
NOTARY PUBLIC
WILSON COUNTY
My Commission Expires

Date: 5/6/19

Signature: Julie Mix McPeak

Name of Officer: Julie Mix McPeak

Title of Officer: Commissioner of Commerce and Insurance

Subscribed and sworn to before me on: 5/6/19

Notary Public Signature: Denise M Lewis

My commission expires on: 1/15/20

Agency/Board/Commission: Department of Commerce and Insurance
Division of Fire Prevention

Rule Chapter Number(s): 0780-02-01.03, 0780-02-01.05

All proposed rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III

Herbert H. Slatery III
Attorney General and Reporter

6/19/2019
Date

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Filed with the Department of State on: 6/20/19

Effective on: 9/18/19

Tre Hargett

Tre Hargett
Secretary of State

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Labor and Workforce Development
DIVISION:	Bureau of Workers' Compensation
SUBJECT:	Rules for Medical Payments
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 50-6-204
EFFECTIVE DATES:	September 10, 2019 through June 30, 2019
FISCAL IMPACT:	Minimal
STAFF RULE ABSTRACT:	These rulemaking hearing rules, together with the Medical Fee Schedule and In-patient Hospital Fee Schedule Rules, establish a comprehensive medical fee schedule, procedures for review of bills, and enforcement procedures.

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

PUBLIC COMMENTS AND RESPONSES

Comment:
Michael Haynie at Manier Herod law firm: References to the Tennessee workers' compensation act should be changed to the Tennessee workers' compensation law to be consistent with word usage in Title 50.
Response: The bureau agrees and has made the suggested changes.
Comment:
Neil Aronov, PhD:
1) Payments to psychologists should be increased to be consistent with increases in medical fee schedule for other medical providers.
Response: The bureau agrees. The increases to psychologists were included in the medical fee schedule increases included in these rules.
2) Psychologists should be permitted to declare a patient at maximum medical improvement and provide a permanent impairment rating.
Response: The bureau neither agrees nor disagrees; this is beyond the scope of the medical fee schedule rules. A statutory change would be needed to permit a psychologist to perform functions that are presently done by physicians pursuant to statute.
Comment:
Tennessee Hospital Association
1) THA supports the fee schedule changes in 0800-02-18 that would base physician reimbursement on the Medicare physician fee schedule conversion factor in effect on the date of service, as opposed to the current fixed conversion factor in the current rule that is consistent with the 2011 Medicare conversion factor.
Response: The bureau agrees.
2) Inpatient hospital fee schedule increase should be changed to 6.07% instead of the proposed 5% to be consistent with 2019 conversion factor change.
Response: The bureau defers at this time. The current changes being made to the medical fee schedule rules were based upon a 2018 review. Making this suggested change would require re-pricing the entire medical fee schedule. However, the bureau has already agreed to review the inpatient fee schedule for its 2019 annual review required by statute, including the stop loss and per diem payment methodologies.
Comment:
Tennessee Radiologists Society (TRS) and Tennessee Radiology Business Managers Association (RBMA):
1) We support the proposed change to float the Medicare conversion factor with the current Medicare conversion factor rather than freezing the number in rule.
Response: The bureau agrees.
2) We suggest adding the phrase "free-standing outpatient diagnostic center" to Rule 0800-02-18-.07(c) to clarify the application of the OPPS rate to the technical services component of radiology services.
Response: The bureau disagrees at this time. This rule only applies to ASCs. To include free-standing outpatient diagnostic centers was not the intent of this section of the rule. The category of diagnostic centers will be subject to review as a part of the statutorily required annual review of the medical fee schedule in 2019.
Comment:
Coventry
1) In 0800-02-17-.09(4) there is a statement: "The reimbursement shall be $200.00 for the first hour of review and $100.00 for each additional hour, provided that each half hour shall be pro-rated." Should this sentence change to clarify the applicability if a prepayment request may not exceed $200?
Response: The bureau disagrees that a clarification needs to be made. This methodology is consistent with other bureau rules regarding medical depositions.
2) In 0800-02-17-.22(1)(a), suggestion is made to add the following: "Submissions that are received less than one week before a Committee meeting will be held and reviewed at the next regularly scheduled meeting."
Response: The bureau agrees with the comment, and the issue of late submissions has been addressed in 0800-02-17-.22(1)(b). Note that this applies only to "written submissions" that are received less than one week prior to the meeting and does not limit oral discussion.
Comment:

John Williams-TAPA: In 0800-02-18.04(2)(c) this change is being made: "PA and APN fees will be based on the specialty of their collaborating physician for all services except those defined as 'assistants at surgery'." How will this impact the payments to PAs and APNs?
Response: The proposed change created confusion about the specialty collaborating physician designation as noted above. APN and PA reimbursement will be calculated according to Medicare billing rules at 160% using a fixed Tennessee specific conversion percentage. This will increase their payments to 85% of the current Medicare conversion factor multiplied by the 160%, providing for a simpler calculation, and will annually "float" with the Medicare conversion factor.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rulemaking process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule: The amended rules will affect small employers that fall under the Tennessee Workers' Compensation Laws, which would be employers with at least five employees, or for those in the construction industry at least one employee. There should be no additional costs associated with these rule changes.

2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record. There is no additional record keeping requirement or administrative cost associated with these rule changes.

3. A statement of the probable effect on impacted small businesses and consumers: These rules should not have any impact on consumers or small businesses.

4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business: There are no less burdensome methods to achieve the purposes and objectives of these rules.

5. Comparison of the proposed rule with any federal or state counterparts: None.

6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule: Exempting small businesses could frustrate the small business owners' access to the services provided by the Bureau of Workers' Compensation and timely medical treatment for injured workers, which would be counter-productive.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://state.tn.us/sos/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

These proposed rules will have little, if any, impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

These rules together with the Medical Fee Schedule and In-patient Hospital Fee Schedule Rules establish a comprehensive medical fee schedule, procedures for review of bills and enforcement procedures.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 50-6-204 provides that the Bureau administrator is authorized to establish by rule a comprehensive medical fee schedule and will review it annually and make revisions as necessary.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

All parties to a workers' compensation claim will be affected by the adoption or rejection of these rules.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

The overall effect will have little fiscal impact upon state or local government.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Troy Haley, Legislative Liaison and Director of Administrative Legal Services

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Troy Haley, Legislative Liaison and Director of Administrative Legal Services

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Tennessee Bureau of Workers' Compensation
220 French Landing Drive, Floor 1-B
Nashville, TN 37243
(615) 532-0179
troy.haley@tn.gov

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None

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For Department of State Use Only
Sequence Number: 06-14-19
Rule ID(s): 9035
File Date: 6/12/19
Effective Date: 9/10/19

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee Department of Labor and Workforce Development
Division:	Bureau of Workers' Compensation
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Revision Type (check all that apply):
X Amendment
___ New
___ 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.)

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0800-02-17	Rules for Medical Payments
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RULES
OF
TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WORKERS' COMPENSATION

CHAPTER 0800-02-17
RULES FOR MEDICAL PAYMENTS

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0800-02-17-.01 PURPOSE AND SCOPE.

(1) Purpose:

Pursuant to Tenn. Code Ann. § 50-6-204 (Repl. 2005), this chapter, together with the Medical Fee Schedule Rules, Chapter 0800- 02-18-.01 et seq., and the In-patient Hospital Fee Schedule Rules, Chapter 0800-02-19-.01 et seq., (collectively hereinafter "Rules") are hereby adopted by the Administrator in order to establish a comprehensive medical fee schedule and a related system which includes, but is not limited to, procedures for review of bills, enforcement procedures and appeal hearings. The Administrator promulgates these Rules to establish the maximum allowable fees for health care services falling within the purview of the Tennessee Workers' Compensation Act ("Act"). This chapter must be used in conjunction with the Medical Fee Schedule Rules (Chapter 0800-02-18) and the In-patient Hospital Fee Schedule Rules (Chapter 0800-02-19). The Rules establish maximum allowable fees and procedures for all medical care and services provided to any employee claiming medical benefits under the Tennessee Workers' Compensation Act. Employers and providers may negotiate and contract or pay lesser fees as are agreeable between them, but in no event shall reimbursement be in excess of the Rules, subject to the civil penalties prescribed in the Rules, as assessed by, and in the discretion of, the Administrator, the Administrator's designee, or an agency member appointed by the Administrator. These Rules are applicable only to those injured employees claiming benefits under the Tennessee Workers' Compensation Act.

(2) Scope: These rules do all of the following:

(a) Establish procedures by which the employer shall furnish, or cause to be furnished to an employee who sustains a personal injury, illness, or occupational disease, reasonable and necessary medical, surgical, ~~and~~ hospital services and medicines, or other ~~attendance~~ or treatment recognized by the laws of the state as legal, ~~when~~

(Rule 0800-02-17-.01, continued)

needed. The employer shall also supply to the injured employee dental services, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to treat, so far as reasonably and necessarily possible, and provide relief from the effects of that injury or occupational disease.

(b) Establish schedules of maximum fees by a health facility or health care provider for such treatment or attendance, service, device, apparatus, or medicine.

(c) Establish procedures by which a health care provider shall be paid the lesser of: (1) the provider's usual bill, (2) the maximum fee established under these Rules, or (3) the MCO/PPO or any other negotiated and contracted or lower price, where applicable. Unless authorized by the administrator, in no event shall reimbursement be in excess of these Rules. Reimbursement in excess of these Rules may, at the Administrator's discretion, result in civil penalties of not less than fifty dollars ($50) nor greater than five thousand dollars ($5,000.00) per violation each assessed severally against the provider accepting such fee and the employer paying the excessive fee, if a pattern or practice of such activity is found. At the Administrator's discretion, multiple violations by a provider may subject the provider to exclusion from further participating in providing medical care to injured workers under the Act.

(d) Identify utilization of health care and health services which is above the usual range of utilization for such services, based on medically accepted standards. Also to provide the ability by an employer and the Bureau to obtain necessary records, medical bills, and other information concerning any health care or health service under review.

(e) Establish a system for the evaluation by an employer of the appropriateness in terms of both the level of and the quality of health care and health services provided to injured employees, based upon medically accepted standards.

(f) Permit review by the Bureau of the records and medical bills of any health facility or health care provider to determine whether or not they are in compliance with these Rules, or which may be requiring unjustified and/or unnecessary treatment, hospitalization or office visits or other healthcare services.

(g) Provide for deposition and witness fees.

(h) Establish maximum fees for medical reports.

(i) Provide for uniformity of billing for provider services.

(j) Establish the effective date for implementation of these Rules. Adopt by reference as part of these Rules the International Classification of Diseases, ICD-9-CM and ICD-10-CM, the American Medical Association's CPT® and Center for Medicare and Medicaid Services (CMS-Medicare) guidelines, Medical Fee Schedule Rules (Chapter 0800-02-18), the In-patient Hospital Fee Schedule (Chapter 0800-02-19) and any amendments to them.

(k) Establish procedures for reporting of medical claims.

(l) Establish procedures for pre-authorization for payments of non-emergency hospitalizations, transfers between facilities, and outpatient services.

(m) Establish procedures for imposing and collecting civil penalties for violations of these Rules.

(Rule 0800-02-17-.01, continued)

(n) These rules shall apply where appropriate in conjunction with electronic submission of payments (e-billing). See Rule 0800-02-26.

Authority: *T.C.A. §§ 50-6-102, 50-6-118, 50-6-125, 50-6-128, 50-6-202, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.02 RESERVED.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.03 DEFINITIONS.

The following definitions are for the purposes of and are applicable to the Rules for Medical Payments (Chapter 0800-02-17), the Medical Fee Schedule Rules (Chapter 0800-02-18) and the In-patient Hospital Fee Schedule Rules (Chapter 0800-02-19):

(1) "Act" means Tennessee's Workers' Compensation Act, Tenn. Code Ann. §§ 50-6-101 et seq. as currently enacted by the Tennessee General Assembly, specifically including any future enactments by the Tennessee General Assembly involving amendments, deletions, additions, repeals, or any other modification, in any form of the Workers' Compensation Act.

(2) "Adjust" means that an employer changes a health care provider's request for payment, including but not limited to:

(a) Applies the maximum fee allowable under these Rules;

(b) Applies an agreed upon discount to the provider's usual bill, in accordance with the requirement in T.C.A. § 50-6-215;

(c) Adjusts to a usual and customary amount when the maximum fee is by report;

(d) Reduces or denies all or part of a properly-submitted bill for payment as a result of bill review;

(e) Recodes a procedure.

(3) "Administrator" means the chief administrative officer of the Bureau of Workers' Compensation or the Administrator's designee.

(4) "Appropriate care" means health care that is suitable for a particular person, condition, occasion, or place as determined by the Administrator or the Administrator's designee after consultation with the Medical Director.

(5) "Bill" means a request by a provider submitted to an employer for payment for health care services provided in connection with a compensable injury, illness or occupational disease.

(6) "BR" (By Report) means that the procedure is not assigned a maximum fee and requires a written description. The description shall be included on the bill or attached to the bill and shall include the following information, as appropriate:

(Rule 0800-02-17-.03, continued)

(a) Copies of operative reports;

(b) Consultation reports;

(c) Progress notes;

(d) Office notes or other applicable documentation;

(e) Description of equipment or supply (when that is the bill).

(7) "Bureau" means the Tennessee Bureau of Workers' Compensation as defined in T.C.A. § 50-6-102, an autonomous unit attached to the Tennessee Department of Labor and Workforce Development for administrative matters only pursuant to T.C.A. § 4-3-1409.

(8) "Case" means a compensable injury, illness or occupational disease identified by the worker's name and date of injury, illness or occupational disease.

(9) "CMS" means the U.S. Centers for Medicare & Medicaid Services (formerly Health Care Financing Administration). The rules promulgated by CMS used in these chapters are referred to as "Medicare".

(10) "Complete procedure" means a procedure containing a series of steps which are not to be billed separately, as defined by Medicare.

(11) "Consultant service" means; in regard to the health care of a covered injury and illness; an examination, evaluation, and opinion rendered by a health care specialist when requested by the authorized treating practitioner or by the employee; and which includes a history, examination, evaluation of treatment, and a written report. If the consulting practitioner assumes responsibility for the continuing care of the patient, subsequent service(s) cease(s) to be a consultant service.

(12) "CPT®" means the ~~most current~~ edition of the American Medical Association's Current Procedural Terminology, in effect on the date of service.

(13) "Critical care" has the same meaning as defined by Medicare.

(14) "Day" means a calendar day, unless otherwise designated in these Rules.

(15) "Diagnostic procedure" means a service which aids in determining the nature and/or cause of an occupational disease, illness or injury.

(16) "Diagnostic Code" means the properly constructed numeric code from the International Classification of Diseases, version ICD-9-CM for dates of service before October 1, 2015. For dates of service on or after October 1, 2015, it means the properly constructed alpha-numeric code, ICD-10-CM.

(17) "Dispute" means a disagreement between an employer and a health care provider on interpretation, payment under, or application of these Rules.

(18) "MS-DRG" (Diagnosis Related Group) means one of the classifications of diagnoses in which patients demonstrate similar resource consumption and length of stay patterns as defined for Medicare.

(19) "Durable Medical Equipment" or "DME" is equipment which:

(Rule 0800-02-17-.03, continued)

(a) Can withstand repeated use;

(b) Is primarily and customarily used to serve a medical purpose;

(c) Generally is not useful to a person in the absence of illness, injury or occupational disease; and

(d) Is appropriate for use in the home.

(20) "Employer" shall have the same meaning as defined in T.C.A. § 50-6-102, but also includes an employer's insurer, third party administrator, self-insured employers, self-insured pools and trusts, as well as the employer's legally authorized representative or legal counsel, and agents to accomplish billing and payment transactions, as applicable.

(21) "Established patient" has the same meaning as in the most current version of the CPT®.

(22) "Expendable medical supply" means a disposable article which is needed in quantity on a daily or monthly basis.

(23) "Focused review" means the evaluation of a specific health care service or provider to establish patterns of use and dollar expenditures.

(24) "Follow-up care" means the care which is related to the recovery from a specific procedure and which is considered part of the procedure's maximum allowable payment, as defined by Medicare but does not include care for complications.

(25) "Follow-up days" means the days of care following a surgical procedure that are included in the procedure's maximum allowable payment, as defined by Medicare but does not include care for complications.

(26) "Follow-up visits" means the number of office visits following a surgical procedure which is included in the procedure's maximum allowable payment, as defined by Medicare but does not include care for complications.

(27) "Health care organization" means a group of practitioners or individuals joined together to provide health care services and includes, but is not limited to, a freestanding surgical outpatient facility, health maintenance organization, an industrial or other clinic, an occupational health care center, a home health agency, a visiting nurse association, a laboratory, a medical supply company, or a community mental health center.

(28) "Health care review" means the review of a health care case or bill, or both, by an employer.

(29) "Health Care Specialist" means a board-certified practitioner, board-eligible practitioner, or a practitioner otherwise considered an expert in a particular field of health care service by virtue of education, training, and experience generally accepted by practitioners in that particular field of health care service.

(30) "Inappropriate health care" means health care that is not suitable for a particular person, condition, occasion, or place as determined by the Administrator or the Administrator's designee after consultation with the Bureau's Medical Director.

(31) "Incidental surgery" means a surgery performed through the same incision, on the same day, by the same doctor, and not related to the original or covered diagnosis that is in accord with the Medicare rules.

(32) "Independent Medical Examination" means an examination and evaluation conducted by a practitioner who has not previously been involved in providing care to the examinee. There is

(Rule 0800-02-17-.03, continued)

no doctor/therapist-patient relationship. This does not include one conducted under the Bureau's Medical Impairment Rating Registry ("MIRR") Program.

(33) "Independent procedure" means a procedure which may be carried out by its self, separate and apart from the total service that usually accompanies it according to CPT® guidelines.

(34) "Injury" has the same meaning defined in T.C.A. § 50-6-102.

(35) "Inpatient services" mean services rendered to a person who is formally admitted to a hospital and whose condition is such that requires Inpatient admission in accordance with industry standard guidelines.

(36) "Institutional services" mean all non-physician services rendered within the institution by an agent of the institution.

(37) "Maximum allowable payment" means the maximum fee for a procedure established by these Rules or the usual and customary bill as defined in these Rules, whichever is less, except as otherwise might be specified. In no event shall reimbursement be in excess of the Bureau's Medical Fee Schedule, unless otherwise authorized by the administrator. Fee collected in excess of the Bureau's Medical Fee Schedule and reported to the Bureau, may, at the Administrator's discretion, result in civil penalties of fifty dollars ($50.00) to five thousand dollars ($5,000.00) per violation for each violation assessed severally against the provider accepting such fee and the employer paying the excessive fee, whenever a pattern or practice of such activity is found. At the Administrator's discretion, multiple violations by a provider may subject the provider to exclusion from participating in providing workers care under the Act.

(38) "Maximum fee" means the maximum allowable payment for a procedure established by this rule, the Medical Fee Schedule and the In-patient Hospital Fee Schedule.

(39) "Medical admission" means any hospital admission where the primary services rendered are not surgical or in an acute care hospital where the admission is to special unit such as inpatient psychiatric or rehab beds, or in a separately licensed psychiatric or rehabilitation hospital.

(40) "Medical Director" means the Bureau's Medical Director appointed by the Administrator pursuant to T.C.A. § 50-6-126.

(41) "Medical only case" means a case which does not involve lost work time.

(42) "Medical supply" means either a piece of durable medical equipment or an expendable medical supply.

(43) "Modifier code" means a 2-digit number or alphabetical designation used in conjunction with the procedure code to describe circumstances, as defined by CMS which arise in the treatment of an injured or ill employee.

(44) "New patient" designation for billing purposes means a patient who is new to the provider according to the definitions used by CMS as of the date of service. ~~in the most recent edition of CPT®.~~

(45) "Operative report" means the practitioner's written description of the surgery and includes all of the following:

(a) A preoperative diagnosis;

(b) A postoperative diagnosis;

(Rule 0800-02-17-.03, continued)

(c) A step-by-step description of the surgery;

(d) An identification of problems which occurred during surgery;

(e) The condition of the patient, when leaving the operating room, the practitioner's office, or the health care organization.

(46) "Ophthalmologist" shall be defined according to T.C.A. § 71-4-102(3).

(47) "Optician" shall mean a licensed dispensing optician as set forth in T.C.A. § 63-14-103.

(48) "Optometrist" means an individual licensed to practice optometry.

(49) "Optometry" shall be defined according to T.C.A. § 63-8-102(12).

(50) "Orthotic equipment" means an orthopedic apparatus designed to support, align, prevent, correct deformities, or improve the function of a movable body part.

(51) "Orthotist" means a person skilled in the construction and application of orthotic equipment.

(52) "Outpatient service" means a service provided by the following, but not limited to, types of facilities: physicians' offices and clinics, hospital emergency rooms, hospital outpatient facilities, community mental health centers, outpatient psychiatric hospitals, outpatient psychiatric units, and freestanding surgical outpatient facilities also known as ambulatory surgical centers.

(53) "Package" means a surgical procedure that includes but is not limited to all of the following components:

(a) The operation itself;

(b) Local infiltration;

(c) Topical anesthesia when used;

(d) The normal or global follow-up period and/or visits as defined by CPT®.

(54) "Pattern of practice" means repeated, similar violations over a three-year period of the Medical Fee Schedule Rules.

(55) "Pharmacy" means the place where the science, art, and practice of preparing, preserving, compounding, dispensing, and giving appropriate instruction in the use of drugs is practiced and governed by the Board of Pharmacy.

(56) "Practitioner" means a person licensed, registered, or certified as an audiologist, chiropractic physician, doctor of dental surgery, doctor of medicine, doctor of osteopathy, doctor of podiatry, doctor of optometry, nurse, nurse anesthetist, nurse practitioner, occupational therapist, orthotist, pharmacist, physical therapist, physician assistant, prosthetist, psychologist, or other person licensed, registered, or certified as a health care professional, or their agents used to accomplish medical records, billing and payment transactions.

(57) "Preauthorization" for workers' compensation claims means that the employer prospectively~~,~~ ~~retrospectively,~~ or concurrently authorizes the payment of medical benefits. Preauthorization for workers' compensation claims does not mean that the employer accepts the claim or has

(Rule 0800-02-17-.03, continued)

made a final determination on the compensability of the claim. Preauthorization for workers' compensation claims does not include utilization review.

(58) "Primary procedure" means the therapeutic procedure most closely related to the principle diagnosis.

(59) "Procedure" means a unit of health service.

(60) "Procedure code" means an alpha/numeric or numeric sequence used to identify a service performed and billed by a qualified provider.

(61) "Properly submitted and complete bill" means a request for a provider for payment of health care services submitted to the employer on the appropriate forms which are completed pursuant to this rule or the rules appropriate to electronic billing. To be properly submitted and complete, the bill shall:

(a) Identify:

1. The injured employee who received the service;

2. The employer and the responsible paying agent with information sufficient to contact the responsible party in case of a dispute or questions. This information shall be provided by the payer if the bill is adjusted, contested or rejected and shall include a clear explanation of the reasons;

3. The health care provider with an IRS, NPI or other appropriate identifier;

4. The medical service product;

5. Other information required by the form;

(b) Include a valid MS-DRG, Revenue Code, CPT® or HCPCS code as applicable;

(c) Include a ICD-10-CM codes where necessary shall be used by all parties;

(d) Have attached, in legible text, all supporting documentation required for the particular bill format, including, but not limited to, medical reports and records, evaluation reports, narrative reports, assessment reports, progress reports/notes, clinical notes, hospital records and diagnostic test results that may be expressly required by law or can reasonably be expected by the payer or its agent under the laws of Tennessee.

(62) "Prosthesis" means an artificial substitute for a missing body part.

(63) "Prosthetist" means a person skilled in the construction and application of prosthesis.

(64) "Provider" means a facility, health care organization, or a practitioner, or their agents to accomplish medical records, correspondences, billing and payment transactions.

(65) "Reject" means that an employer denies partial or total payment to a provider or denies a provider's request for reconsideration. Notification of any full or partial rejection must be made within fifteen (15) business days of receipt of the bill by the employer.

(66) "Secondary procedure" means a surgical procedure which is performed to ameliorate conditions that are found to exist during the performance of a primary surgery and which is considered an independent procedure that may not be performed as a part of the primary surgery or for the existing condition, as defined by Medicare.

(Rule 0800-02-17-.03, continued)

(67) "Stop-Loss Payment" or "SLP" means an independent method of payment for ann ~~unusually costly or lengthy~~ inpatient hospital stay.

(68) "Stop-Loss Reimbursement Factor" or "SLRF" means a factor established by the Administrator to be used as a multiplier to establish a reimbursement amount when total hospital bills have exceeded specific stop-loss dollar thresholds.

(69) "Stop-Loss Threshold" or "SLT" means a dollar threshold of bills established by the Administrator, beyond which reimbursement is calculated by multiplying the applicable SLRF times the total dollars billed following that particular dollar threshold.

(70) "Surgical admission" means any hospital admission for which the patient has a surgical MS-DRG as defined by CMS.

(71) "Timely f~~F~~iling of bills for medical services" means the period of time within which a request for payment from a provider must be billed consistent with Medicare guideline time limits.

(72) "Timely p~~P~~ayment" means the period of time that the employer has to remit payment to the provider.

(73) "Transfer between facilities" means to move or remove a patient from one facility to another for a purpose related to obtaining or continuing medical care. The transfer may or may not involve a change in the admittance status of the patient, i.e., patient transported from one facility to another to obtain specific care, diagnostic testing, or other medical services not available in the facility in which the patient has been admitted. The transfer between facilities shall include costs related to transportation of patient to obtain medical care.

(74) "Usual and customary" (U&C) means eighty percent (80%) of a specific provider's billed charges.

(75) "CMS-1500 or CMS-1450, UB04" or their successors means the most recent industry standard health insurance claim forms maintained for use by medical care providers and institutions, including the ADA form for dentists and the NCPDP WC/PC UCF for pharmacies.

(76) "Utilization Review" means evaluation of the necessity, appropriateness, efficiency and quality of medical services, including the prescribing of one (1) or more Schedule II, III or IV controlled substances for pain management for a period of time exceeding ninety (90) days from the initial prescription of such controlled substances, provided to an injured or disabled employee based upon medically accepted standards and an objective evaluation of the medical care services provided; provided, that "utilization review" does not include the establishment of approved payment levels, a review of medical charges or fees, or an initial evaluation of an injured or disabled employee by a physician specializing in pain management. "Utilization review," also known as "Utilization management," does not include the evaluation or determination of causation or the compensability of a claim. For workers' compensation claims, "utilization review" is not a component of preauthorization. The employer shall be responsible for all costs associated with utilization review and shall in no event obligate the employee, health care provider or Bureau to pay for such services.

Authority: *T.C.A. §§ 50-6-102, 50-6-202, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed December 20, 2007; effective March 4, 2008. Amendments filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.04 RESERVED.

Authority: *T.C.A. §§ 50-6-102 and 50-6-204 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.05 PROCEDURE CODES, ADOPTION OF THE CMS MEDICARE PROCEDURES, GUIDELINES AND AMOUNTS.

(1) Services and medical supplies must be coded with valid procedure or supply codes of the Health Care Financing Administration Common Procedure Coding System ("HCPCS"). Procedure codes used in these rules were developed and copyrighted by the American Medical Association ("AMA").

(2) The ~~most current effective~~ editions adopted by CMS of the American Medical Association's Current Procedural Terminology ("CPT®"), the Medicare MS-DRG table and the Medicare RBRVS in effect on the date of service or date of discharge, and the National Correct Coding Initiative edits ("NCCI") are incorporated in these Rules and shall~~must~~ be used in conjunction with these Rules.

(3) Unless otherwise explicitly stated in these Rules, the most current effective Medicare procedures and guidelines are hereby adopted and incorporated as part of these Rules as if fully set out herein and are effective upon adoption and implementation by Medicare.

(4) Whenever there is no specific fee or methodology for reimbursement set forth in these Rules, then the maximum amount of reimbursement shall be at 100% of the current, effective Medicare allowable amount. The effective Medicare guidelines and procedures on the date of service shall be followed in arriving at the correct amount, subject to the requirements of Rule 0800-02-18-.02(4). The Medical Fee Schedule conversion factor and TN specific conversion percentages may be, upon review by the Administrator, adjusted periodically. Whenever there is no applicable Medicare code or methodology, the service, equipment, diagnostic procedure, etc. shall be reimbursed at the usual and customary amount as defined in Rule 0800-02-17-.03 of this Chapter.

(5) Telehealth: the definitions, licensing and processes for the purpose of these rules shall be the same as adopted by the Tennessee Department of Health. Payments shall be the based upon the applicable Medicare guidelines and coding for the different service providers with the exception of any geographic restriction.

Authority: *T.C.A. §§ 50-6-102, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.06 PROCEDURES FOR WHICH CODES ARE NOT LISTED.

(1) If a procedure is performed which is not listed in the Medicare Resource Based Relative Value Scale ("RBRVS"), the health care provider must use an appropriate CPT® procedure code or revenue code, as applicable. The provider must submit an explanation, such as copies of operative reports, consultation reports, progress notes, office notes or other applicable documentation, or description of equipment or supply (when that is the bill).

(Rule 0800-02-17-.06, continued)

(2) The CPT® contains procedure codes for unlisted procedures. These codes should only be used when there is no procedure code which accurately describes the service rendered. A special report is required. These services are reimbursed BR (by report, see 0800-02-17-.03~~(6)~~).

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.07 MODIFIER CODES.

(1) Modifiers listed in the most current CPT® shall be added to the procedure code when the service or procedure has been altered from the basic procedure described by the descriptor.

(2) The use of modifiers does not imply or guarantee that a provider will receive reimbursement as billed. Reimbursement for modified services or procedures must be based on documentation of reasonableness and necessity and must be determined on a case-by-case basis.

(3) When Modifier 21, 22, or 25 is used, a report explaining the medical necessity of the situation must be submitted to the employer. It is not appropriate to use Modifier 21, 22, or 25 for routine billing.

(4) The maximum allowable additional amount under these Rules for Modifier 22 is 50%, not to exceed billed charges of the primary procedure.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.08 TOTAL PROCEDURES BILLED SEPARATELY.

(1) Certain diagnostic procedures (neurological testing, radiology and pathology procedures, etc.) may be performed by two separate entities that also bill separately for the professional and technical components. When this occurs, the total reimbursement must not exceed the maximum medical fee schedule allowable for the procedure code listed.

(a) When billing for the professional component only, Modifier 26 must be added to the appropriate procedure code.

(b) When billing for the technical component only, Modifier TC (Technical Component) is to be added to the appropriate procedure code.

Authority: *T.C.A. §§ 50-6-128, 50-6-204, and 50-6-205 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.09 INDEPENDENT MEDICAL EXAMINATION TO EVALUATE MEDICAL ASPECTS OF A CASE.

(1) An Independent Medical Examination, other than one conducted under the Bureau's MIRR Program, shall include a study of previous history and medical care information, diagnostic studies, diagnostic x-rays, and laboratory studies, as well as an examination and evaluation. This service may be necessary in order to make a judgment regarding the current status of the injured or ill worker, or to determine the need for further health care.

(2) An Independent Medical Examination, performed to evaluate the medical aspects of a case (other than one conducted under the Bureau's MIRR Program), shall be billed using the appropriate independent medical examination procedure, and shall include the practitioner's time only. Time spent shall include face-to-face time with the patient, time spent reviewing records, reports and studies, and time spent preparing reports. The office visit bill is included with the CPT® code, *99456*, and shall not be billed separately. The total amount for an IME under this Rule shall not exceed $500.00 per hour, and shall be pro-rated per half hour, i.e. two and one-half hours may not exceed $1,250.00. Physicians may only require pre-payment of $500.00 for an IME provided that following the completion of the IME and report, the physician may bill for other amounts appropriately due. The payer may recover any amounts that were overpaid.

(3) Any laboratory procedure, x-ray procedure, and any other test which is needed to establish the worker's ability to return to work shall be identified by the appropriate procedure code established by this Rule and reimbursed accordingly.

(4) Physicians who perform consultant services and/or records review in order to determine whether to accept a new patient shall not bill for an IME. Rather, such physicians shall bill using CPT codes *99358* and *99359*. The reimbursement shall be $200.00 for the first hour of review and $100.00 for each additional hour, provided that each half hour shall be pro-rated. Any prepayment request may not exceed $200.00.~~$500.00.~~

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.10 PAYMENT.

(1) Reimbursement for all health care services and supplies shall be the lesser of (a) the provider's usual billed charge, (b) the maximum fee calculated according to these Rules (and/or any amendments to these Rules) or (c) the agreed contracted or published rate between the provider and the MCO/PPO pursuant to T.C.A. § 50-6-215. A licensed provider or institution shall receive no more than the maximum allowable payment, in accordance with these Rules, for appropriate health care services rendered to a person who is entitled to health care services under the Act. Any provider reimbursed or employer paying an amount which is in excess of these Rules shall have a period of one hundred eighty (180) calendar days from the time of receipt/payment of such excessive payment in which to refund/recover the overpayment amount. Overpayments refunded/recovered within this time period shall not constitute a violation under these Rules.

(2) The edition of the Medicare RBRVS: The Physicians' Guide in effect on the date of service or date of discharge is adopted by reference as part of these Rules. The Medicare RBRVS is distributed by the American Medical Association and by the Office of the Federal Register and is also available on the Internet at www.cms.hhs.gov/home/medicare.asp. Whenever a

(Rule 0800-02-17-.10, continued)

guideline or procedure is not set forth in these Rules, the Medicare guidelines and procedures in effect on the date of service shall be followed.

(3) When extraordinary services resulting from severe head injuries, major burns, severe neurological injuries or any injury requiring an extended period of intensive care are required, a greater fee may be allowed up to 150% of the professional service fees normally allowed under these Rules. Such cases shall be billed with modifier -21 or -22 (for CPT® coded procedures) and shall contain a detailed written description of the extraordinary service rendered and the need therefore. This provision does not apply to In-patient Hospital Care facility fees which are specifically addressed in the In-patient Hospital Fee Schedule Rules, Chapter 0800-02-19.

(4) Billing for provider services shall be submitted on industry standard billing forms; UB-04, CMS-1450, CMS-1500, the ADA form for dental providers, and the NCPDP WC/PC UCF for pharmacies, or their official replacement forms. Electronic billing submissions shall be in accord with the Bureau's rules for electronic billing.

(5) An employer's payment shall reflect any adjustments in the bill.

(a) An employer shall provide an explanation of medical benefits with current and complete contact information for to a health care provider whenever the employer's reimbursement differs from the amount billed by the provider, using industry standard remark codes.

(b) A provider shall not attempt to collect from the injured employee or employer any amounts properly reduced by the employer.

(c) All such communications shall comply with all applicable Medicare and HIPAA requirements.

(d) Remittances for electronically submitted bills shall be in accordance with the Bureau's rules for electronic billing.

(6) All providers and carriers shall use electronic billing and EDI, if they have the capability to do so. All such communications shall comply with all applicable Medicare and HIPPA requirements.

(7) An employer shall date stamp medical bills and reports not submitted electronically upon receipt. Payment for all properly submitted and complete bill not disputed within 15 business days (or uncontested portions of the bill) shall be made to the provider within thirty 30 calendar days.

(8) The employer shall notify the provider within fifteen (15) business days of receipt of the bill that it was not properly submitted and specify the reason(s).

(9) When an employer disputes a bill or portion thereof, the employer shall pay the undisputed portion of the bill within thirty (30) calendar days of receipt of a properly submitted bill.

(10) Any provider not receiving timely payment of the undisputed portion of the provider's bill may institute a collection action in a state court having proper jurisdiction over such matters to obtain payment of the bill. Such providers, if they prevail, shall also be entitled to receive reasonable costs and attorney fees incurred in such collection actions to be paid by the employer.

(11) Billings not submitted on the proper form, as prescribed in these Rules, the In-patient Hospital Fee Schedule Rules, and the Medical Fee Schedule Rules, may be returned to the provider

(Rule 0800-02-17-.10, continued)

for correction and resubmission. If an employer returns such billings, it must do so within 15 business days of receipt of the bill. The number of days between the date the employer returns the billing to the provider and the date the employer receives the corrected billing, shall not apply toward the thirty (30) calendar days within which the employer is required to make payment. The rules for electronic billing shall apply to the types of forms where applicable.

(12) Payments to providers for initial examinations and treatment authorized by the carrier or employer shall be paid by that employer and shall not later be subject to reimbursement by the employee, even if the injury or condition for which the employee was sent to the provider is later determined non-compensable under the Act.

(13) ~~Provider requests for pre-payment may not exceed five hundred ($500.00) dollars for any individual services except the impairment rating.~~

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed June 12, 2009; effective August 26, 2009. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.11 REIMBURSEMENT FOR EMPLOYEE-PAID SERVICES.

Notwithstanding any other provision of this rule, if an employee has personally paid for a health care service and at a later date an employer is determined to be responsible for the payment for that specific service, then the employee shall be fully reimbursed by the employer. Medical Fee Schedule maximum payments may not apply under this provision. If the service delivered is determined to be reasonable and necessary, the reimbursed expenses may exceed the maximum fee schedule amount.

Authority: *T.C.A. §§ 50-6-128, 50-6-204, and 50-6-205 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.12 RECOVERY OF PAYMENT.

Nothing in these Rules shall preclude the recovery of payment already made for services and bills which may later be found to have been medically paid at an amount which exceeds the maximum allowable payment. Likewise, nothing in these Rules shall preclude any provider from receiving additional payment for services or supplies if it is properly due that provider and does not exceed the amount allowed bythese Rules.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, 50-6-226, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee stayed the amendment on May 7, 2012; new effective date August 9, 2012. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.13 PENALTIES FOR VIOLATIONS OF FEE SCHEDULE RULES.

(1) Except when a waiver has been granted by the Bureau, providers shall not accept and employers shall not pay any amount for health care services provided for the treatment of a covered injury or illness or for any other services encompassed within these Rules, Medical

(Rule 0800-02-17-.13, continued)

Fee Schedule Rules or the In-patient Hospital Fee Schedule Rules, when that amount exceeds the maximum allowable payment established by these Rules. Any provider accepting and any employer paying an amount in excess of these Rules, Medical Fee Schedule Rules or the In-patient Hospital Fee Schedule Rules, shall be in violation of these Rules and may, at the Administrator's discretion, be subject to civil penalties of not less than fifty dollars ($50.00) nor more than five thousand dollars ($5,000.00) per violation, which may be assessed severally against the provider accepting such fee and the employer paying the excessive fee, except as authorized pursuant to T.C.A. § 50-6-204, whenever a pattern or practice of such activity is found. Any provider reimbursed or employer paying an amount which is in excess of these Rules shall have a period of one hundred eighty (180) calendar days from the time of receipt/payment of such excessive payment in which to refund/recover the overpayment amount. Overpayments refunded/recovered within this time period shall not constitute a violation under these Rules. At the discretion of the Administrator, the Administrator's Designee, or an agency member appointed by the Administrator, such provider may also be reported to the appropriate certifying board, and may be subject to exclusion from participating in providing care under the Act. Any other violation of the these Rules, Medical Fee Schedule Rules, or the In-patient Hospital Fee Schedule Rules shall subject the violator(s) to a civil penalty of not less than fifty dollars ($50.00) nor more five thousand dollars ($5,000.00) per violation, at the discretion of the Administrator, Administrator's Designee, or an agency member appointed by the Administrator.

(2) A provider or employer found to be in violation of these Rules, may request a contested case hearing by requesting the hearing in writing within fifteen (15) business days of issuance of a Notice of Violation and, if applicable, notice of the assessment of civil penalties. If a request for hearing is not received by the Bureau within the fifteen (15) business days of issuance of the Notice of Violation, the determination of such violation shall be deemed a final order of the Bureau and not subject to further review. All rights, duties, obligations, and procedures applicable under the Bureau's Rules for Penalty Assessments and Hearing Contested Cases (Chapter 0800-02-13) are applicable under these Rules, including, but not limited to, the right to judicial review of any final Bureau decision.

(3) A request for hearing shall be made to the Bureau in writing by an employer or provider notified of violation of these Rules.

(4) Any request for a hearing shall be filed with the Bureau within fifteen (15) business days of the date of issuance of the Notice of Violation and, if applicable, of civil penalty. Failure to file a request for a hearing within fifteen (15) business days of the date of issuance of the Notice of Violation shall result in the decision of the Administrator, Administrator's Designee, or an agency member appointed by the Administrator becoming a final order and not subject to further review.

(5) The Administrator, Administrator's Designee, or an agency member appointed by the Administrator shall have the authority to hear the matter as a contested case and determine if any civil penalty assessed should have been assessed. All procedural aspects set forth in the Bureau's Rules for Penalty Assessment and Hearing Contested Cases, Chapter 0800-02-13, shall apply and be followed in any such contested case hearing.

(6) Upon receipt of a timely filed request for a hearing, the Administrator shall issue a Notice of Hearing to all interested parties.

Authority: *T.C.A. §§ 50-6-102, 50-6-118, 50-6-125, 50-6-128, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.14 MISSED APPOINTMENT.

A provider shall not receive payment for a missed appointment unless the appointment was arranged by the Bureau, the case manager, or employer. If the case manager or employer fails to cancel the appointment not less than one (1) business day prior to the time of the appointment, the provider may bill the employer for the missed appointment using CPT® procedure code *99199*, with a maximum fee being the amount which would have been allowed under these Rules had the patient not missed the appointment. The employer shall make payment to the provider for the missed appointment pursuant to these Rules. This amount shall not include any bill for diagnostic testing that would have been billed. Follow-up appointments are deemed to be approved unless the adjuster notifies the provider's office and the injured employee more than one business day prior to the appointment.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.15 MEDICAL REPORT OF INITIAL VISIT AND PROGRESS REPORTS FOR OTHER THAN IN-PATIENT HOSPITAL CARE.

(1) Except for inpatient hospital care, a provider shall furnish the employer with a narrative medical report for the initial visit, all information pertinent to the compensable injury, illness, or occupational disease if requested within thirty (30) calendar days after examination or treatment of the injured employee.

(2) If the provider continues to treat an injured or ill employee who is receiving temporary disability payments (total or partial) for the same compensable injury, illness or occupational disease, the provider shall provide an updated medical report to the employer, including an assessment of functional progress toward employment (restricted or unrestricted as appropriate), at intervals not to exceed sixty (60) calendar days.

(3) The narrative medical report or the medical office visit note including an assessment of functional progress toward employment, of the initial visit and the progress or follow-up visit shall include (in addition to applicable identifying information) all of the following information:

(a) Subjective complaints and objective findings, including interpretation of diagnostic tests;

(b) For the narrative medical report of the initial visit, the history of the injury, and for the progress report(s), significant history since the last submission of a progress report and the diagnosis;

(c) As of the date of the narrative medical report or progress report, the projected treatment plan, including the type, frequency, and estimated length of treatment;

(d) Physical limitations and expected work restrictions and length of time of those limitations and/or restrictions if applicable.

(4) When copies of narrative medical reports required by 0800-02-17-.15(1) and (2) are requested, the provider of the requested reports shall be reimbursed at the following rate: initial and subsequent reports - not to exceed $10.00 for reports twenty (20) pages or less in length, and twenty-five (25) cents per page after the first twenty pages. Initial reports that are in addition to the standard medical office note shall be billed using procedure code WC101, subsequent reports shall be billed using procedure code WC102, and all final reports shall be billed using procedure code WC103. No charge is allowed for routine office notes as these are not considered narrative reports under this Rule. No fee shall be paid if a request for medical records does not produce any records.

(Rule 0800-02-17-.15, continued)

(5) A medical provider shall complete any medical report required by the Bureau without charge except completion of the C-30A (Final Medical Report) or the C-32 (Standard Form Medical Report) or their replacement forms.

(6) After an initial opinion on causation has been issued by the physician, a request for a subsequent review based upon new information not available to the physician initially, may be billed by the physician and paid by the requesting party under CPT® code 99358-9 ($200/one hour or less and $100 for an extra hour). No additional reimbursement is due for the initial opinion on causation or a response to a request for clarification (that does not include any new information) of a previously issued opinion on causation.

(7) Extra time spent in explanation or discussion with an injured worker or the case manager (that is separate from the discussion with the injured worker) may be charged using CPT™ code *99354-52* up to a maximum payment of forty dollars ($40), added to a standard E/M CPT® code if the extra service exceeds 15 minutes. Use code *99354* up to a maximum of eighty dollars ($80) if that extra service exceeds 30 minutes. The Medicare allowable fee does not apply to the service. There is no extra reimbursement if the service is less than 15 minutes.

(8) If a provider assesses, counsels or provides behavioral intervention to a Workers' Compensation patient for substance and/or alcohol use, or for substance and/or alcohol use disorder, the provider may charge for the extra time involved using CPT® code *99408* (or codes *96150-96155*, if appropriate) up to a maximum of eighty dollars ($80) in addition to a standard E/M code. An assessment by structured screening must be documented. The code may only be charged if the patient is on a long term (over 90 days) Schedule II medication or a combination of one or more Schedule II, III, and/or IV medications. The Medicare allowable fee does not apply to this service.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.16 ADDITIONAL RECORDS.

Nothing in this rule shall preclude an employer or an employee from requesting reports from a provider in addition to those specified in Rule 0800-02-17-.15.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.17 DEPOSITION/WITNESS APPEARANCES.

(1) Any provider who gives a deposition or appears in person as a witness shall be allowed a fee. The fee for appearance in person as a witness should be negotiated and agreed to in advance.

(2) Procedure Code 99075 must be used to bill for a deposition.

(3) Licensed physicians shall be reimbursed for depositions at the rate established in Bureau's Rule Chapter 0800-02-16, and shall be subject to penalties under these Rules for charging any amount which exceeds that amount.

(Rule 0800-02-17-.17, continued)

(4) Other providers giving depositions shall be reimbursed at a fee at or below the fee for a licensed physician agreed to in advance.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.18 OUT-OF-STATE PROVIDERS.

Upon waiver granted by the Bureau, providers rendering medically appropriate care outside of the state of Tennessee to an injured employee pursuant to the Tennessee Workers' Compensation Act may be paid in accordance with the medical fee schedule, law, and rules governing in the jurisdiction where such medically appropriate care is provided.

Authority: *T.C.A. §§ 50-6-204 and 50-6-205.* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.19 PREAUTHORIZATION.

(1) Preauthorization shall be required for all non-emergency hospitalizations, non-emergency transfers between facilities, and non-emergency surgery. Decisions regarding authorization shall be communicated to the requesting provider within seven (7) business days of the request being received. Failure to provide a timely decision within seven (7) business days shall result in the authorization being deemed approved.

(2) If a provider makes a written request by fax or e-mail (and receives acknowledgement of receipt of the request) for authorization for a treatment at least 21 business days in advance of the anticipated date that treatment is to be delivered and has not been notified of a denial or modification in writing or confirmed telephone call or confirmed fax at least 7 business days in advance of the date of the proposed treatment, it is presumed to be medically necessary, a covered service, and to be paid for by the employer.

(3) If a provider makes a verbal request for authorization, the burden of proof for showing that authorization was granted by the employer rests with the provider.

Authority: *T.C.A. §§ 50-6-118, 50-6-125, 50-6-128, 50-6-204, and 50-6-205.* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.20 RESERVED.

Authority: *T.C.A. §§ 50-6-102, 50-6-122, 50-6-124, 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed December 20, 2007; effective March 4, 2008. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.21 PROCESS FOR RESOLVING DISPUTES BETWEEN EMPLOYERS AND PROVIDERS REGARDING BILLS.

(1) Disputes

(a) Unresolved disputes between an employer and provider concerning bills due to conflicting interpretation of these Rules and/or the Medical Fee Schedule Rules and/or the In- patient Hospital Fee Schedule Rules may be submitted to the Medical Payment Committee (the Committee) on or after July 1, 2014 in accordance with the provisions in T.C.A. § 50-6-125. A request for Committee Review may be submitted on the form posted by the Bureau within one (1) year of the date of service to: Medical Director of the Bureau of Workers' Compensation, Tennessee Department of Labor and Workforce Development, Suite 1-B, 220 French Landing Drive, Nashville, Tennessee 37243, or any subsequent address as prescribed by the Bureau.

(b) Valid requests for Committee Review must be accompanied by the form prescribed by the Bureau, must be legible and complete, and must contain copies of the following:

1. Copies of the original and resubmitted bills in dispute which include dates of service, procedure codes, bills for services rendered and any payment received, and an explanation of unusual services or circumstances;

2. Copies of all explanations of benefit(EOB's);

3. Supporting documentation and correspondence, if any;

4. Specific information regarding the contacts made with the employer;

5. A verified or declared written medical report signed by the provider and all pertinent medical records; and

6. A redacted copy of the above information removing all patient specific identifying information.

(c) The party requesting Committee Review must send a copy of the request and all documentation accompanying the request to the opposing party at the same time it is submitted to the Medical Director.

(d) If the request for review does not contain proper documentation, then the Committee will decline to review the dispute. Likewise, if the timeframe in this Rule is not met, then the Committee will decline to review the dispute, but such failure shall not provide an independent basis for denying payment or recovery of payment.

(e) Resubmission of a request will be entertained by the Bureau and the Medical Payment committee for 3 months from the date the Committee declined to hear the original dispute but only if pertinent or new information is forwarded with the resubmission.

Authority: *T.C.A. §§ 50-6-126, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed June 12, 2009; effective August 26, 2009. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.22 COMMITTEE REVIEW OF FEE SCHEDULE DISPUTES/HEARINGS.

(1) Medical Payment Committee (the Committee) Review Procedure:

(a) When a valid request for Committee Review is received by the Bureau's Medical Director, the parties will be notified at least 7 business days in advance when the Committee will consider the dispute. The Committee may consider the dispute at any meeting during which it has a quorum of the voting members. Members may participate by telephone or by video conferencing or by properly executed proxy. Members that participate by telephone or video conferencing or properly executed proxy shall be counted as present for purposes of establishing a quorum.

(b) The parties will have the opportunity to submit documentary evidence and present arguments to the Committee prior to and during the Committee meeting in which the dispute will be heard. Written submissions to the committee must be received by the Bureau at least one week in advance of the meeting. A redacted copy of all written material must be included with any submission.

(c) The Committee shall consider the dispute and issue its decision on the merits as to the proper resolution of the dispute, based upon a simple majority vote of the members present for the purpose of a quorum. If the dispute cannot be decided in one meeting, then the Committee may continue it to the next meeting.

(d) If the parties to the dispute do not follow the decision of the Committee, then either party may proceed in any court of law with proper jurisdiction to decide the dispute.

(2) Computation of Time Periods:

In computing a period of time prescribed or allowed by the Rules, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day on which compliance therewith is required shall be included. If the last day within which an act shall be performed or an appeal filed is a Saturday, Sunday, or a legal holiday, the day shall be excluded, and the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday. "Legal holiday" means those days designated as a Tennessee State holiday.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.23 RESERVED.

Authority: *T.C.A. §§ 50-6-102, 50-6-204, 50-6-205, 50-6-226, 50-6-233, and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.24 PROVIDER AND FACILITY FEES FOR COPIES OF MEDICAL RECORDS.

(1) Health care providers and facilities are entitled to recover an amount in accordance with Tenn. Code Ann. § 50-6-204 to cover the cost of copying documents requested by the employer, employee, attorneys, etc. Documentation which is submitted by the provider and/or facility, but was not specifically requested by the employer, shall not be allowed a copy charge. The cost set forth in this subsection shall also apply to paper records transmitted on a

(Rule 0800-02-17-.24, continued)

disc or by other electronic means based upon the number of pages reproduced on the disc or other media.

(2) Health care providers and facilities shall furnish an injured employee or the employee's attorney and employer or their legal representatives copies of records and reports as set forth in Tenn. Code Ann. § 50-6-204, as amended.

(3) Health care providers and facilities shall be reimbursed up to the usual and customary amount, as defined in these Rules at 0800-02-.03, for copying x-rays, microfilm or other non-paper records.

(4) The copying charge shall be paid by the party who requests the records.

(5) An itemized invoice shall accompany the copy. Payment of all charges shall be made within thirty (30) calendar days.

(6) There shall be no fee paid should a requested search not produce identified records.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

0800-02-17-.25 IMPAIRMENT RATINGS-EVALUATIONS AND IN MEDICAL RECORDS.

(1) This rule applies to authorized treating physicians. This rule is not applicable to Independent Medical Examinations ("IME") or impairment ratings rendered as a part of an IME pursuant to Rule 0800-02-17-.09. As used in this Rule 0800-02-17-.25 only, an authorized treating physician is that physician, chiropractor or medical practitioner who determines the employee has reached maximum medical improvement regarding the condition or injury for which the physician has provided treatment. The authorized treating physician may include any of the following:

(a) A physician chosen from the panel required by T.C.A. § 50-6-204;

(b) A physician referred to by the physician chosen from the panel required by T.C.A. § 50-6-204;

(c) A physician recognized and authorized by the employer to treat an injured employee for a work-related injury; or

(d) A physician designated by the Bureau to treat an injured employee for a work-related injury.

(2) The authorized treating physician is required and responsible for determining the employee's maximum medical improvement date (MMI) and providing the employee's impairment rating for the injury the physician is treating. In some circumstances, a work-related accident may lead to multiple injuries that require multiple authorized treating physicians. In such cases, the physician that is treating a distinct injury shall determine that the employee has reached maximum medical improvement as to that injury only and is required and responsible for providing an impairment rating for that injury only. An authorized treating physician shall not be required or responsible for providing an impairment rating for an injury that the physician is not treating. The authorized treating physician shall only be required to provide an impairment rating when the physician believes in good faith that the employee retains a permanent

(Rule 0800-02-17-.25, continued)

impairment upon reaching maximum medical improvement. If, after completion of the rating, it is determined that the employee has an impairment rating of zero, then the provisions of Rule 0800-02-17-.25(6) shall still apply. If the treating physician does not have a good faith belief that the employee retains a permanent impairment upon reaching maximum medical improvement, then the authorized treating physician shall still be required to complete an impairment rating on the Bureau's form but shall not charge a fee for the impairment rating.

(3) All impairment ratings shall be made pursuant to T.C.A. § 50-6-204.

(4) Within twenty-one (21) calendar days of the date the authorized treating physician determines the employee has reached maximum medical improvement, the authorized treating physician shall submit to the employer a fully completed report on a form prescribed by the Administrator. The employer shall submit a fully completed form to the Bureau (if requested) and the parties within thirty (30) calendar days of the date the authorized treating physician determines the employee has reached maximum medical improvement.

(5) Upon determination of the employee's impairment rating, the authorized treating physician shall enter the employee's impairment rating into the employee's medical records. In a response to a request for medical records pursuant to T.C.A. § 50-6-204, a provider, authorized treating physician or hospital shall include the portion of the medical records that includes the impairment rating.

(6) The authorized treating physician is required and responsible for providing the impairment rating, fully completing the report on a form prescribed by the Administrator, and submitting the report to the employer, as required by these Rules, using CPT® code *99455* Notwithstanding Rule 0800-02-17-.15, the authorized treating physician shall receive payment of no more than $250.00 for these services to be paid by the employer. The payment shall only be made to the authorized treating physician, if the authorized treating physician documents the consultation with the applicable AMA Guides™ (documentation of the analysis including section, page, or table as applicable). The authorized treating physician shall not require prepayment of such fee.

(7) Failure to fully complete the form and submit it within the appropriate timeframes may~~shall~~, at the discretion of the Administrator, subject the employer or authorized treating physician, as applicable, to a civil penalty of $100 for every fifteen (15) calendar days past the required date until the fully completed form is received by the parties and the Bureau (if requested).

Authority: *T.C.A. §§ 50-6-102, 50-6-204, 50-6-205, 50-6-226, 50-6-233, 50-6-246, and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Original rule filed December 20, 2007; effective March 4, 2008. Public necessity rule filed January 8, 2009; effective through June 22, 2009. Public necessity rule filed May 19, 2009; effective through October 31, 2009. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Repeal and new rules filed November 27, 2017; effective February 25, 2018.*

*NOTE: All references to the "Tennessee Workers' Compensation Act" or "Act" are being replaced with "Tennessee Workers' Compensation Law" or "Law".

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Bureau of Workers' Compensation on 4/18/19 and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on November 21, 2018.

Rulemaking Hearing Conducted on January 17, 2019.

Date: April 18, 2019

Signature: Abbie Hudgens

Name of Officer: Abbie Hudgens

Title of Officer: Administrator, Bureau of Workers' Compensation

JANIE L. DORRIS
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY
MY COMMISSION EXPIRES 3-8-2022

Subscribed and sworn to before me on: 4/18/19

Notary Public Signature: Janie L Dorris

My commission expires on: 3/8/22

Agency/Board/Commission: Department of Labor & Workforce Development
Bureau of Workers' Compensation

Rule Chapter Number(s): 0800-02-17

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

6/7/2019
Date

Department of State Use Only

Filed with the Department of State on: 6/12/19

Effective on: 9/10/19

Tre Hargett
Secretary of State

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PUBLICATIONS

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Labor and Workforce Development
DIVISION:	Bureau of Workers' Compensation
SUBJECT:	Inpatient Hospital Fee Schedule
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 50-6-204
EFFECTIVE DATES:	September 10, 2019 through June 30, 2020
FISCAL IMPACT:	Minimal
STAFF RULE ABSTRACT:	The rulemaking hearing rules together with the Rules of Medical Payments and Medical Fee Schedule Rules establish comprehensive medical fee schedule, procedures for review of bills and enforcements procedures.

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

PUBLIC COMMENTS AND RESPONSES

Comment:
Michael Haynie at Manier Herod law firm: References to the Tennessee workers' compensation act should be changed to the Tennessee workers' compensation law to be consistent with word usage in Title 50.
Response: The bureau agrees and has made the suggested changes.
Comment:
Neil Aronov, PhD:
1) Payments to psychologists should be increased to be consistent with increases in medical fee schedule for other medical providers.
Response: The bureau agrees. The increases to psychologists were included in the medical fee schedule increases included in these rules.
2) Psychologists should be permitted to declare a patient at maximum medical improvement and provide a permanent impairment rating.
Response: The bureau neither agrees nor disagrees; this is beyond the scope of the medical fee schedule rules. A statutory change would be needed to permit a psychologist to perform functions that are presently done by physicians pursuant to statute.
Comment:
Tennessee Hospital Association
1) THA supports the fee schedule changes in 0800-02-18 that would base physician reimbursement on the Medicare physician fee schedule conversion factor in effect on the date of service, as opposed to the current fixed conversion factor in the current rule that is consistent with the 2011 Medicare conversion factor.
Response: The bureau agrees.
2) Inpatient hospital fee schedule increase should be changed to 6.07% instead of the proposed 5% to be consistent with 2019 conversion factor change.
Response: The bureau defers at this time. The current changes being made to the medical fee schedule rules were based upon a 2018 review. Making this suggested change would require re-pricing the entire medical fee schedule. However, the bureau has already agreed to review the inpatient fee schedule for its 2019 annual review required by statute, including the stop loss and per diem payment methodologies.
Comment:
Tennessee Radiologists Society (TRS) and Tennessee Radiology Business Managers Association (RBMA):
1) We support the proposed change to float the Medicare conversion factor with the current Medicare conversion factor rather than freezing the number in rule.
Response: The bureau agrees.
2) We suggest adding the phrase "free-standing outpatient diagnostic center" to Rule 0800-02-18-.07(c) to clarify the application of the OPPS rate to the technical services component of radiology services.
Response: The bureau disagrees at this time. This rule only applies to ASCs. To include free-standing outpatient diagnostic centers was not the intent of this section of the rule. The category of diagnostic centers will be subject to review as a part of the statutorily required annual review of the medical fee schedule in 2019.
Comment:
Coventry
1) In 0800-02-17-.09(4) there is a statement: "The reimbursement shall be $200.00 for the first hour of review and $100.00 for each additional hour, provided that each half hour shall be pro-rated." Should this sentence change to clarify the applicability if a prepayment request may not exceed $200?
Response: The bureau disagrees that a clarification needs to be made. This methodology is consistent with other bureau rules regarding medical depositions.
2) In 0800-02-17-.22(1)(a), suggestion is made to add the following: "Submissions that are received less than one week before a Committee meeting will be held and reviewed at the next regularly scheduled meeting."
Response: The bureau agrees with the comment, and the issue of late submissions has been addressed in 0800-02-17-.22(1)(b). Note that this applies only to "written submissions" that are received less than one week prior to the meeting and does not limit oral discussion.
Comment:

John Williams-TAPA: In 0800-02-18.04(2)(c) this change is being made: "PA and APN fees will be based on the specialty of their collaborating physician for all services except those defined as 'assistants at surgery'." How will this impact the payments to PAs and APNs?
Response: The proposed change created confusion about the specialty collaborating physician designation as noted above. APN and PA reimbursement will be calculated according to Medicare billing rules at 160% using a fixed Tennessee specific conversion percentage. This will increase their payments to 85% of the current Medicare conversion factor multiplied by the 160%, providing for a simpler calculation, and will annually "float" with the Medicare conversion factor.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rulemaking process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule: The amended rules will affect small employers that fall under the Tennessee Workers' Compensation Laws, which would be employers with at least five employees, or for those in the construction industry at least one employee. There should be no additional costs associated with these rule changes.

2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record. There is no additional record keeping requirement or administrative cost associated with these rule changes.

3. A statement of the probable effect on impacted small businesses and consumers: These rules should not have any impact on consumers or small businesses.

4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business: There are no less burdensome methods to achieve the purposes and objectives of these rules.

5. Comparison of the proposed rule with any federal or state counterparts: None.

6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule: Exempting small businesses could frustrate the small business owners' access to the services provided by the Bureau of Workers' Compensation and timely medical treatment for injured workers, which would be counter-productive.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://state.tn.us/sos/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

These proposed rules will have little, if any, impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

These rules together with the Rules for Medical Payments and Medical Fee Schedule Rules establish a comprehensive medical fee schedule, procedures for review of bills and enforcement procedures.

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 50-6-204 provides that the Bureau administrator is authorized to establish by rule a comprehensive medical fee schedule and will review it annually and make revisions as necessary.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

All parties to a workers' compensation claim will be affected by the adoption or rejection of these rules.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

The overall effect will have little fiscal impact upon state or local government.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Troy Haley, Legislative Liaison and Director of Administrative Legal Services

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Troy Haley, Legislative Liaison and Director of Administrative Legal Services

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Tennessee Bureau of Workers' Compensation
220 French Landing Drive, Floor 1-B
Nashville, TN 37243
(615) 532-0179.
troy.haley@tn.gov

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None

Department of State
Division of Publications
312 Rosa L. Parks, 8th Floor Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615.741.2650
Email: publications.information@tn.gov

For Department of State Use Only
Sequence Number: 06-16-19
Rule ID(s): 9037
File Date: 06/12/19
Effective Date: 09/10/19

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee Department of Labor and Workforce Development
Division:	Bureau of Workers' Compensation
Contact Person:	Troy Haley
Address:	220 French Landing Drive 1-B, Nashville, TN 37243
Phone:	615-532-0179
Email:	troy.haley@tn.gov

Revision Type (check all that apply):
X Amendment
___ New
___ 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**
0800-02-19	Inpatient Hospital Fee Schedule
Rule Number	**Rule Title**
0800-02-19-.01	General Rules
0800-02-19-.02	Definitions
0800-02-19-.03	Special Ground Rules – Inpatient Hospital Services
0800-02-19-.04	Pre-admission Utilization Review
0800-02-19-.05	Other Services
0800-02-19-.06	Penalties for Violations of Fee Schedules

RULES
OF
TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WORKERS' COMPENSATION

CHAPTER 0800-02-19
IN-PATIENT HOSPITAL FEE SCHEDULE

TABLE OF CONTENTS

0800-02-19-.01	General Rules	0800-02-19-.04	Pre-admission Utilization Review
0800-02-19-.02	Definitions	0800-02-19-.05	Other Services
0800-02-19-.03	Special Ground Rules – Inpatient Hospital Services	0800-02-19-.06	Penalties for Violations of Fee Schedules

0800-02-19-.01 GENERAL RULES.

(1) These In-patient Hospital Fee Schedule Rules are applicable to all in-patient services as defined herein. These include medical, surgical, rehabilitation, and/or psychiatric services rendered in a hospital to injured or ill workers claiming medical benefits pursuant to the Tennessee Workers' Compensation Act. Maximum fees for outpatient hospital services are not addressed in these In-patient Hospital Fee Schedule Rules, but are addressed in Rule 0800-02-18-.07 of the Medical Fee Schedule Rules, Chapter 0800-02-18-.01 et seq. These In-patient Hospital Fee Schedule Rules are established pursuant to Tenn. Code Ann. § 50-6-204. They must be used in conjunction with the Rules for Medical Payments, Chapter 0800-02-17-.01 et seq., and the Medical Fee Schedule Rules, Chapter 0800-02-18-.01 et seq., as the definitions and provisions set forth in those rules are incorporated as if set forth fully herein. Providers rendering medically appropriate care outside of the state of Tennessee to an injured employee pursuant to the Tennessee Workers' Compensation Act may be paid in accordance with the medical fee schedule, law, and rules governing in the jurisdiction where such medically appropriate care is provided, if a waiver is granted by the Bureau.

(2) General Information

(a) Reimbursements shall be determined for services rendered in accordance with these Fee Schedule Rules and shall be considered to be inclusive unless otherwise expressly noted in these Rules.

(b) The most recent Medicare procedures and guidelines are hereby adopted and incorporated as part of these Rules as if fully set out herein and shall be effective upon adoption and implementation by the CMS. All such Medicare procedures and guidelines are applicable unless these Rules set forth a different procedure or guideline. Whenever there is no specific maximum fee or methodology for reimbursement set forth in these Rules for a service, diagnostic procedure, equipment, etc., then the maximum amount of reimbursement shall be 100% of the ~~most recent and effective~~ Medicare allowable amount and the ~~most recent effective~~ Medicare guidelines and procedures effective on the date of service shall be followed in arriving at the correct amount. Whenever there is no applicable Medicare code, the service, equipment, diagnostic procedure, etc. shall be reimbursed up to a maximum of the usual and customary amount, as defined in Rule 0800-02-17-.03. All Medicare rules shall be applied that are effective on the date of service or the date of discharge in accordance with Medicare guidelines.

(c) Reimbursement for a compensable workers' compensation claim shall be the lesser of the hospital's usual and customary charges or the maximum amount allowed under this In-patient Hospital Fee Schedule.

(d) In-patient hospitals shall be grouped into the following separate peer groupings:

(Rule 0800-02-19-.01, continued)

1. Peer Group 1 Hospitals;
2. Peer Group 2 Rehabilitation Hospitals;
3. Peer Group 3 Psychiatric Hospitals;
4. Peer Group 4 Designated Level 1 Trauma Centers.

(e) For each inpatient claim submitted, the provider shall assign a Medicare Diagnosis Related Group ("MS-DRG") code which appropriately reflects the patient's primary cause of hospitalization.

(f) Prospective utilization review is required for non-emergent, non-urgent inpatient services. Emergency or urgent admissions require utilization review to begin within one (1) business day of the employer receiving notification of the admission.

Authority: *T.C.A. §§ 50-6-124, 50-6-125, 50-6-128, 50-6-204, and 50-6-205 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-19-.02 DEFINITIONS.

(1) "Administrator" means the chief administrative officer of the Bureau of Workers' Compensation or the Administrator's designee.

(2) "Allowed Charges" or "Allowable Charges" shall mean charges as prescribed in the Bureau's Rules, or as determined by the Administrator or the Administrator's designee after consultation with the Bureau's Medical Director.

(3) "Bureau" means the Tennessee Bureau of Workers' Compensation.

(4) "MS-DRG" – Medicare classifications of diagnoseis in which patients demonstrate similar resource consumption and length of stay patterns.

(5) "Hospital" is the same as the definition for Medicare.

(6) "In-patient Services" - services rendered to a person who is formally admitted to a hospital and whose length of stay as defined by Medicare:

(a) Is expected to include at least two midnights, or;

(b) The medical record supports the admitting physician's determination that the patient requires inpatient care despite the lack of a two midnight length of stay, or;

(c) The procedure/treatment is included on the "in-patient only" list.

(7) "Institutional Services" - all non-physician services rendered within the institution by an agent of the institution.

(8) "Length of Stay" ("LOS") - number of days of admission where patient appears on midnight census. Last day of stay shall count as an admission day if it is medically necessary for the patient to remain in the hospital beyond 12:00 noon as defined by Medicare.

(Rule 0800-02-19-.02, continued)

(9) "Medical Admission" - any hospital admission where the primary services rendered are not surgical, or in a psychiatric, or rehabilitation hospital, or in a specially designated psychiatric or rehabilitation unit within an acute care hospital.

(10) "Stop-Loss Payment" ("SLP") - an independent method of payment for an inpatient hospital ~~unusually costly or lengthy~~ stay. This provision does not apply to skilled nursing facilities.

(11) "Stop-Loss Reimbursement Factor" ("SLRF") - a factor established by the Bureau~~Division~~ to be used as a multiplier to establish a reimbursement amount when total hospital charges have exceeded specific stop-loss thresholds.

(12) "Stop-Loss Threshold" ("SLT") - threshold of total charges established by the Bureau, beyond which reimbursement is calculated by multiplying the applicable Stop-Loss Reimbursement Factor times the total charges identifying that particular threshold.

(13) "Surgical Admission" - any hospital admission where the patient has an assigned surgical MS-DRG as defined by the Medicare.

(14) "Transfers between Facilities" - to move or remove a patient from one facility to another for a purpose related to obtaining or continuing medical care. This may or may not involve a change in the admittance status of the patient, i.e. patient transported from one facility to another to obtain specific care, diagnostic testing, or other medical services not available in facility in which patient has been admitted. This includes costs related to transportation of patient to obtain medical care.

(15) "Trauma Admission" – means:

(a) Any level 1 trauma center hospital admission in which the patient has an ICD-9 diagnosis code of 800 to 959.99, or ICD-10 code that is (or includes) S00.00XA through S99.99XX, T07, T14 to T32, T79 and the claim includes an ICU revenue code of 020x or a CCU revenue code of 021x, or

(b) Any level 1 trauma center hospital admission for any diagnosis with a trauma response revenue code of 068x and/or type of admission code, "5."

Note: this includes all hospital days that qualify as an inpatient day as defined under inpatient services.

(16) "Usual and Customary Charge" means eighty percent (80%) of a specific provider's average charges to all payers for the same procedure.

(17) "Utilization Review" for workers' compensation claims means evaluation of the necessity, appropriateness, efficiency and quality of medical care services provided to an injured or disabled employee based on medically accepted standards and an objective evaluation of the medical care services provided; provided, that "utilization review" does not include the establishment of approved payment levels or a review of medical charges or fees.

(18) "Workers' Compensation Standard Per Diem Amount" ("SPDA") - A standardized per diem amount established for the reimbursement of hospitals for services rendered.

Authority: *T.C.A. §§ 50-6-102, 50-6-125, 50-6-128, 50-6-204, 50-6-205 (Repl. 2005), 50-6-233, and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-19-.03 SPECIAL GROUND RULES – INPATIENT HOSPITAL SERVICES.

(1) This section defines the reimbursement procedures and calculations for inpatient health care services by all hospitals. Hospital reimbursement is divided into four (4) groups based on type of admission:

(a) Peer Groups:

1. Peer Group 1-surgical or non-surgical (medical);
2. Peer Group 2-rehabilitation;
3. Peer Group 3-psychiatric;
4. Peer Group 4-trauma, level 1 and:

(b) Length of stay (less than eight (8) days/over seven (7) days).

(2) General Information, Payments

For each inpatient claim submitted, the provider shall assign a Diagnosis Related Group (MS-DRG) code which appropriately reflects the patient's primary cause for hospitalization to determine average length of stay and for tracking purposes. Hospitals within each peer group are to be paid the maximum amount per inpatient day unless a contracted rate is less. An additional payment will be due if the total bill for the hospitalization exceeds the stop loss threshold as defined below.

(a) The maximum per diem rates to be used in calculating the reimbursement rate is as follows:

1. Peer Group 1	$2,347.00 ~~2,235.00~~ (surgical admission) daily for the first seven (7) days;
	$2,032.00 ~~1,935.00~~ (surgical admission) per day for the 8th day and thereafter;
	Note: these rates include Intensive Care (ICU) & Critical and Cardiac Care (CCU) if not a trauma admission as defined above.
	$1,932.00 ~~1,840.00~~ (medical admission) daily for first seven (7) days;
	$1,670.00 ~~1,590.00~~ (medical admission) per day for the 8th day and thereafter;
	Note: these rates include Intensive Care (ICU) & Critical and Cardiac Care (CCU)
2. Peer Group 2 (Rehabilitation)	$1,145.00 ~~1,090.00~~ for the first seven (7) days and $935.00 ~~890.00~~ per day thereafter;
3. Peer Group 3 (Psychiatric)	$830.00 ~~790.00~~ per day (applicable also to chemical dependency);

4.	Peer Group 4 (Trauma level 1)	All trauma care at any licensed Level 1 Trauma Center only shall be reimbursed at a maximum rate of $4,725.00 ~~4,500.00~~ per day for each day of the patient's admission as defined in 0800-02-18-

(b) Surgical implants shall be reimbursed separately and in addition to the per diem hospital charges.

(c) Reimbursement for trauma inpatient hospital services shall be limited to the lesser of the maximum allowable as calculated by the appropriate per diem rate, or the hospital's billed charges minus any non-covered charges. Non-covered charges are convenience items or charges for services not related to the work injury/illness.

(d) Additional reimbursement may be made in addition to the per diem for implantables (i.e. rods, pins, plates and joint replacements, etc.). Reimbursement for implantables is limited to a maximum of the hospital's cost plus fifteen percent (15%)-capped at one thousand dollars ($1000.00)-of the invoice amount. This is applicable per item, and is not cumulative. Implantables shall be billed using the appropriate HCPCS codes, when available. Billing for implantables shall be accompanied by an invoice ~~if requested by~~ to the payer.

(e) The following items are not included in the per diem reimbursement to the facility and may be reimbursed separately. All of these items must be listed with the applicable CPT®/HCPCS.

1. Durable Medical Equipment;
2. Orthotics and Prosthetics;
3. Implantables;
4. Ambulance Services;
5. Take home medications and supplies.

(f) The items listed in subsection (e) shall be reimbursed according to the Rules for Medical Payments (Chapter 0800-02-17, and the Medical Fee Schedule Rules (Chapter 0800-02-18) payment limits. Refer to the maximum rates set forth in Rule 0800-02-18 for practitioner fees. Items not listed in the Rules shall be reimbursed at the usual and customary rate as defined in Rule 0800-02-17, unless otherwise indicated herein.

(g) Per- diem rates are all inclusive (with the exception of those items listed in subsection (e) above).

(h) The In-patient Hospital Fee Schedule allows for independent reimbursement on a case-by-case basis if the particular care exceeds the Stop-Loss Threshold.

(i) Payments for implantables shall be made only to the facility and not to a supplier or distributor.

(j) Charges for licensed/accredited Skilled Nursing Facilities shall be paid according to the CMS national unadjusted rates for urban or rural facilities in effect on the date of service, applicable carve outs, including adjustments made under "Patient-Drive Payment Model" (PDPM) or later CMS methodology. The bill shall include the applicable "Resource Utilization Group" (RUG) for each day. Hospital per-diem and stop loss calculations do not apply to these facilities.

(Rule 0800-02-19-.03, continued)

(3) ReimbursementCalculations

(a) Explanation

1. Each admission is assigned an appropriate MS-DRG.

(Rule 0800-02-19-.03, continued)

2. The applicable Standard Per Diem Amount ("SPDA") is multiplied by the length of stay ("LOS") for that admission plus items listed under (e) above:

   Formula: (LOS) X (SPDA) + (items listed under (e) above) = WCRA

3. The Workers' Compensation Reimbursement Amount ("WCRA") is the total amount of reimbursement to be made for that particular admission and may include a stop loss payment ("SLP") as calculated below.

(4) Stop-Loss Method

(a) Stop-loss is an independent reimbursement factor established to ensure fair and reasonable compensation to the hospital for ~~unusually costly~~ services rendered during treatment to an injured worker. This stop-loss threshold is established to ensure compensation for ~~for unusually extensive~~ services required during an admission.

(b) Explanation

1. To be eligible for stop loss payment, the total Allowed Charges for a hospital admission must exceed the hospital maximum payment, as determined by the hospital maximum payment rate per day, by at least $21,788.00~~20,750~~ for Non-Trauma Admissions and $31,500.00~~30,000.00~~ for Trauma Admissions. This does not include amounts for items set forth in rule 0800-02-19-.03, such as implantables, DME, etc., which shall not be included in determining the total Allowed Charges for stop-loss calculations.

2. Once the allowed charges reach the stop-loss threshold, reimbursement for all additional charges shall be made based on a stop-loss payment factor of 80%.

3. The additional charges are multiplied by the Stop-Loss Reimbursement Factor (SLRF) and added to the maximum allowable payment.

(c) Formula: (LOS) x (SPDA) + (Items listed under (2)(e) in this section) + (Additional Charges x SLRF) = WCRA

(5) Billing for In-patient Admissions

(a) All bills for in-patient institutional services shall be submitted on the standard billing form or any revision to that form approved for use by the Medicare.

Authority: *T.C.A. §§ 50-6-125, 50-6-128, 50-6-204, and 50-6-205 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-19-.04 PRE-ADMISSION UTILIZATION REVIEW.

Utilization review shall be performed in accordance with Chapter 0800-02-06.

Authority: *T.C.A. §§ 50-6-124, 50-6-125, 50-6-128, 50-6-204, and 50-6-205 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February*

(Rule 0800-02-19-.04, continued)

3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendments filed November 27, 2017; effective February 25, 2018.

0800-02-19-.05 OTHER SERVICES.

(1) Pharmacy Services

(a) Pharmaceutical services rendered as part of in-patient care are considered inclusive within the In-patient Fee Schedule and shall not be reimbursed separately.

(b) All retail pharmaceutical services rendered shall be reimbursed in accordance with the Pharmacy Schedule Guidelines, Rule 0800-02-18-.12.

(2) Professional Services

(a) All non-institutional professional and technical services will be reimbursed in accordance with the Bureau's Rules for Medical Payments and the Medical Fee Schedule Rules which must be used in conjunction with these Rules.

Authority: *T.C.A. §§ 50-6-118, 50-6-125, 50-6-128, 50-6-204, and 50-6-205 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-19-.06 PENALTIES FOR VIOLATIONS OF FEE SCHEDULES.

(1) Except when a waiver is granted by the Bureau, providers shall not accept and employers shall not pay any amount for health care services provided for the treatment of a covered injury or illness or for any other services encompassed within the Rules for Medical Payments, Medical Fee Schedule Rules or the In-patient Hospital Fee Schedule Rules, when that amount exceeds the maximum allowable payment established by these Rules. Any provider accepting and any employer paying an amount in excess of the Rules shall be in violation of the Rules and may, at the Administrator's discretion, be subject to civil penalties of up to one thousand dollars ($1,000.00) per violation for each violation, which may be assessed severally against the provider accepting such fee and the employer paying the excessive fee, whenever a pattern or practice of such activity is found. At the discretion of the Administrator, the Administrator's Designee, or an agency member appointed by the Administrator, such provider may also be reported to the appropriate certifying board, and may be subject to exclusion from participating in providing care under the Act. Other violations of the Rules for Medical Payments, Medical Fee Schedule Rules, or the In-patient Hospital Fee Schedule Rules may subject the alleged violator(s) to a civil penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) per violation, at the discretion of the Administrator, the Administrator's Designee, or an agency member appointed by the Administrator.

(2) Any provider reimbursed or carrier paying an amount which is in excess of these Rules shall have a period of one hundred eighty (180) calendar days from the time of receipt/payment of such excessive payment in which to refund/recover the overpayment amount. Overpayments refunded/recovered within this time period shall not constitute a violation under these Rules.

(3) A provider, employer or carrier found to be in violation of these Rules, whether a civil penalty is assessed or not, may request a contested case hearing by requesting such hearing in writing within fifteen (15) calendar days of issuance of a Notice of Violation and, if applicable, the notice of assessment of civil penalties. All rights, duties, obligations, and procedures

(Rule 0800-02-19-.06, continued)

applicable under the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 et seq., are applicable under these Rules, including, but not limited to, the right to judicial review of any final departmental decision.

(4) The request for a hearing shall be made to the Bureau in writing by an employer, carrier or provider which has been notified of its violation of these Rules, and if applicable, assessed a civil penalty.

(5) Any request for a hearing shall be filed with the Bureau within fifteen (15) calendar days of the date of issuance of the Notice of Violation and, if applicable, of civil penalty. Failure to file a request for a hearing within fifteen (15) calendar days of the date of issuance of a Notice of Violation shall result in the decision of the Administrator, Administrator's Designee, or an agency member appointed by the Administrator becoming a final order and not subject to further review.

(6) The Administrator or the Administrator's Designee, shall have the authority to hear the matter as a contested case and determine if any civil penalty assessed should have been assessed. All procedural aspects set forth in the Bureau's Penalty Rules, Chapter 0800-02-13, shall apply and be followed in any such contested case hearing.

(7) Upon receipt of a timely filed request for a hearing, the Administrator shall issue a Notice of Hearing to all interested parties.

Authority: *T.C.A. §§ 50-6-102, 50-6-125, 50-6-128, 50-6-204, 50-6-205, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Amendments filed November 27, 2017; effective February 25, 2018.*

*NOTE: All references to the "Tennessee Workers' Compensation Act" or "Act" are being changed to "Tennessee Workers' Compensation Law" or "Law".

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Bureau of Workers' Compensation on 4/18/19 and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on November 21, 2018.

Rulemaking Hearing Conducted on January 17, 2019.

Date: April 18, 2019

Signature: Abbie Hudgens

Name of Officer: Abbie Hudgens

Title of Officer: Administrator, Bureau of Workers' Compensation

JANIE L. DORRIS
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY
MY COMMISSION EXPIRES 3-8-2022

Subscribed and sworn to before me on: 4/18/19

Notary Public Signature: Janie L Dorris

My commission expires on: 3/8/22

Agency/Board/Commission: Department of Labor & Workforce Development
Bureau of Workers' Compensation

Rule Chapter Number(s): 0800-02-19

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

6/7/2019
Date

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Filed with the Department of State on: 06/12/19

Effective on: 09/10/19

Tre Hargett
Secretary of State

G.O.C. STAFF RULE ABSTRACT

DEPARTMENT:	Labor and Workforce Development
DIVISION:	Bureau of Workers' Compensation
SUBJECT:	Medical Fee Schedule
STATUTORY AUTHORITY:	Tennessee Code Annotated, Section 50-6-204
EFFECTIVE DATES:	September 10, 2019 through June 30, 2020
FISCAL IMPACT:	Minimal
STAFF RULE ABSTRACT:	These rulemaking hearing rules, together with the Rules for Medical payments and In-patient Hospital Fee Schedule Rules, establish a comprehensive medical fee schedule, procedures for review of bills and enforcement.

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

PUBLIC COMMENTS AND RESPONSES

Comment:
Michael Haynie at Manier Herod law firm: References to the Tennessee workers' compensation act should be changed to the Tennessee workers' compensation law to be consistent with word usage in Title 50.
Response: The bureau agrees and has made the suggested changes.
Comment:
Neil Aronov, PhD:
1) Payments to psychologists should be increased to be consistent with increases in medical fee schedule for other medical providers.
Response: The bureau agrees. The increases to psychologists were included in the medical fee schedule increases included in these rules.
2) Psychologists should be permitted to declare a patient at maximum medical improvement and provide a permanent impairment rating.
Response: The bureau neither agrees nor disagrees; this is beyond the scope of the medical fee schedule rules. A statutory change would be needed to permit a psychologist to perform functions that are presently done by physicians pursuant to statute.
Comment:
Tennessee Hospital Association
1) THA supports the fee schedule changes in 0800-02-18 that would base physician reimbursement on the Medicare physician fee schedule conversion factor in effect on the date of service, as opposed to the current fixed conversion factor in the current rule that is consistent with the 2011 Medicare conversion factor.
Response: The bureau agrees.
2) Inpatient hospital fee schedule increase should be changed to 6.07% instead of the proposed 5% to be consistent with 2019 conversion factor change.
Response: The bureau defers at this time. The current changes being made to the medical fee schedule rules were based upon a 2018 review. Making this suggested change would require re-pricing the entire medical fee schedule. However, the bureau has already agreed to review the inpatient fee schedule for its 2019 annual review required by statute, including the stop loss and per diem payment methodologies.
Comment:
Tennessee Radiologists Society (TRS) and Tennessee Radiology Business Managers Association (RBMA):
1) We support the proposed change to float the Medicare conversion factor with the current Medicare conversion factor rather than freezing the number in rule.
Response: The bureau agrees.
2) We suggest adding the phrase "free-standing outpatient diagnostic center" to Rule 0800-02-18-.07(c) to clarify the application of the OPPS rate to the technical services component of radiology services.
Response: The bureau disagrees at this time. This rule only applies to ASCs. To include free-standing outpatient diagnostic centers was not the intent of this section of the rule. The category of diagnostic centers will be subject to review as a part of the statutorily required annual review of the medical fee schedule in 2019.
Comment:
Coventry
1) In 0800-02-17-.09(4) there is a statement: "The reimbursement shall be $200.00 for the first hour of review and $100.00 for each additional hour, provided that each half hour shall be pro-rated." Should this sentence change to clarify the applicability if a prepayment request may not exceed $200?
Response: The bureau disagrees that a clarification needs to be made. This methodology is consistent with other bureau rules regarding medical depositions.
2) In 0800-02-17-.22(1)(a), suggestion is made to add the following: "Submissions that are received less than one week before a Committee meeting will be held and reviewed at the next regularly scheduled meeting."
Response: The bureau agrees with the comment, and the issue of late submissions has been addressed in 0800-02-17-.22(1)(b). Note that this applies only to "written submissions" that are received less than one week prior to the meeting and does not limit oral discussion.
Comment:

John Williams-TAPA: In 0800-02-18.04(2)(c) this change is being made: "PA and APN fees will be based on the specialty of their collaborating physician for all services except those defined as 'assistants at surgery'." How will this impact the payments to PAs and APNs?
Response: The proposed change created confusion about the specialty collaborating physician designation as noted above. APN and PA reimbursement will be calculated according to Medicare billing rules at 160% using a fixed Tennessee specific conversion percentage. This will increase their payments to 85% of the current Medicare conversion factor multiplied by the 160%, providing for a simpler calculation, and will annually "float" with the Medicare conversion factor.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rulemaking process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule: The amended rules will affect small employers that fall under the Tennessee Workers' Compensation Laws, which would be employers with at least five employees, or for those in the construction industry at least one employee. There should be no additional costs associated with these rule changes.

2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record. There is no additional record keeping requirement or administrative cost associated with these rule changes.

3. A statement of the probable effect on impacted small businesses and consumers: These rules should not have any impact on consumers or small businesses.

4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business: There are no less burdensome methods to achieve the purposes and objectives of these rules.

5. Comparison of the proposed rule with any federal or state counterparts: None.

6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule: Exempting small businesses could frustrate the small business owners' access to the services provided by the Bureau of Workers' Compensation and timely medical treatment for injured workers, which would be counter-productive.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (http://state.tn.us/sos/acts/106/pub/pc1070.pdf) of the 2010 Session of the General Assembly)

These proposed rules will have little, if any, impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

These rules together with the Rules for Medical Payments and In-patient Hospital Fee Schedule Rules establish a comprehensive medical fee schedule, procedures for review of bills and enforcement

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 50-6-204 provides that the Bureau administrator is authorized to establish by rule a comprehensive medical fee schedule and will review it annually and make revisions as necessary.

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

All parties to a workers' compensation claim will be affected by the adoption or rejection of these rules.

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars ($500,000), whichever is less;

The overall effect will have little fiscal impact upon state or local government.

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Troy Haley, Legislative Liaison and Director of Administrative Legal Services

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Troy Haley, Legislative Liaison and Director of Administrative Legal Services

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Tennessee Bureau of Workers' Compensation
220 French Landing Drive, Floor 1-B
Nashville, TN 37243
(615) 532-0179
troy.haley@tn.gov

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None

Department of State
Division of Publications
312 Rosa L. Parks, 8th Floor Snodgrass/TN Tower
Nashville, TN 37243
Phone: 615.741.2650
Email: publications.information@tn.gov

For Department of State Use Only
Sequence Number: 06-15-19
Rule ID(s): 9036
File Date: 6/12/19
Effective Date: 9/10/19

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee Department of Labor and Workforce Development
Division:	Bureau of Workers' Compensation
Contact Person:	Troy Haley
Address:	220 French Landing Drive 1-B, Nashville, TN 37243
Phone:	615-532-0179
Email:	troy.haley@tn.gov

Revision Type (check all that apply):
X Amendment
___ New
___ Repeal

Chapter Number	**Chapter Title**
0800-02-18	Medical Fee Schedule
Rule Number	**Rule Title**
0800-02-18-.01	Medicare-Basis for System, Applicability, Effective Date, and Coding References
0800-02-18-.02	General Information and Instructions for Use
0800-02-18-.03	General Guidelines
0800-02-18-.04	Surgical Guidelines
0800-02-18-.05	Anesthesia Guidelines
0800-02-18-.06	Injections Guidelines
0800-02-18-.07	Ambulatory Surgical Centers and Outpatient Hospital Care (Including Emergency Room Facility Charges)
0800-02-18-.08	Chiropractic Services Guidelines
0800-02-18-.09	Outpatient Physical and Occupational Therapy Guidelines
0800-02-18-.10	Durable Medical Equipment and Implantables
0800-02-18-.11	Orthotics and Prosthetics Guidelines
0800-02-18-.12	Pharmacy Schedule Guidelines
0800-02-18-.13	Ambulance Services Guidelines
0800-02-18-.14	Clinical Psychological Service Guidelines
0800-02-18-.15	Penalties for Violations of Fee Schedule

RULES
OF
TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WORKERS' COMPENSATION

CHAPTER 0800-02-18
MEDICAL FEE SCHEDULE

TABLE OF CONTENTS

0800-02-18-.01	Medicare-Basis for System, Applicability, Effective Date and Coding References	0800-02-18-.08	Chiropractic Services Guidelines
0800-02-18-.02	General Information and Instructions for Use	0800-02-18-.09	Outpatient Physical and Occupational Therapy Guidelines
0800-02-18-.03	General Guidelines	0800-02-18-.10	Durable Medical Equipment and Implantables
0800-02-18-.04	Surgery Guidelines	0800-02-18-.11	Orthotics and Prosthetics Guidelines
0800-02-18-.05	Anesthesia Guidelines	0800-02-18-.12	Pharmaceutical Schedule Guidelines
0800-02-18-.06	Injections Guidelines	0800-02-18-.13	Ambulance Services Guidelines
0800-02-18-.07	Ambulatory Surgical Centers and Outpatient Hospital Care (Including Emergency Room Facility Charges)	0800-02-18-.14	Clinical Psychological Service Guidelines
		0800-02-18-.15	Penalties for Violations of Fee Schedules

0800-02-18-.01 MEDICARE-BASIS FOR SYSTEM, APPLICABILITY, EFFECTIVE DATE AND CODING REFERENCES.

(1) The Medical Fee Schedule of the Tennessee Bureau of Workers' Compensation (Bureau) is a Medicare-based system, but with multiple medical specialty Tennessee Specific conversion percentages. These Medical Fee Schedule Rules apply to all injured employees claiming benefits under the Tennessee Workers' Compensation Act. The Medical Fee Schedule is based upon the Centers for Medicare and Medicaid Services ("CMS") (formerly the Health Care Financing Administration) ("HCFA") Medicare Resource Based Relative Value Scale ("RBRVS") system, utilizing the CMS' relative value units ("RVUs") which must be adjusted for the Tennessee Geographic Practice Index ("GPCI") and the Tennessee conversion percentages adopted by the Tennessee Bureau of Workers' Compensation in these Rules. These Medical Fee Schedule Rules must be used in conjunction with the current American Medical Association's (AMA) CPT® Code Guide, CMS Common Procedure Coding System ("HCPCS"), the current and effective Resource Based Relative Value Scale (RBRVS), as developed by the AMA and CMS, the American Society of Anesthesiologists (ASA) Relative Value Guide, the National Correct Coding Initiative edits (NCCI) and current effective Medicare procedures and guidelines, unless specifically exempted in these rules. Providers rendering medically appropriate care outside of the state of Tennessee to an injured employee pursuant to the Tennessee Workers' Compensation Act may be paid in accordance with the medical fee schedule, law, and rules governing in the jurisdiction where such medically appropriate care is provided, upon waiver granted by the Bureau.

(2) These Medical Fee Schedule Rules must also be used in conjunction with Rules for Medical Payments, Chapter 0800-02-17, and the In-patient Hospital Fee Schedule Rules, Chapter 0800-02-19. The definitions set out in those rules, as well as the other general provisions, including but not limited to those regarding electronic billing and prompt payment of provider's bills, are adopted by reference as if set forth fully herein.

(3) These Medical Fee Schedule Rules apply to all services provided after the effective date of these rules. The most recent versions of the American Medical Association's CPT® and the Medicare RBRVS shall automatically be applicable and are adopted by these Rules by reference upon their effective dates. Fees shall be calculated using the edition of the CPT® and RBRVS effective on the date of service, including rules concerning "families" of procedures, add-on codes, status indicators, and multiple procedure discounts in all places of service, except where exceptions are specified in these rules.

(Rule 0800-02-18,-.01, continued)

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed December 20, 2007; effective March 4, 2008. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.02 GENERAL INFORMATION AND INSTRUCTIONS FOR USE.

(1) Format

(a) These Rules address and consist of the following sections: General Guidelines, General Medicine (including Evaluation and Management), General Surgery, Neuro- and Orthopedic Surgery, Radiology, Pathology, Anesthesiology, Injections, Durable Medical Equipment, Implants and Orthotics, Pharmacy, Physical and Occupational Therapy, Ambulatory Surgical Centers and Outpatient Hospital Care, Chiropractic, Ambulance Services and Clinical Psychological Services. Providers should consult and use the section(s) containing the procedure(s) they perform, or the service(s) they render, together with the appropriate sections of the Rules for Medical Payments, and the In-patient Hospital Fee Schedule Rules, if applicable, and the NCPDP WC/PC UCF (National Council for Prescription Drug Programs, Property & Casualty/Workers' Compensation, Universal Claim Form) for pharmacies.

(2) Reimbursement

(a) Unless otherwise indicated herein, the most recent, effective Medicare procedures and guidelines are hereby adopted and incorporated as part of these Rules as if fully set out herein and effective upon adoption and implementation by the CMS. Whenever there is no specific fee or methodology for reimbursement set forth in these Rules for a service, diagnostic procedure, equipment, etc., then the maximum amount of reimbursement shall be 100% of the Medicare allowable amount, in effect on the date of service. The Medicare guidelines and procedures, in effect at the date of service, shall be followed in arriving at the correct amount. For purposes of these Rules, the base Medicare amount may be adjusted at the discretion of the Administrator based upon the Medicare Economic Index adjustment. Whenever there is no applicable Medicare code or method of reimbursement, the service, equipment, diagnostic procedure, etc. shall be reimbursed at the usual and customary amount as defined in the Rules for Medical Payments.

(b) Reimbursement to all providers shall be the lesser of the following:

1. The provider's usual charge;

2. The fee calculated according to the Medical Fee Schedule Rules (includes 100% of Medicare if no other specific fee or methodology is set forth in these Rules);

3. The MCO/PPO or any other contracted price;

4. Except when a waiver is granted by the Bureau, in no event shall reimbursement be in excess of these Fee Schedule Rules that are in force on the date of service unless otherwise provided in T.C.A § 50-6-204 or in the Bureau's rules. Reimbursement in excess of the Medical Fee Schedule Rules may result in civil penalties, at the Administrator's discretion, of from $50.00 (fifty dollars) up to $5,000.00 (five thousand dollars) per violation assessed severally against the provider accepting such fee and the carrier or employer paying the excessive fee, should a pattern or practice of such activity be found. It is recognized that providers must bill all payers at the same amount and simply billing an amount

(Rule 0800-02-18,-.02, continued)

which exceeds the Fee Schedule Rules does not constitute a violation. It is acceptance and retention of an amount in excess of this Fee Schedule Rules for longer than one hundred eighty (180) calendar days that constitutes a violation by a provider. At the Administrator's discretion, multiple violations may subject the provider to exclusion from participating in the program of the Tennessee Workers' Compensation Act ("Act"). Any provider reimbursed or carrier paying an amount which is in excess of the maximum amount allowed under these Rules shall have a period of one hundred eighty (180) calendar days from the time of receipt or payment of such excessive payment in which to refund/recover the overpayment amount. If such amount is refunded or recovered within this one hundred eighty (180) calendar day time period, the overpayment shall not be considered a violation of these Rules by the provider or employer and shall not be the basis for a penalty against the provider receiving or employer paying the excessive payment.

5. The "lesser of" comparison among:

(i) The provider's usual charge;

(ii) The maximum allowable amount pursuant to these Rules; or

(iii) Any other contracted amount.

(iv) These comparisons shall be determined based on the entire bill or an amount due for a particular service, rather than on a line-by-line basis.

(3) Fee Schedule Calculations

The Medical Fee Schedule maximum reimbursement amount for professional services is calculated for any specific CPT® code by multiplying the Medicare relative value units (RVU) with the Medicare Tennessee specific Geographic Practice Cost Index (GPCI) to establish the total Tennessee RVUs. That figure is then multiplied by the appropriate conversion factor to establish the base payment amount. This base payment amount is multiplied by the appropriate Medical Fee Schedule Tennessee specific conversion percentage. Whether one uses the facility or non-facility RVUs is determined using the effective Medicare guidelines on the date of service and is dependent upon the location at which the service is provided. ~~Certain specialty areas listed below do not have a specific conversion factor and the maximum reimbursement amount allowed is the usual and customary amount defined in the Rules for Medical Payments, as indicated.~~ For other areas not listed, the maximum allowable amount is 100% of the Tennessee specific Medicare allowable amount calculated in accordance with Medicare guidelines and methodology effective on the date of service, except where a waiver has been granted by the bureau.

(4) Practitioner fees shall be based on the Medicare's Physician Fee Schedule conversion factor in effect on the date of service~~of 33.9764~~, which shall be used in conjunction with the effective Medicare RVUs on the date of service, as adjusted above. The Administrator may designate another Medical Fee Schedule conversion factor at any time. The Tennessee-Specific Conversion percentage listed below should be applied to the appropriate service category in order to calculate the correct charge or billing amount (Anesthesia by units, see Rule 0800-02-18-.05):

Service Category by Medical Specialty	TN Specific Conversion %
Anesthesiology	$75.00 per unit
Orthopaedics and Neurosurgery*	275%

General Surgery (And surgery procedure codes)..... **200%**

Radiology..... **200%**

Pathology..... **200%**

Physical/Occupational/Speech Therapy..... **130%**

Chiropractic..... **130%**

General Medicine/Occupational Medicine/Physiatrist (Physical Medicine and Rehabilitation)..... **160%**

PA and APN, all services except those defined as "assistants at surgery" ..... **160**% (Subject to Medicare rules for billing)
See 0800-02-18-.04(2) (c) for rates for assisting in surgery involving a PA or APN

Emergency Care..... **200%**

Home Health Services (episodic and not "LUPA" adjustment)..... **100**% of Medicare

Dentistry..... **100**% (using ADA dental codes-CDT®)
See (2) (a) above and 0800-02-17-.03 (74) for the complete explanation

Oral Surgery follows the surgery percentage when using CPT® codes.

All Evaluation and Management (E/M) codes are paid at **160**% (not specialty dependent).

* Board certified or Board eligible Orthopaedists and Neurosurgeons may use the modifier "**ON**" on the appropriate billing form when submitting surgical charges. If the modifier or another indicator is not placed on the form, then the Tennessee Department of Health's database may be consulted in order to determine the provider's specialty.

(5) Forms

(a) The following forms (or their official replacements) should be used for provider billing: the effective current version of the CMS 1500 and UB 04 or the electronic equivalents.

(b) Bills for reimbursement shall be sent directly to the employer responsible for reimbursement. In most instances, this is the Insurance Carrier or the Self-Insured Employer. Insurance Carriers and/or Employers shall furnish this billing information to the Providers, and such information must be accurate and updated, within thirty (30) calendar days of any change to the billing address of the responsible party, either mail, e-mail or electronic submission.

(6) Violations of Fee Schedule Rules and Rules for Medical Payments

The Administrator, Administrator's Designee, or an agency member appointed by the Administrator, shall have the authority to issue civil penalties from $50.00 (fifty dollars) up to $5,000.00 (five thousand dollars) per violation for violations of the Medical Fee Schedule Rules, In-patient Hospital Fee Schedule Rules or the Rules for Medical Payments ("Rules") as prescribed in the Rules. Any party notified of an alleged violation shall be entitled to a contested case hearing before the Administrator, Administrator's Designee, or an agency member appointed by the Administrator pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 et seq., if a written request is submitted to the Bureau by the party within fifteen (15) calendar days of issuance of notice of such violations and of any civil penalty. Failure to make a timely request will result in the violation and penalty decision becoming a final order and not subject to further review.

(Rule 0800-02-18,-.02, continued)

Authority: *T.C.A. §§ 50-6-102, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Emergency rules filed April 27, 2006; effective through October 9, 2006. Amendment filed January 8, 2007; effective March 24, 2007. Amendments filed December 20, 2007; effective March 4, 2008. Amendments filed June 12, 2009; effective August 26, 2009. Emergency rule filed September 2, 2011; effective through February 29, 2012. Withdrawal of emergency rule 0800-02-18(4) filed November 8, 2011 by the Department of Labor and Workforce Development; withdrawal effective November 8, 2011. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendment filed December 26, 2013; effective March 26, 2014. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.03 GENERAL GUIDELINES.

(1) Guidelines define items that are necessary to appropriately interpret and report the procedures and services contained in a particular section and provide explanations regarding terms that apply only to a particular section.

(2) The Guidelines found in the editions of the AMA CPT® Guide and Medicare RBRVS in effect on the date of service The Physicians' Guide applies to the following: General Medicine (includes Evaluation and Management), General Surgery, Neuro-surgery, Orthopedic Surgery, Chiropractic, Physical and Occupational Therapy, Home Health Care, Home Infusion, Ambulatory Surgical Centers and Outpatient Hospital Services, Radiology, Clinical Psychological, and Pathology. Codes of dental terminology prescribed by the American Dental Association, including the terminology updates and revisions issued in the future by the American Dental Association shall be used for all Dentistry services.

(3) In addition to the Guidelines found in the AMA CPT® and the Medicare RBRVS: The Physicians' Guide, the following Medical Fee Schedule Rule Guidelines also apply. For a Tennessee claim, whenever a conflict exists between these Medical Fee Schedule Rules and any other state fee schedule, rule or regulation, these Rules shall govern.

(4) For free standing or in-office laboratory, pathology and toxicology procedures including urine drug screens (UDS), these services shall be reimbursed at the pathology percentage when there is a G code or applicable cross-walk CPT® code. For any urine drug screens, the laboratory requisition must specify exactly which drugs are to be tested and why. The billing code(s) submitted shall be those recognized by Medicare as appropriate for the date of service. The frequency of urine drug screens should be in accord with the most recent version of the Department of Health Tennessee Chronic Pain Guidelines, Clinical Practice Guidelines for the Outpatient Management of Chronic Non-Malignant Pain.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.04 SURGERY GUIDELINES.

(1) Multiple Procedures: Maximum reimbursement shall be based on 100% of the appropriate Medical Fee Schedule amount for the major procedure plus each additional appropriately coded secondary and/or multiple procedures according to Medicare guidelines (including endoscopy and other applicable "families) and CPT® CCI edits.

(2) Services Rendered by More Than One Physician:

(Rule 0800-02-18-.04, continued)

(a) Concurrent Care: One attending physician shall be in charge of the care of the injured employee. However, if the nature of the injury requires the concurrent services of two or more specialists for treatment, then each physician shall be entitled to the listed fee for services rendered.

(b) Surgical Assistant: A physician who assists at surgery may be reimbursed as a surgical assistant. To identify surgical assistant services provided by physicians, Modifier 80 or 81 shall be added to the surgical procedure code which is billed. A physician serving as a surgical assistant must submit a copy of the operative report to substantiate the services rendered. Reimbursement is limited to the lesser of the surgical assistant's usual charge or 20% of the maximum allowable Medical Fee Schedule amount.

(c) Appropriately licensed Physician Assistants and Advance Practice Nurses (Nurse Practitioners) may serve as surgical assistants as deemed appropriate by the physician, and if so, that assistants' reimbursement shall not exceed 100% of the Physician Assistant fee or Advance Practice Nurse fee that would be due under Medicare guidelines, without regard to conversion factors or percentages applicable to their supervising physician specialty contained in this Medical Fee Schedule.

(d) Two Surgeons: For reporting see the most current CPT®. Each surgeon must submit an operative report documenting the specific surgical procedure(s) provided. Each surgeon must submit an individual bill for the services rendered. Reimbursement must not be made to either surgeon until the employer has received each surgeon's individual operative report and bill. Reimbursement to both surgeons shall be in accord with Medicare guidelines.

(e) The need for a surgical assistant, assisting surgeon, co-surgeon, second surgeon or team surgery will follow Medicare status indicators. The payment amount will depend on the specialty as designated in 0800-02-18-.02(4) and 0800-02-18-.04(2).

(3) When a surgical fee is chargeable, no office visit charge shall be allowed for the day on which this surgical fee is earned, except if surgery is performed on the same day as the physician's first examination, in accord with Medicare guidelines. All exceptions require use of the appropriate modifiers.

(4) Certain of the listed procedures in the Medical Fee Schedule are commonly carried out as an integral part of a total service and, as such, do not warrant a separate charge, commonly known as a global fee. Lacerations ordinarily require no aftercare except removal of sutures. The removal is considered a routine part of an office or hospital visit and shall not be billed separately unless such sutures are removed by a provider different from the provider administering the sutures.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.05 ANESTHESIA GUIDELINES.

(1) General Information and Instructions.

(a) The current ASA Relative Value Guide, by the American Society of Anesthesiologists will be used to determine reimbursement for anesthesia codes that do not appear in the RBRVS. These values are to be used only when the anesthesia is personally

(Rule 0800-02-18-.05, continued)

administered by an Anesthesiologist or Certified Registered Nurse Anesthetist ("CRNA") who remains in constant attendance during the procedure, for the sole purpose of rendering such anesthesia service.

(b) When anesthesia is administered by a CRNA not under the medical direction of an anesthesiologist, maximum reimbursement shall be 90% of the maximum allowable fee for anesthesiologists under these Medical Fee Schedule Rules. No additional payment will be made to any physician supervising the CRNA.

(c) Whenever anesthesia services are provided by an anesthesiologist or other physician and a CRNA, reimbursement shall never exceed 100% of the maximum amount an anesthesiologist or physician would have been allowed under these Medical Fee Schedule Rules had the anesthesiologist or physician alone performed these services.

(2) Anesthesia Values

(a) Each anesthesia service contains two value components which make up the charge and determine reimbursement: a Basic Value and a Time Value, and physical status modifiers and qualifying circumstance codes that may be appropriately added according to Medicare guidelines.

(b) Basic Value: This relates to the complexity of the service and includes the value of all usual anesthesia services except the time actually spent in anesthesia care and any modifiers. The Basic Value includes usual preoperative and postoperative visits, the anesthesia care during the procedure, the administration of fluids and/or blood products incidental to the anesthesia or surgery and interpretation of non-invasive monitoring (ECG, temperature, blood pressure, oximetry, capnography, and mass spectrometry). When multiple surgical procedures are performed during an operative session, the Basic Value for anesthesia is the Basic Value for the procedure with the highest unit value. The Basic Values in units for each anesthesia procedure code are listed in the current ASA Relative Value Guide.

(c) Time Value: Anesthesia time starts when the anesthesiologist or CRNA begins to prepare the patient for induction of anesthesia and ends when the personal attendance of the anesthesiologist or CRNA is no longer required and the patient can be safely placed under customary, postoperative supervision. Anesthesia time must be reported on the claim form as the total number of minutes of anesthesia. For example, one hour and eleven minutes equals 71 minutes of anesthesia. The Time Value is converted into units for reimbursement as follows:

1. Each 15 minutes equals one (1) time unit.

2. No additional time units are allowed for recovery room observation monitoring after the patient can be safely placed under customary post-operative supervision.

(3) Total Anesthesia Value

(a) The total anesthesia value ("TAV") for an anesthesia service is the sum of the Basic Value (units) plus the Time Value which has been converted into units, and physical status modifiers and qualifying circumstance codes that may be appropriately added according to Medicare guidelines. The TAV is calculated for the purpose of determining reimbursement.

(4) Billing

(Rule 0800-02-18-.05, continued)

(a) Anesthesia services must be reported by entering the appropriate anesthesia procedure code and descriptor into Element 24 D of the HCFA 1500 Form. The provider's usual total charge for the anesthesia service must be entered in Element 24 F on the HCFA 1500 Form, or its presently accepted equivalent. The total time in minutes must be entered in Element 24 G of the HCFA 1500 Form. Include the appropriate modifiers.

(5) Reimbursement

(a) Reimbursement for anesthesia services shall not exceed the maximum allowable Medical Fee Schedule amount of $75.00 per unit.

(6) Medical Direction Provided by Anesthesiologists

(a) When an anesthesiologist is not personally administering the anesthesia but is providing medical direction for the services of a nurse anesthetist who is not employed by the anesthesiologist, the anesthesiologist may bill for the medical direction. Medical direction includes the pre and post-operative evaluation of the patient. The anesthesiologist must remain within the operating suite, including the pre-anesthesia and post-anesthesia recovery areas, except in an appropriately documented emergency situation. Total reimbursement for the nurse anesthetist and the anesthesiologist shall not exceed the maximum amount allowable under the Medical Fee Schedule Rules had the anesthesiologist alone performed the services.

(7) Anesthesia by Surgeon

(a) Local Anesthesia

When infiltration, digital block or topical anesthesia is administered by the operating surgeon or surgeon's assistant, reimbursement for the procedure and anesthesia are included in the global reimbursement for the procedure.

(b) Regional or General Anesthesia

When regional or general anesthesia is provided by the operating surgeon or surgeon's assistant, payment is included in the surgical procedure reimbursement, according to Medicare guidelines.

(8) Unlisted Service, Procedure or Unit Value. When an unlisted service or procedure is provided or without specified unit values, the values used shall be substantiated by report.

(9) Procedures Listed In The ASA Relative Value Guide Without Specified Unit Values. For any procedure or service that is unlisted or without specified unit value, the physician or anesthetist shall establish a unit value consistent in relativity with other unit values shown in the current ASA Relative Value Guide. Pertinent information concerning the nature, extent and need for the procedure or service, the time, the skill and equipment necessary, etc., shall be furnished. Sufficient information shall be furnished to identify the problem and the service(s).

(10) Actual time of beginning and duration of anesthesia time may require documentation, such as a copy of the anesthesia record in the hospital file.

(11) Special Supplies. Supplies and materials provided by the physician over and above those usually included with the office visit or other services rendered may be listed separately. Drugs, materials provided, and tray supplies shall be listed separately. Supplies and materials provided in a hospital or other facility must not be billed separately by the physician or CRNA.

(Rule 0800-02-18-.05, continued)

(12) Separate or Multiple Procedures. It is appropriate to designate multiple procedures that are rendered on the same date by separate entries.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed December 20, 2007; effective March 4, 2008. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.06 INJECTIONS GUIDELINES.

Reimbursement for injection(s) (such as J codes) includes allowance for CPT® code 96372. Surgery procedure codes defined as injections include the administration portion of payment for the medications billed. J Codes are found in the Health Care Financing Administration Common Procedure Coding System ("HCPCS"). Follow the Medicare guidelines in effect for the date of service for both single and multiple use vials of injectable medications for both medications and procedures. Immunization codes (vaccines and toxoid) should be reimbursed for both the medication and the procedure, reported separately with number of units administered.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.07 AMBULATORY SURGICAL CENTERS AND OUTPATIENT HOSPITAL CARE (INCLUDING EMERGENCY ROOM FACILITY CHARGES).

(1) Medically appropriate surgical procedures may be performed on an outpatient basis.

(a) For the purpose of the Medical Fee Schedule Rules, "ambulatory surgical center" means an establishment with an organized medical staff of physicians; with permanent facilities that are equipped and operated primarily for the purpose of performing surgical procedures, with continuous physicians and registered nurses on site or on call; which provides services and accommodations for patients to recover for a period not to exceed twenty-three (23) hours after surgery. An ambulatory surgical center may be a free standing facility or may be attached to a hospital facility. For purposes of workers' compensation reimbursement to ASCs, the facility must be an approved Medicare ASC.

(b) The CMS has implemented the Outpatient Prospective Payment System ("OPPS") under Medicare for reimbursement for hospital outpatient services at most hospitals. All services paid under the new OPPS are classified into groups called Ambulatory Payment Classifications ("APC"). Services in each APC are similar clinically and in terms of the resources they require. The CMS has established a payment rate for each APC. Current APC Medicare allowable payment amounts and guidelines are available online at: http://www.cms.hhs.gov/HospitalOutpatientPPS. The payment rate for each APC group is the basis for determining the maximum total payment to which an ASC or hospital outpatient center will be entitled, including add-ons, hospital outpatient procedures, multiple procedure discounts and status indicators, according to current CMS guidelines.

(c) Under the Medical Fee Schedule Rules, the OPPS reimbursement system shall be used for reimbursement for all outpatient services, wherever they are performed, in a free-standing ASC or hospital setting. The most current, effective Medicare APC rates shall be used as the basis for facility fees charged for outpatient services and shall be reimbursed at a maximum of 150% of current value for such services. Depending on the services provided, ASCs and hospitals may be paid for more than one APC for an

(Rule 0800-02-18-.07, continued)

encounter. When multiple surgical procedures are performed during the same surgical session, Medicare guidelines shall be used in determining separate and distinct surgical procedures and the order of payment.

(d) If a claim contains services that result in an APC payment but also contains packaged services, separate payment of the packaged services is not made since the payment is included in the APC. However, charges related to the packaged services are used in setting outlier calculations.

(e) Reimbursement for all outpatient services is based on the Medicare Ambulatory Payment Classification ("APC") national unadjusted base rates, which can be obtained from the Centers for Medicare and Medicaid Services. There are no adjustments for wage-price indices and these are not hospital-specific APC rate calculations. Reimbursements for Critical Access Hospitals ("CAH") are not based on CAH methodology but on the national unadjusted APC base rates as described in the preceding sentence.

(f) Status indicators used under Medicare should be interpreted using Medicare guidelines with the exception of status indicator "C," which Medicare does not reimburse for outpatient services, but requires inpatient treatment. Under these Rules, these procedures listed with status indicator "C" performed on an outpatient basis shall be reimbursed, but with the maximum amount being usual & customary, which is 80% of the billed charges, as defined in the Bureau's Rules for Medical Payments.

(g) All other outpatient hospital care in all ASCs and all hospitals, including but not limited to observation and emergency room facility fees, shall be calculated in accordance with the most current Medicare rules and procedures applicable to such services and shall be reimbursed at a maximum rate of 150% of the current value of Medicare reimbursement for outpatient hospital care.

(h) All of the following services are to be reimbursed in accordance with the Medicare status indicators effective on the date of service or according to the Medicare guidelines concerning hospital outpatient diagnostic services rates, in effect on the date of service:

1. Physician services, including pathologists, radiologists and anesthesiologists and CRNAs.
2. Radiology services (technical components may only be separately reimbursed when not included in APC).
3. Diagnostic procedures not related to the surgical procedure.
4. Prosthetic devices.
5. Ambulance services.
6. Orthotics.
7. Implantables.
8. DME for use in the patient's home.
9. Take home medications.
10. Take home supplies.

(Rule 0800-02-18-.07, continued)

(i) 1. For cases involving implantation of medical devices (implantables), regardless of the current Medicare status indicators, payment shall be made only to the facility.

2. For DME, orthotics and prosthetics used in the patient's home that is supplied by the facility, payment shall be made only to the facility (at the rates specified in 0800-02-18-.10 and 0800-02-18-.11), and not to any other separate entity for these services. No extra payment shall be made for these services if according to CMS regulations and status indicators when those particular services are included in the APC payment.

(j) The listed services and supplies in subsection (1)(h) above shall be reimbursed according to the Medical Fee Schedule Rules, or at the usual and customary amount, as defined in these Rules, for items/services not specifically addressed in the Medical Fee Schedule Rules.

(k) Pre-admission lab and x-ray may be billed separately from the Ambulatory Surgery bill when performed 24 hours or more prior to admission, and will be reimbursed the lesser of billed charges or the payment limit of the fee schedule, according to Medicare guidelines. Pre-admission lab and radiology are not included in the facility fee.

(l) Facility fees for surgical procedures not listed shall be reimbursed by report with a maximum of the usual and customary rate as defined in the Division's Rule 0800-02-17-.03.

(m) There may be emergency cases or other occasions in which the patient was scheduled for outpatient surgery and it becomes necessary to admit the patient. All hospitals with ambulatory patients who stay longer than 23 hours past ambulatory surgery or other diagnostic procedures and are formally admitted to the hospital as an inpatient will be paid in accordance with the In-patient Hospital Fee Schedule Rules, 0800-02-19. Medicare hospital criteria shall apply to these cases.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Emergency rules filed April 27, 2006; effective through October 9, 2006. Amendment filed January 8, 2007; effective March 24, 2007. Amendment filed December 20, 2007; effective March 4, 2008. Amendments filed June 12, 2009; effective August 26, 2009. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.08 CHIROPRACTIC SERVICES GUIDELINES.

(1) Charges for chiropractic services shall not exceed 130% of the participating fees prescribed in the Medicare RBRVS System fee schedule. The number of approved visits shall be limited pursuant to any restrictions in Tenn. Code Ann. § 50-6-204. The same procedures for utilization review applicable to physical therapy and occupational therapy services under Rule 0800-02-18-.09~~(5)~~ below apply to chiropractic services.

(2) For chiropractic services, an office visit (E/M code) may only be billed on the same day as a manipulation when it is the patient's initial visit with that provider. During the course of treatment, the chiropractor may bill a second E/M code if the patient does not adequately respond to the initial treatment regimen, and a documented significant change is made in the treatment recommendations.

(Rule 0800-02-18,-.08, continued)

(3) There shall be no fee allowable for any modalities performed in excess of four (4) modalities per day per employee. The Medicare definition of modality is applicable.

(4) There shall be no charge for either hot packs or cold packs provided to an employee who has suffered a compensable work-related injury under the Workers' Compensation Law.

(5) If the Bureau's adopted treatment guidelines allow for exceptions such as but not limited to the number of modalities or visits, then the guidelines may be used.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.09 OUTPATIENT PHYSICAL, SPEECH AND OCCUPATIONAL THERAPY GUIDELINES.

(1) Reimbursement for all physical, speech, and occupational therapy services shall not exceed one hundred thirty percent (130%) of the maximum allowable fees prescribed in the Medicare RBRVS fee schedule, no matter where the services are performed, except home health services.

(2) For physical therapy ~~and/~~or occupational therapy, there shall be no reimbursement for either hot packs or cold packs provided to an employee who has suffered a compensable work-related injury under the Workers' Compensation Law.

(3) For physical therapy, ~~and/or~~ occupational therapy, or speech therapy, there shall be no fee allowable for any modalities or therapeutic procedures performed in excess of four (4) modalities, therapeutic procedures, or combination thereof per type of therapy per day per employee, with no additional reductions such as those to the relative value units (RVUs). The definitions of modality and therapeutic procedures from the most recent American Medical Association's Current Procedural Terminology (CPT®) edition are applicable.

(4) For a Functional Capacity Evaluations, the four unit (time measurement) maximum may not apply as long as the documentation supports the extra units. The most recent CPT® codes available for Functional Capacity Evaluations are appropriate for use under the Tennessee Workers' Compensation Medical Fee Schedule.

(5) Work Hardening/Conditioning Programs using the approved CPT® codes shall be billed at Usual and Customary hourly charges for a maximum of 6 hours per day or 60 hour maximum and are subject to utilization review prior approval. Payment is 80% of the billed charges.

(6) Whenever physical therapy, ~~and/or~~ occupational therapy, or speech therapy services exceed twelve (12) visits, such treatment may be reviewed pursuant to the employer's utilization review program in accordance with the procedures set forth in Chapter 0800-02-06 of the Bureau's Utilization Review rules before further physical therapy and/or occupational therapy services may be certified for payment by the employer. Such certification shall be completed within the timeframes set forth in Chapter 0800-02-06 to assure no interruption in delivery of needed services. Failure by a provider to properly certify such services as prescribed herein may result in the forfeiture of any payment for uncertified services. Failure by an employer or utilization review organization to conduct utilization review in accordance with this Chapter 0800-02-18 and Chapter 0800-02-06 shall result in no more than twelve (12) additional visits being deemed certified. The initial utilization review of physical therapy, ~~and/or~~ occupational therapy, or speech therapy services shall, if necessary and appropriate, certify an appropriate number of visits. If

(Rule 0800-02-18,-.09, continued)

necessary, further subsequent utilization review may be conducted to certify additional physical therapy ~~and/~~or occupational therapy or speech therapy services as is appropriate; provided, that further certifications are not required to be in increments of twelve (12) visits.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Emergency rules filed April 27, 2006; effective through October 9, 2006. Amendment filed January 8, 2007; effective March 24, 2007. Amendments filed December 20, 2007; effective March 4, 2008. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.10 DURABLE MEDICAL EQUIPMENT AND IMPLANTABLES.

(1) Reimbursement for durable medical equipment and implantables for which billed charges:

(a) Are $100.00 or less shall be limited to eighty (80%) of billed charges;

(b) Exceed $100.00 shall be reimbursed at a maximum amount of the supplier or manufacturer's invoice amount, plus the lesser of 15% of invoice or $1,000.00, and coded using the HCPCS codes. These calculations are per item and are not cumulative. Charges for durable medical equipment that is not included in the facility payments and implantables that are not included in the facility payments are in addition to, and shall be billed separately from~~, all~~ facility and professional service fees only if these charges are not included in facility OPPS or APC methodology. ~~.~~ See rule 0800-02-18-.07.

(c) This Rule shall not apply to durable medical equipment and medical supplies, other than implantables with applicable Medicare allowable amounts. Such durable medical equipment and medical supplies, including home DMEs, infusion and oxygen services, other than implantables, shall be reimbursed at the lesser of the billed charges or 100% of the applicable Medicare allowable amount.

(2) Quality. The reimbursement for supplies/equipment in this fee guideline is based on a presumption that the injured worker is being provided the highest quality of supplies/equipment. All billing must contain the brand name, model number, and catalog number.

(3) Rental/Purchase. Rental fees are applicable in instances of short-term utilization (30-60 days). The maximum allowable rental fee for DME is 100% of the Tennessee Medicare allowable amount. If it is more cost effective to purchase an item rather than rent it, this must be stressed and brought to the attention of the insurance carrier. The first month's rent should apply to the purchase price. However, if the decision to purchase an item is delayed by the insurance carrier, subsequent rental fees cannot be applied to the purchase price. When billing for rental, identify with modifier "RR".

(4) Transcutaneous electrical neurostimulators (TENs) Units. All bills submitted to the carrier for TENs~~ens~~, Hwave, ~~and~~ Cranial Electrical Stimulator (CES) units and other external stimulator devices should be accompanied by a copy of the invoice, if available.

(a) Rentals

1. Include the following supplies:

(i) Lead wires;

(ii) Two (2) rechargeable batteries, as indicated~~;~~

(Rule 0800-02-18,-.09, continued)

(iii) Battery charger;

(Rule 0800-02-18-.10, continued)

(iv) Electrodes; and

(v) Instruction manual and/or audiotape.

2. Supplies submitted for reimbursement must be itemized. In unusual circumstances where additional supplies are necessary, use modifier -22 and "BR."

3. Limited to 30 days trial period.

(b) Purchase:

1. Prior to the completion of the 30-day trial period, the prescribing doctor must submit a report documenting the medical justification for the continued use of the unit. The report should identify the following:

(i) Describe the condition and diagnosis that necessitates the use of a TENs unit or other external stimulator units.

(ii) Does the patient have any other implants which would affect the performance of the TENs unit or the implanted unit?

(iii) Was the TENs unit effective for pain control during the trial period?

(iv) Was the patient instructed on the proper use of the TENS unit during the trial period?

(v) How often does the patient use the TENS unit?

2. The purchase price should include the items below if not already included with the rental:

(i) Lead wires;

(ii) Two (2) rechargeable batteries; and

(iii) Battery charger.

3. Only the first month's rental price shall be credited to purchase price.

4. The provider shall indicate TENs manufacturer, model name, and serial number.

(5) Continuous Passive Motion and Other External Exercise/Treatment Devices (see Medicare Code)

(a) Use of this unit in excess of the days recommended by the Bureau's adopted treatment guidelines requires documentation of medical necessity by the doctor. Only one (1) set of soft goods will be allowed for purchase.

(b) The use of cold compression therapy units and other external exercise/treatment devices in excess of 7 days (or the length of use recommended by the Bureau's adopted treatment guidelines) requires documentation of the device's use and medical necessity and may be subject to utilization review.

(Rule 0800-02-18-.10, continued)

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed December 20, 2007; effective March 4, 2008. Amendments filed June 12, 2009; effective August 26, 2009. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.11 ORTHOTICS AND PROSTHETICS GUIDELINES.

(1) Orthotics and prosthetics, not supplied under 0800-02-18-.07, should be coded according to the HCFA Common Procedures Coding System (HCPCS). Payment shall be 115% of Tennessee Medicare allowable amount. If the invoice costs exceed the Medicare payments amounts at the time of delivery, the payment for orthotics and prosthetics shall be the higher of invoice costs or 115% of the Tennessee Medicare allowable amount and coded using the HCPCS code. Charges for these items are in addition to, and shall be billed separately from all other facility and professional service fees. Supplies and equipment should be coded 99070 if appropriate codes are not available in the HCPCS and the maximum reimbursement shall be the usual and customary amount. Charges should be submitted on the HCFA 1500 form or its approved successor form.

(2) Fitting and customizing codes may be reimbursed separately according to Medicare guidelines.

~~(2)~~(3) For the purpose of reimbursements, hearing aids are considered under this section.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed December 20, 2007; effective March 4, 2008. Amendment filed June 12, 2009; effective August 26, 2009. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.12 PHARMACEUTICAL SCHEDULE GUIDELINES.

(1) The Pharmacy Fee Guideline maximum allowable amount for prescribed drugs (medicines by pharmacists and dispensing practitioners) under the Tennessee workers' compensation laws is the lesser of:

(a) The provider's usual charge;

(b) A negotiated contract or lower amount; or

(c) The fees established by the formula for brand-name and generic pharmaceuticals as described in the following subsections.

(d) Prescribed Medication Services

1. "Drug" has the meaning set out in Tenn. Code Ann. § 63-10-204.

2. Medicine or drugs may only be dispensed by a currently licensed pharmacist or a dispensing practitioner.

3. Carriers may contract with pharmacy benefit managers to process and administer claims for reimbursement of pharmacy services and review the relatedness and appropriateness of prescribed services. Carriers and pharmacists may also negotiate alternative reimbursement schedules and amounts, so long as the reimbursement amount does not exceed the fee schedule amount set out in these Rules.

4. For the purposes of these Medical Fee Schedule Rules, medicines are defined as drugs prescribed by an authorized health care provider and include only generic drugs or single-source patented drugs for which there is no generic equivalent, unless the authorized health care provider writes that the brand name is medically necessary and includes on the prescription "dispense as written."

(e) Reimbursement

1. The pharmaceutical reimbursement formula for prescribed drugs (medicines by pharmacists) is the lesser of:

   (i) Average Wholesale Price* ("AWP") + $5.10 filling fee; (only the original manufacturer's NDC number should be used in determining AWP); or

   (ii) A negotiated contractual amount, that is less than or equal to the above reimbursements.

2. If the original manufacturer's NDC number is not provided on the bill, then the reimbursement shall be based on the AWP of the lowest priced therapeutically equivalent drug, calculated on a per unit basis.

3. Reimbursement to pharmacists or any third-party billing agency or other contracted agent of a pharmacy shall never exceed the maximum amount calculated by the pharmaceutical reimbursement formula for prescribed drugs. The usual and customary charge of the pharmacy for the medication must be included on each bill. A generic drug must be substituted for any brand name drug unless there is no pharmaceutical and bioequivalent drug available, or the prescribing physician indicates that substitutions are prohibited by including the words "Dispense as Written", or "No Substitution Allowed", along with a statement that the brand name drug is medically necessary. A prescribing physician may also prohibit substitution of generic drugs by oral or electronic communication to the pharmacist so long as the same content is conveyed that is required in a written prescription.

   (i) A bill or receipt for a prescription drug shall include all of the following:

      (I) When a brand name drug with a generic equivalent is dispensed, the brand name and the generic name shall be included unless the prescriber indicates "do not label."

      (II) If the drug has no brand name, the generic name, and the manufacturer's name or the supplier's name, shall be included, unless the prescriber indicates "do not label."

      (III) The strength, unless the prescriber indicates "do not label."

      (IV) The quantity dispensed.

      (V) The dosage.

      (VI) The name, address, and federal tax ID# of the pharmacy.

      (VII) The prescription number, if available.

      (VIII) The date dispensed.

(IX) The name of the prescriber.

(X) The name of the patient.

(XI) The price for which the drug was sold to the purchaser.

(XII) The original manufacturer's National Drug Code Number ("NDC Number"), if one is available.

(ii) The AWP shall be determined from the appropriate monthly publication. The monthly publication that shall be used for calculation shall be the same as the date of service. When an AWP is changed during the month, the provider shall still use the AWP from the monthly publication. The publications to be used are:

(I) Primary reference: Price Alert from Medi-Span, available online at the following web site: www.medi-span.com/Products/index.aspx?id+27.

(II) Secondary reference: (for drugs NOT found in PriceAlert) the Red Book from Medical Economics.

(iii) Dietary supplements such as minerals and vitamins shall not be reimbursable unless a specific compensable dietary deficiency has been clinically established in the injured employee as a result of the work-related injury.

(iv) A compounding fee not to exceed twenty-five Dollars ($25.00) per compound prescription may be charged if two (2) or more prescriptive drugs require compound preparation when sold by a hospital or pharmacy.

(v) If a workers' compensation claimant chooses a brand-name medicine when a generic medicine is available and allowed by the prescriber, the claimant shall pay the difference in price between the brand-name and generic medicine and shall not be eligible to subsequently recover this difference in cost from the employer or carrier.

(f) "Patent" or "Proprietary Preparations"

1. "Patent" or "Proprietary preparations," frequently called "over-the-counter drugs," are sometimes prescribed for a work-related injury or illness instead of a legend drug.

2. Generic substitution as discussed in (e) (2) above applies also to "over-the-counter" preparations.

3. Pharmacists must bill and be reimbursed their usual retail price for the "over-the-counter" drug(s).

4. The reimbursement formula does not apply to the "over-the-counter" drugs and no filling fee may be reimbursed.

(g) Dispensing Practitioner

(Rule 0800-02-18-.12, continued)

1. Dispensing practitioners shall be reimbursed the same as pharmacists for prescribed drugs (medicines), except such practitioners shall not receive a filling fee.

2. "Patent" or "proprietary preparations" frequently called "over-the-counter drugs," dispensed by a physician(s) from their office(s) to a patient during an office visit should be billed as follows:

   (i) Procedure Code 99070 must be used to bill for the "proprietary preparation" and the name of the preparation, dosage and package size must be listed as the descriptor.

   (ii) An invoice indicating the cost to the dispensing physician of the "proprietary preparation" must be submitted to the carrier with the HCFA 1500 Form or its successor form.

   (iii) Reimbursement is limited to the lesser of the provider's billed charge or 20 percent above the actual cost to the dispensing physician of the item.

(h) Repackaged or Compounded Products

All pharmaceutical bills submitted for repackaged or compounded products must include the NDC Number of the original manufacturer registered with the U.S. Food & Drug Administration or its authorized distributor's stock package used in the repackaging or compounding process. The reimbursement allowed shall be based on the current published manufacturer's AWP of the product or ingredient, calculated on a per unit basis, as of the date of dispensing. A repackaged or compounded NDC Number shall not be used and shall not be considered the original manufacturer's NDC Number. If the original manufacturer's NDC Number is not provided on the bill, then the reimbursement shall be based on the AWP of the lowest priced therapeutically equivalent drug, calculated on a per unit basis. The filling fees otherwise provided in these Rules shall be payable when applicable.

Authority: *T.C.A. §§ 50-6-102, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendments filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendment filed December 26, 2013; effective March 26, 2014. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.13 AMBULANCE SERVICES GUIDELINES.

(1) All non-emergency ground and air ambulance service provided to workers' compensation claimants shall be pre-certified. Emergency ground and air ambulance services may be retrospectively reviewed within three (3) business days.

(2) All ground and air ambulance services shall be medically necessary and appropriate. Documentation, trip sheets, shall be submitted with the bill that states the condition that indicates the necessity of the ground and air ambulance service provided. It should readily indicate the need for transport via this mode rather than another less expensive form of transportation. The service billed shall be supported by the documentation submitted for review.

(Rule 0800-02-18,-.13, continued)

(3) Billing shall be submitted to the employer or carrier on a properly completed HCFA 1500 form (or its successor form) by HCPCS code. Hospital based or owned providers must submit charges on a HCFA 1500 form (or its successor form) by HCPCS code.

(4) Reimbursement shall be based upon the lesser of the submitted charge or 150% of the current Medicare rate. To the extent permitted by federal law, the rates determined in the preceding sentence shall also apply to air ambulance services.

Authority: *T.C.A. §§ 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed March 12, 2012; to have been effective June 10, 2012. The Government Operations Committee filed a stay on May 7, 2012; new effective date August 9, 2012. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.14 CLINICAL PSYCHOLOGICAL SERVICE GUIDELINES.

(1) Reimbursement for psychological treatment services by any clinician other than a licensed psychiatrist shall be based on reasonableness and necessity and shall be reimbursed at 130%~~100%~~ of the participating fees prescribed in the Medicare RBRVS System fee schedule (Medicare Fee Schedule). Treatment by a licensed psychiatrist shall be reimbursed as any other evaluation and management medical treatment under this Medical Fee Schedule.

(2) Whenever such psychological treatment services exceed twelve (12) sessions/visits, then such treatment may be reviewed pursuant to the carrier's utilization review program in accordance with the procedures set forth in 0800-02-06 of the Bureau~~Division~~'s Utilization Review rules before further psychological treatment services may be certified for payment by the carrier. Failure to properly certify such services as prescribed herein shall result in the forfeiture of any payment for uncertified services. The initial utilization review of psychological treatment services after the first twelve (12) sessions/visits shall, if necessary and appropriate, certify an appropriate number of sessions/visits. If necessary, further subsequent utilization review shall be conducted to certify additional psychological treatment services as is appropriate.

Authority: *T.C.A. §§ 50-6-118, 50-6-125, 50-6-128, 50-6-204, 50-6-205, and 50-6-233 (Repl. 2005).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendments filed November 27, 2017; effective February 25, 2018.*

0800-02-18-.15 PENALTIES FOR VIOLATIONS OF FEE SCHEDULES.

(1) Except when a waiver is granted by the Bureau, providers shall not accept and employers shall not pay any amount for health care services provided for the treatment of a covered injury or illness or for any other services encompassed within the Rules for Medical Payments, Medical Fee Schedule Rules or the In-patient Hospital Fee Schedule Rules, when that amount exceeds the maximum allowable payment established by these Rules, unless otherwise provided by T.C.A. § 50-6-204. Any provider accepting and any employer or carrier paying an amount in excess of the Rules for Medical Payments, Medical Fee Schedule Rules or the In-patient Hospital Fee Schedule Rules, unless otherwise provided by T.C.A. § 50-6-204, shall be in violation of these Rules and may, at the Administrator's discretion, be subject to civil penalties whenever a pattern or practice of such activity is found, in accordance with the Uniform Rules of Procedure for Penalty Assessments and Hearing Contested Cases before the Bureau of Workers' Compensation Any provider reimbursed or employer paying an amount which is in excess of these Rules shall have a period of one hundred eighty (180) calendar days from the time of receipt/payment of such excessive payment in which to refund/recover the overpayment amount. Overpayments refunded/recovered within this time

(Rule 0800-02-18-.15, continued)

period shall not constitute a violation under these Rules. At the discretion of the Administrator, the Administrator's Designee, or an agency member appointed by the Administrator, such provider may also be reported to the appropriate certifying board, and may be subject to exclusion from participating in providing care under the Act. Any other violations of the Rules for Medical Payments, Medical Fee Schedule Rules, or the In-patient Hospital Fee Schedule Rules except as allowed by law shall subject the violator(s) to civil penalties in accordance with the Uniform Rules of Procedure for Penalty Assessments and Hearing Contested Cases before the Bureau of Workers' Compensation, at the discretion of the Administrator, Administrator's Designee, or an agency member appointed by the Administrator.

(2) A provider, employer or carrier found in violation of these Rules may request a contested case hearing by requesting such hearing in writing within fifteen (15) calendar days of issuance of a Notice of Violation and, if applicable, notice of assessment of civil penalties. All rights, duties, obligations, and procedures applicable under the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 et seq., are applicable under these Rules, including, but not limited to, the right to judicial review of any final departmental decision.

(3) The request for a hearing shall be made to the Bureau in writing by an employer, carrier or provider which has been notified of its violation of these Rules, and if applicable, assessed a civil penalty.

(4) Any request for a hearing shall be filed with the Bureau within fifteen (15) calendar days of the date of issuance of the Notice of Violation and, if applicable, of civil penalty by the Administrator. Failure to file a request for a hearing within fifteen (15) calendar days of the date of issuance of a Notice of Violation shall result in the decision of the Administrator, Administrator's Designee, or an agency member appointed by the Administrator being deemed a final order and not subject to further review.

(5) The Administrator, Administrator's Designee, or an agency member appointed by the Administrator shall have the authority to hear any matter as a contested case and determine if any civil penalty assessed should have been assessed. All procedural aspects set forth in the Bureau's Penalty Program Rules, Chapter 0800-02-13, shall apply and be followed in any such contested case hearing.

(6) Upon receipt of a timely filed request for a hearing, the Administrator shall issue a Notice of Hearing to all interested parties.

Authority: *T.C.A. §§ 50-6-102, 50-6-118, 50-6-125, 50-6-128, 50-6-204, 50-6-205, 50-6-226, 50-6-233 (Repl. 2005), and Public Chapters 282 & 289 (2013).* ***Administrative History:*** *Public necessity rule filed June 5, 2005; effective through November 27, 2005. Public necessity rule filed November 16, 2005; effective through April 30, 2006. Original rule filed February 3, 2006; effective April 19, 2006. Amendment filed June 12, 2009; effective August 26, 2009. Amendment filed December 26, 2013; effective March 26, 2014. Amendments filed November 27, 2017; effective February 25, 2018.*

NOTE: All references to the "Tennessee Workers' Compensation Act" or "Act" have been changed to "Tennessee Workers' Compensation Law" or "Law".

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Bureau of Workers' Compensation on 4/18/19 and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on November 21, 2018.

Rulemaking Hearing Conducted on January 17, 2019.

Date: April 19, 2019

Signature: Abbie Hudgens

Name of Officer: Abbie Hudgens

Title of Officer: Administrator, Bureau of Workers' Compensation

JANIE L. DORRIS
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY
MY COMMISSION EXPIRES 3-8-2022

Subscribed and sworn to before me on: 4/18/19

Notary Public Signature: Janie L Dorris

My commission expires on: 3/8/22

Agency/Board/Commission: Department of Labor & Workforce Development
Bureau of Workers' Compensation

Rule Chapter Number(s): 0800-02-18

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

6/7/2019
Date

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Filed with the Department of State on: 6/12/19

Effective on: 9/10/19

Tre Hargett
Secretary of State