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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:	Underground Storage Tanks and Solid Waste Disposal Control Board
Division:	Solid Waste Management
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Statement of Necessity:

On July 7, 2017, the United States Court of Appeals, District of Columbia Circuit, ruled that 40 CFR § 260.43(a)(4) (commonly referred to as Factor 4 of the “legitimacy test”) is unreasonable insofar as it applies to all hazardous secondary materials via § 261.2(g) (sham recycling definition) and rejected parts of the Verified Recycler Exclusion. The Underground Storage Tanks and Solid Waste Disposal Control Board (Board) adopted equivalent rules on December 2, 2015. These rules were filed with the Secretary of State on May 8, 2017, with an original effective date of August 7, 2017. In light of the Court’s opinion and order the Joint Government Operations Committee stayed these rules for 75 days. The Board voted to stay these rules for an additional 75 days. The new effective date for the rules is January 4, 2018. Prior to January 4, 2018, pursuant to Tenn. Code Ann. § 4-5-208(a)(2), the Board has adopted this emergency rule and filed the emergency rule with the Secretary of State on January 3, 2018, in order to delay the effective date of the rules specified in this rulemaking until July 2, 2018. The remainder of the amendments in the rulemaking filed with the Secretary of State on May 9, 2017, will become effective on January 4, 2018. It is also the intent of the Board to amend the delayed rules through the rulemaking hearing rules process so they will conform to the Court’s July 7, 2017, opinion and order.

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 Please make sure that ALL new rule and repealed rule numbers are listed in the chart below.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
0400-12-01	Hazardous Waste Management
Rule Number	Rule Title
0400-12-01-.01	Hazardous Waste Management System: General
0400-12-01-.02	Identification and Listing of Hazardous Waste

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 0400-12-01
Hazardous Waste Management

Amendments

Part 2 of subparagraph (b) of paragraph (4) of Rule 0400-12-01-.01 Hazardous Waste Management System: General is amended by deleting it in its entirety and substituting instead the following:

2. This part shall not be effective until July 2, 2018. In accordance with the standards and criteria in subparagraph (f) of this paragraph and the procedures in subparagraph (g) of this paragraph, the Commissioner may, on a case-by-case basis, issue a Certificate to Operate for a hazardous secondary material reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a Part B permit issued under Rule 0400-12-01-.07 or the interim status standards of Rule 0400-12-01-.05.

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-201 et seq.

Subparagraph (f) of paragraph (4) of Rule 0400-12-01-.01 Hazardous Waste Management System: General is amended by deleting it in its entirety and substituting instead the following:

- (f) This subparagraph shall not be effective until July 2, 2018. The Commissioner may issue a Certificate to Operate for a hazardous secondary material reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a Part B permit issued under Rule 0400-12-01-.07 or the interim status standards of Rule 0400-12-01-.05.
 1. The Commissioner's decision will be based on the following criteria:
 - (i) The reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to subparagraph (5)(d) of this rule and its hazardous secondary material acceptance plan;
 - (ii) The reclamation facility or intermediate facility must satisfy the financial assurance condition in subitem (1)(d)1(xxiv)(VI)VI of Rule 0400-12-01-.02;
 - (iii) The reclamation facility or intermediate facility must not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under Rule Chapter 0400-12-01 or RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;
 - (iv) The intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet emergency preparedness and response requirements under paragraph (13) of Rule 0400-12-01-.02;
 - (v) If residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals

will be managed in a manner that is protective of human health and the environment; and

- (vi) The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (i.e., releases that are not covered by a permit, such as a permit to discharge to water or air), which may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures, and must include consideration of potential cumulative risks from other nearby potential stressors.
2. To evaluate the criteria of subpart 1(vi) of this subparagraph, the Commissioner will require the petitioner to comply with subparts (i) and (ii) of this part.
- (i) Prior to applying for a Certificate to Operate, the petitioner must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous secondary material management activities.
 - (I) At the meeting, the petitioner must:
 - I. Post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses; and
 - II. Provide a community impact statement that includes the following:
 - A. A description of the hazardous secondary materials to be received at the facility, including quantities and methods of management;
 - B. A description of security procedures proposed for the facility;
 - C. Information on hazard prevention and preparedness, including a summary of the arrangements with local emergency authorities;
 - D. A description of procedures, structures or equipment used to prevent employee exposure, hazards during unloading, runoff from handling areas, and contamination of water supplies;
 - E. A description of traffic patterns, traffic volume and control, condition of access roads, and the adequacy of traffic control signals; and
 - F. A description of the facility location information relative to flood plain and seismic activity.
 - (II) The petitioner must submit documentation to the Commissioner of the public notices, the community impact statement, a summary of the meeting, along with the list of attendees and their addresses, and copies of any written comments or materials submitted at the meeting.
 - (III) The owner or operator must provide public notice of the community meeting at least thirty (30) days prior to the meeting.

- (IV) The public notice required by item (III) of this subpart must contain language approved by the Commissioner and published in a manner specified by the Commissioner.
- (ii) The petitioner must describe how the facility is designed, constructed, operated and maintained to ensure protection of human health and the environment. Protection of human health and the environment includes, but is not limited to:
 - (I) Prevention of any releases that may have adverse effects on human health or the environment due to migration of hazardous constituents in the ground water or subsurface environment, considering:
 - I. The volume and physical and chemical characteristics of the hazardous secondary material to be managed at the facility, including its potential for migration through soil, liners, or other containing structures;
 - II. The hydrologic and geologic characteristics of the management units at the facility and the surrounding area;
 - III. The existing quality of ground water, including other sources of contamination and their cumulative impact on the ground water;
 - IV. The quantity and direction of ground-water flow;
 - V. The proximity to and withdrawal rates of current and potential ground-water users;
 - VI. The patterns of land use in the region;
 - VII. The potential for deposition or migration of hazardous constituents into subsurface physical structures, and into the root zone of food-chain crops and other vegetation;
 - VIII. The potential for health risks caused by human exposure to hazardous constituents; and
 - IX. The potential for damage to domestic animals, wildlife, crops, vegetation, and physical structures caused by exposure to hazardous constituents.
 - (II) Prevention of any releases that may have adverse effects on human health or the environment due to migration of hazardous constituents in surface water, or wetlands, or on the soil surface considering:
 - I. The volume and physical and chemical characteristics of the hazardous secondary material to be managed at the facility;
 - II. The effectiveness and reliability of containing, confining, and collecting systems and structures in preventing migration;
 - III. The hydrologic characteristics of the facility and the surrounding area, including the topography of the land around the facility;
 - IV. The patterns of precipitation in the region;
 - V. The quantity, quality, and direction of ground-water flow;
 - VI. The proximity of the unit to surface waters;

- VII. The current and potential uses of nearby surface waters and any water quality standards established for those surface waters;
 - VIII. The existing quality of surface waters and surface soils, including other sources of contamination and their cumulative impact on surface waters and surface soils;
 - IX. The patterns of land use in the region;
 - X. The potential for health risks caused by human exposure to hazardous constituents; and
 - XI. The potential for damage to domestic animals, wildlife, crops, vegetation, and physical structures caused by exposure to hazardous constituents.
- (III) Prevention of any releases that may have adverse effects on human health or the environment due to migration of hazardous constituents in the air, considering:
- I. The volume and physical and chemical characteristics of the hazardous secondary materials to be managed at the facility, including its potential for the emission and dispersal of gases, aerosols and particulates;
 - II. The effectiveness and reliability of systems and structures to reduce or prevent emissions of hazardous constituents to the air;
 - III. The operating characteristics of the units managing hazardous secondary materials;
 - IV. The atmospheric, meteorologic, and topographic characteristics of the units to be managing hazardous secondary materials at the facility and the surrounding area;
 - V. The existing quality of the air, including other sources of contamination and their cumulative impact on the air;
 - VI. The potential for health risks caused by human exposure to hazardous constituents; and
 - VII. The potential for damage to domestic animals, wildlife, crops, vegetation, and physical structures caused by exposure to hazardous constituents.

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-201 et seq.

Subparagraph (g) of paragraph (4) of Rule 0400-12-01-.01 Hazardous Waste Management System: General is amended by deleting it in its entirety and substituting instead the following:

- (g) This subparagraph shall not be effective until July 2, 2018, in so far as it relates to the issuance of Certificates to Operate. Procedures for variances from classification as a solid waste, for issuing a Certificate to Operate for a hazardous secondary material reclamation facility or intermediate facility, for variances to be classified as a boiler, and for non-waste determinations [40 CFR 260.33]

The Commissioner will use the following procedures in evaluating applications for variances from classification as a waste, applications for obtaining a Certificate to Operate for a hazardous secondary material reclamation facility or intermediate facility, applications to classify particular

enclosed controlled flame combustion devices as boilers, and applications for non-waste determinations.

1. The applicant must apply to the Commissioner for the variance, the Certificate to Operate or non-waste determination. The application must address the relevant criteria contained in subparagraph (c), (d), (e) or (f) of this paragraph, as applicable.
2. The Commissioner will evaluate the application and make a tentative decision to grant or deny the application and shall notify the petitioner of this tentative decision. If the Commissioner makes a tentative decision to grant the petition, the Commissioner shall give public notice of such tentative decision for written public comment. The public notice shall be provided by the applicant as prepared and required by the Commissioner in a newspaper advertisement or radio broadcast in the locality where the recycler is located. The applicant shall provide proof of the completion of all notice requirements to the Commissioner within ten days following conclusion of the public notice procedures. The Commissioner will accept comment on the tentative decision for thirty (30) days, and may also hold a public hearing upon request or at his discretion. Notice of the public hearing shall be given by the applicant and prepared as required by the Commissioner. The Commissioner will issue a final decision after receipt of comments and after the hearing (if any).
3.
 - (i) Except for the change described in subpart (ii) of this part. in the event of a change in circumstances that affects how a hazardous secondary material meets the relevant criteria contained in subparagraph (c), (d), (e) or (f) of this paragraph upon which a variance, Certificate to Operate or non-waste determination has been based, the applicant must send a description of the change in circumstances to the Commissioner. The Commissioner may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance, Certificate to Operate, or non-waste determination or may require the facility to re-apply for the variance, Certificate to Operate or non-waste determination.
 - (ii) Any change made to the hazardous secondary material acceptance plan required under item (4)(d)1(xxiv)(VI)VIII of Rule 0400-12-01-.02 must be approved and the Certificate to Operate modified by the Commissioner after considering the applicable criteria of subparagraph (f) of this paragraph and following the procedures of this subparagraph prior to the change being implemented.
4. Variances, Certificates to Operate and non-waste determinations shall be effective for a fixed term not to exceed ten (10) years. No later than six (6) months prior to the end of this term, facilities must re-apply for a variance, Certificate to Operate, or non-waste determination. If a facility re-applies for a variance, Certificate to Operate, or non-waste determination within six (6) months, the facility may continue to operate under an expired variance, Certificate to Operate or non-waste determination until receiving a decision on the facility's re-application from the Commissioner.
5. Facilities receiving a variance, Certificate to Operate or non-waste determination must provide notification as required by subparagraph (5)(c) of this rule.

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-201 et seq.

Subparagraph (h) of paragraph (4) of Rule 0400-12-01-.01 Hazardous Waste Management System: General is amended by deleting it in its entirety and substituting instead the following:

(h) Causes for Termination of the Certificate to Operate

[This subparagraph shall not be effective until July 2, 2018.](#)

1. Failure of the owner or operator to comply with any condition of the Certificate to Operate;
2. The owner or operator's failure in the application or during the issuance process to disclose fully all relevant facts, or the owner or operator's misrepresentation of any relevant facts at any time;
3. A determination by the Commissioner that continuing the authorized activity endangers human health or the environment;
4. Failure of the owner or operator to timely pay the annual maintenance fees in accordance with Rule 0400-12-01-.08; or
5. At the request of the owner or operator, provided all hazardous secondary materials and residues have been removed to the satisfaction of the Commissioner.

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-201 et seq.

Subparagraph (h) of paragraph (4) of Rule 0400-12-01-.01 Hazardous Waste Management System: General is amended by deleting it in its entirety and substituting instead the following:

(i) Duty to Comply with the Certificate to Operate

This subparagraph shall not be effective until July 2, 2018.

1. The owner or operator of the hazardous secondary material reclamation or intermediate facility shall comply with the conditions of the Certificate to Operate as determined necessary by the Commissioner.
2. Failure to comply with the conditions of the Certificate to Operate issued by the Commissioner shall subject the owner or operator of the hazardous secondary material reclamation or intermediate facility to an enforcement action, including, if applicable, operating a hazardous waste treatment, storage or disposal facility without a permit.

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-201 et seq.

Subpart (iv) of part 1 of subparagraph (d) of paragraph (5) of Rule 0400-12-01-.01 Hazardous Waste Management System: General is amended by deleting it in its entirety and substituting instead the following:

(iv) This subpart shall not be effective until July 2, 2018, in so far as it is applied through part (1)(b)7 of Rule 0400-12-01-.02. The product of the recycling process must be comparable to a legitimate product or intermediate:

- (I) Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:
 - I. The product of the recycling process does not exhibit a hazardous characteristic (as defined in paragraph (3) of Rule 0400-12-01-.02) that analogous products do not exhibit, and
 - II. The concentrations of any hazardous constituents found in appendix VIII of paragraph (30) of Rule 0400-12-01-.02 that are in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

(II) Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

I. The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (e.g., commodity specification grades for common metals), or

(Note: For specialty products such as specialty batch chemicals or specialty metal alloys, customer specifications would be sufficient.)

II. The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (e.g., closed loop recycling).

(Note: There is no analogous product when the hazardous secondary material is recycled by being returned to the original production process or processes. Production process or processes includes those activities that tie directly into the manufacturing operation or those activities that are the primary operation at an establishment.)

(III) If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per item (I) or (II) of this subpart, the recycling still may be shown to be legitimate, if it meets the following specified requirements. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the product made using recycled material does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Commissioner of this activity using forms provided by the department.

(Note: To comply with the requirements of this subpart, a generator of the hazardous secondary material, product or intermediate may use its knowledge of the materials it recycles and of the recycling process to make legitimacy determinations.)

(Note: A person who meets the specific provisions included in 0400-12-01-.02(1)(b)3 Table 1, 0400-12-01-.02(1)(b)5, 0400-12-01-.02(1)(d)1(vi) through (xxii), 0400-12-01-.02(1)(f)1(ii)(III) and (IV), and 0400-12-01-.02(1)(f)1(iii)(I), are presumed to conduct legitimate recycling, except in those rare cases when it is necessary to document legitimacy in accordance with item 1(iv)(III) of this subparagraph. If, at any time, the Commissioner suspects that sham recycling may be occurring, in accordance with part (1)(b)6 of Rule 0400-12-01-.02, the Commissioner may require a person to demonstrate that the recycling in question is legitimate in accordance with this subparagraph.)

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-208

Subpart (xxiv) of part 1 of subparagraph (a) of paragraph (4) of Rule 0400-12-01-.02 Identification and Listing of Hazardous Waste is amended by deleting it in its entirety and substituting instead the following:

(xxiv) This subpart shall not be effective until July 2, 2018. Hazardous secondary material that is generated and then transferred to a verified reclamation facility, as defined in subparagraph (2)(a) of Rule 0400-12-01-.01, for the purpose of reclamation is not a solid waste, provided that:

- (I) The material is not speculatively accumulated, as defined in subparagraph (a)3(viii) of this paragraph;
- (II) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than ten (10) days at a transfer facility, as defined in subparagraph (2)(a) of Rule 0400-12-01-.01, and is packaged according to applicable Department of Transportation regulations at 49 CFR parts 173, 178, and 179 while in transport;
- (III) The material is not otherwise subject to material-specific management conditions under part 1 of this subparagraph when reclaimed, and it is not a spent lead-acid battery (see subparagraph (7)(a) of Rule 0400-12-01-.09 and subparagraph (1)(d) of Rule 0400-12-01-.12);
- (IV) The reclamation of the material is legitimate, as specified under subparagraph (5)(d) of Rule 0400-12-01-.01;
- (V) The hazardous secondary material generator satisfies all of the following conditions:
 - I. The material must be contained as defined in subparagraph (2)(a) of Rule 0400-12-01-.01. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of recycling. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste.
 - II. The hazardous secondary material generator must arrange for transport of hazardous secondary materials to a verified reclamation facility (or facilities), as defined in subparagraph (2)(a) of Rule 0400-12-01-.01, in the United States or to a reclamation facility where the management of the hazardous secondary materials is addressed under a Part B permit issued under Rule 0400-12-01-.07 or interim status standards under Rule 0400-12-01-.05 or, if not in Tennessee, under a RCRA Part B permit or interim status standards in another state. If the hazardous secondary material will be passing through an intermediate facility, the intermediate facility must be a verified intermediate facility, as defined in subparagraph (2)(a) of Rule 0400-12-01-.01, or the management of the hazardous secondary materials at that facility must be addressed under a Part B permit issued under Rule 0400-12-01-.07 or interim status standards under Rule 0400-12-01-.05, or, if not in Tennessee, under a RCRA Part B permit or interim status standards in another state, and the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator.
 - III. The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For

each shipment, these records must, at a minimum, contain the following information:

- A. Name of the transporter and date of the shipment;
 - B. Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent; and
 - C. The type and quantity of hazardous secondary material in the shipment.
- IV. The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt);
- V. The hazardous secondary material generator must comply with the emergency preparedness and response conditions in paragraph (13) of this rule.
- (VI) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and verified intermediate facilities, as defined in subparagraph (2)(a) of Rule 0400-12-01-.01, satisfy all of the following conditions:
- I. The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:
 - A. Name of the transporter and date of the shipment;
 - B. Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility which the hazardous secondary materials were received from;
 - C. The type and quantity of hazardous secondary material in the shipment; and
 - D. For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

- II. The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.
- III. The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials, within thirty (30) days of receipt. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).
- IV. The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An "analogous raw material" is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.
- V. Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to paragraph (3) of this rule, or if they themselves are specifically listed in paragraph (4) of this rule, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of Rules 0400-12-01-.01 through 0400-12-01-.10.
- VI. The reclaimer and intermediate facility have financial assurance as required under paragraph (8) of this rule,
- VII. The reclaimer and intermediate facility have been issued a Certificate to Operate under part (4)(b)2 of Rule 0400-12-01-.01 or have a Part B permit issued under Rule 0400-12-01-.07 or interim status standards under Rule 0400-12-01-.05 that address the management of the hazardous secondary materials;
- VIII. If not operating under a Part B permit issued under Rule 0400-12-01-.07 or interim status standards under Rule 0400-12-01-.05 that address the management of the hazardous secondary materials, the reclaimer and intermediate facility develops and maintains a hazardous secondary material acceptance plan. The reclaimer only accepts hazardous secondary materials for reclamation that comply with the hazardous waste acceptance plan as approved by the Commissioner under part (4)(b)2 of Rule 0400-12-01-.01; and

(VII) All persons claiming the exclusion under this subpart provide notification as required under subparagraph (5)(c) of Rule 0400-12-01-.01.

Authority: T.C.A. §§ 68-212-101 et seq. and 4-5-208

* 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)
Marty Calloway (Petroleum Business with at least 15 Underground Storage Tanks)					
Stacey Cothran (Solid/Hazardous Waste Management Industry)					
Kenneth L. Donaldson (Municipal Government)					
Dr. George Hyfantis, Jr. (Institution of Higher Learning)					
Richard "Ric" Morris (Single Facility with less than 5 Underground Storage Tanks)					
Alan M. Leiserson Environmental Interests					
Jared L. Lynn (Manufacturing experienced with Solid/Hazardous Waste)					
David Martin (Working in a field related to Agriculture)					
Beverly Philpot (Manufacturing experienced with Underground Storage Tanks/Hazardous Materials)					
DeAnne Redman (Petroleum Management Business)					
Mayor Howard Bradley (County Government)					
Mark Williams (Small Generator of Solid/Hazardous Materials representing Automotive Interests)					
Chuck Head Commissioner's Designee, Dept. of Environment and Conservation					
Jimmy West Commissioner's Designee, Dept. of Economic and Community Development					

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

Date: December 6, 2017

Signature: _____

Name of Officer: Jared L. Lynn

Title of Officer: Chairman

Subscribed and sworn to before me on: _____

Notary Public Signature: _____

My commission expires on: _____

Agency/Board/Commission: Underground Storage Tanks and Solid Waste Disposal Control Board

Rule Chapter Number(s): 0400-12-01

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

Date

Department of State Use Only

Filed with the Department of State on: _____

Effective for: _____ **days*

Effective through: _____

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

Tre Hargett
Secretary of State

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 Department does not anticipate an impact on local governments from this rulemaking.

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;

On July 7, 2017, the United States Court of Appeals, District of Columbia Circuit, issued an opinion and order which upheld in part and vacated in part the challenged agency rule. The Court ruled that 40 CFR § 260.43(a)(4) (commonly referred to as Factor 4 of the “legitimacy test”) is vacated insofar as it applies to all hazardous secondary materials via § 261.2(g) (sham recycling definition) and vacated parts of the Verified Recycler Exclusion. The Underground Storage Tanks and Solid Waste Disposal Control Board (Board) adopted equivalent rules on December 2, 2015. These rules were filed with the Secretary of State on May 8, 2017, with an original effective date of August 7, 2017. In light of the Court’s opinion and order the Joint Government Operations Committee stayed these rules for 75 days. The Board voted to stay these rules for an additional 75 days. The new effective date for the rules is January 4, 2018. Pursuant to Tenn. Code Ann. § 4-5-208(a)(2), the Board has adopted this emergency rule to delay the effective date of the rules specified in this rulemaking in order that the remainder of the amendments in the rulemaking filed with the Secretary of State on May 9, 2017, may become effective on January 4, 2018. It is the intent of the Board to amend the rules with the delayed effective date further through the rulemaking hearing rules process so they will conform to the Court’s July 7, 2017, opinion and order.

- (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;

These rules are being promulgated under the authority of Tenn. Code Ann. §§ 68-212-101 et seq. The federal requirements adopted are compiled in 40 CFR Parts 260 and 261.

- (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 generators and recyclers of hazardous waste and hazardous secondary materials are directly affected by this rulemaking.

- (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;

American Petroleum Institute v. EPA 862 F.3d 50 (D.C. Cir. 2017)

- (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 will be no fiscal impact resulting from this rulemaking.

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

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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;

Emily Urban
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

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

The Department is not aware of any additional relevant information requested by the committee.