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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
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Revision Type (check all that apply):

_X_ Amendment
___ New
___ Repeal

___ Content based on previous emergency rule filed on ______________
___ Content is identical to the emergency rule

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 Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below.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 https://sos.tn.gov/publications/services/rulemaking-guidelines.

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 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). Except as provided by T.C.A. § 69-3-106, persons who wish to conduct an activity that may impact a stream or wetland shall consider avoidance and minimization of such impacts.

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

(3) Additionally, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-108(b)(1), provides that it is unlawful for any person, except in accordance with the conditions of a valid permit, to carry out any activity that results in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. 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 that result in the alteration of the waters of the state. State permits for these activities are 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 applicable to 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. Permits issued pursuant to this chapter do not:

   (a) Authorize activities that require a National Pollutant Discharge Elimination System (NPDES) permit, a state operating permit, or an underground injection control permit;

   (b) Supersede any other local, state, or federal permit requirements;

   (c) Authorize activities that will cause a prohibited take of threatened or endangered species, unless such take is separately authorized by the applicable state or federal wildlife agency; or

   (d) Grant the permittee access to public or private property.

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

Rule 0400-40-07-.02 Exemptions is amended by deleting the rule in its entirety and substituting instead the following:

0400-40-07-.02 Exemptions.

(1) Management activities such as timber harvesting, beaver control, construction activities conducted outside the top of stream banks (e.g., directional boring), and stream crossings that only span the outside of the top stream banks, which do not alter or adversely affect the classified uses of waters of the state, are not subject to these requirements.

(2) Agriculture and forestry activities and the activities necessary to the conduct and operations thereof and lands devoted to the production of agricultural or forestry products are exempt from the requirements of the Act and these rules, unless there is a point source discharge from a discernible, confined, and discrete water conveyance, as provided in T.C.A. § 69-3-120(g).

(3) The Department of Agriculture provides guidance for development of best management practices (BMPs) for agriculture and forestry. One of the primary goals of these BMPs is the prevention of soil erosion and discharge of silt and sedimentation to streams. These BMPs should be followed. If silvicultural activities have polluted waters of the state as a result of a failure to use BMPs, the Commissioner is authorized to issue a stop work order under T.C.A. § 69-3-133.

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

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

Rule 0400-40-07-.03 Definitions is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.03 Definitions.

As used in this chapter and in any ARAP 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 to -148.

(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) “Agriculture” has the meaning established in T.C.A. § 1-3-105(a)(2).

(4) “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.

(5) “Aquatic Resource Alteration Permit” or “ARAP” means a permit issued pursuant to T.C.A. § 69-3-108 of the Act, that authorizes the alteration of properties of waters of the state that result from activities other than discharges of wastewater through a pipe, ditch, or other conveyance.

(6) “Artificial isolated wetland” means:

(a) A wetland formed in an area that would otherwise be upland as a result of prior human alterations such as drainage, fill, cropping, ditching, tile drainage, excavation, tire ruts, silviculture, or impoundment for which sufficient proof exists providing evidence that a wetland did not exist five years prior to the submission of a wetland resource inventory report; or

(b) A wetland that was intentionally constructed in an upland area for the purpose of wastewater treatment, stormwater management, or other engineered use, or was inadvertently created due to changes in surface hydrology from site development, and grading or as a result of a beaver dam within the five years prior to the submission of a wetland resource inventory report; and

(c) Does not include wetlands that serve as fish spawning areas or wetlands created as a result of mitigation requirements.

(7) “Best 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. BMPs include methods, measures, practices, and design and performance standards.

(8) “Certification” means an Aquatic Resource Alteration Permit under the Act, when required by § 401 of the federal Water Pollution Control Act, that certifies, either unconditionally or through imposition of terms under which the activity must be carried out, that the activity will comply with applicable provisions of §§ 301, 302, 303, 306, and 307 of the federal Water Pollution Control Act and Chapter 0400-40-01 of the rules of the

Board of Water Quality, Oil and Gas and the Department of Environment and Conservation and the Act.

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

(10) “Common plan of development” means a contiguous area where multiple separate and distinct aquatic alterations may be taking place at different times on different schedules under one common plan. The common plan of development or sale is broadly defined as any announcement or piece of documentation or physical demarcation indicating (construction, development, physical alteration) activities may occur on a specific plot.

(11) “Cumulative impacts” means the impact on resource values that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.

(12) “Department” means the Department of Environment and Conservation.

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

(14) “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.

(15) “Emergency” means a situation where life, public health, the environment, or substantive improvements to real property is in immediate danger.

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

(17) “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 Department.

(18) “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.

(19) “High-quality isolated wetland” means an isolated wetland that provides a high degree of ecologic, hydrologic, and biogeochemical functions, as measured by the department’s wetland resource assessment tool.

(20) “HUC” means the hydrologic unit code assigned by the United States Geological Survey.

(21) “Individual Permit” means a permit issued by the Department 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.

(22) “In-system mitigation” means 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 Department 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 alternation (i.e., Tennessee River, Cumberland River, Mississippi River).

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

(24) “Isolated wetland” means a wetland that does not have a continuous surface connection to a relatively permanent body of water that is connected to a traditional interstate navigable water, and, as such, is distinguishable from that body of water.

(25) “Low-quality isolated wetland” means an isolated wetland that provides only minimal ecologic, hydrologic, and biogenochemical functions, as measured by the department’s wetland resource assessment tool.

(26) “Minimal 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.

(27) “Mitigation” means 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.

(28) “Moderate-quality isolated wetland” means an isolated wetland that provides only modest ecologic, hydrologic, and biogeochemical functions as measured by the department’s wetland resource assessment tool.

(29) “Point of impact” means the number of distinct locations within a project where an activity results in an alteration of streams or wetlands. Impacts shall be considered a single point of impact when they are co-located or immediately adjacent and occur as part of the same permitted activity/permit type.

(30) “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.

(31) “Resource values” are 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.

(32) “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.

(33) “Sedimentation” or “Siltation” mean the process by which sediment is deposited in or by the waters of the state.

(34) “Stabilize” means the proper placing, grading, and/or covering of soil, rock, or earth to ensure their resistance to erosion, sliding, or other movement.

(35) “Stream” means a surface water that is not a wet weather conveyance.

(36) “Wetland” means:

(a) An area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions; and

(b) ~~Wetlands~~ A type of waters that are not wet weather conveyances, and generally include swamps, marshes, bogs, and similar areas.

(37) “Wet weather conveyances” are man-made or natural watercourses, including natural watercourses that have been modified by channelization, that flow only in direct response to precipitation runoff in their immediate locality, whose channels are at all times above the 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.

Terminology not specifically defined herein shall be defined in accordance with the Act and the rules adopted thereunder.

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

(b) There are two (2) types of ARAPs: Individual Permits 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 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 that requires the applicant to notify the Commissioner of the planned activity and receive a notice of coverage from the Commissioner prior to implementing the activity in accordance with the terms and conditions of the General Permit.

(c) 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. Army Corps of Engineers and therefore serve as a § 401 Certification. Persons need not file an application with the Commissioner if they are conducting an activity pursuant to a General Permit that does not require notice or approval, but must implement the planned activity in accordance with the terms and conditions of the General Permit.

1. Persons who desire to implement an activity pursuant to a General Permit that requires notice, or notice and prior approval, must submit the necessary documentation required by the General Permit prior to implementing the planned activity in accordance with the terms and conditions of the General Permit.

2. A person must file an application for an Individual Permit or for a § 401 Water Quality Certification with the Department, in accordance with paragraphs (3) and (5) of this rule, to implement any activity requiring an ARAP that is not authorized by a General Permit.

(d) A person applying for an ARAP expressly consents to entry by agents of the commissioner onto the subject property, other than dwelling places on that property, at all reasonable times for the purpose of conducting investigations, inspections, studies, or otherwise enforcing the Act. Such consent may be withdrawn by withdrawing the permit application, or if a permit has been issued, by surrendering the permit.

(2) General Permits.

(a) The Commissioner may 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, unless the General Permit requires compensatory mitigation in accordance with paragraph (7) of this rule. Except for General Permits described in subparagraph (d) of this paragraph, General Permits may authorize only in-system mitigation.

(b) General Permits may be issued for water withdrawals that cause no more than de minimis degradation. General Permits for water withdrawals shall include provisions required by subparagraph (5)(d) of this rule.

(c) 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, the Commissioner will provide notice. 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. The Department will distribute the public notice to interested persons who have requested the Department notify them of ARAP applications and by posting on the Tennessee Department of Environment and Conservation's (TDEC's) website. Interested persons may submit written comments, and request in writing a public hearing on the draft General Permit within 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.

(d) The alteration of a low-quality isolated wetland that is greater than one acre up to two acres in size, or of a moderate-quality isolated wetland that is greater than 0.25 acres up to two acres in size, shall be regulated by a General Permit. This General Permit may not impose any requirements related to riparian buffer, cumulative impact analysis, or antidegradation. A General Permit for isolated wetlands shall include compensatory mitigation requirements in accordance with part (7)(c)3 of this rule.

(3) Section 401 Water Quality Certification.

An applicant for a federal license or permit to conduct an activity that may result in a discharge to the navigable waters must first obtain a § 401 certification from the Department, except for the alteration of a wet weather conveyance as authorized and certified by T.C.A. § 69-3-108(q). 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 Department 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 Department 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 seeking public participation and comment on the planned activity. However, public notice is not required for an activity authorized by a General Permit because public notice is provided pursuant to paragraph (2) of this rule. Each completed application for an individual Permit or a § 401 Certification shall be subject to the public notice and participation requirements of subparagraph (b) of this paragraph with the following exceptions:

1. § 401 Certification.

The Department's procedure for issuing public notice for certification of an application for a federal license or permit pursuant to § 401 of the Clean Water Act for an activity that does not require an ARAP shall be a public notice issued by the Department. Such notice will describe the 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 streams or wetlands, that can be readily addressed, the Commissioner may utilize a 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 20 days after issuance. This permit shall be subject to all other provisions of subparagraph (b) of this paragraph. The remedial actions allowed shall be limited to those necessary to remedy the emergency.

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

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

2. Name, address, telephone number, and electronic mail address of the Department contact person;

3. A brief description of the proposed activity;

4. The location of the streams or wetlands impacted by the proposed activity;

5. The Department website at which additional information about the permit application can be found;

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

7. The procedure for requesting a public hearing; and

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

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

1. The Department will distribute the approved public notice to interested persons who have requested the Department notify them of ARAP applications and by posting on the TDEC website.

2. The Applicant shall distribute the approved public notice to the neighboring landowners by posting a sign within view of a public road in the vicinity of the proposed project site as specified by the Department. The sign shall contain those provisions as specified by the Department. The sign shall be of such size that is readily visible from the public road. Also, the sign shall be maintained for at least 30 days following distribution of the approved public notice.

3. The applicant shall provide certification to the Department 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 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 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. 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 that is not governed by a General Permit, 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.

(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.

(c) 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 mitigation sufficient to result in no overall net loss of state water resource values. 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 Department.

(d) An Individual Permit is required for water withdrawals that will or will likely result in alteration of the properties of the 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 that will or will likely result in an alteration of the properties of a stream or wetland, shall file an application with the Department that includes the following minimum information:

(i) Proposed withdrawal rates and volumes;

(ii) Proposed withdrawal schedule; and

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

2. Where a permit for water withdrawal is required, the Commissioner shall establish permit conditions which are protective of the 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 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 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. Cause shall include, but not be limited to the following:

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

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

3. Causing a condition of pollution;

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

5. A change in the Act or rules that substantively impacts the content of the permit;

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

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

(c) No activity may be authorized by the Commissioner unless any appreciable permanent loss of resource values associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource 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 an Individual Permit application, the Commissioner shall determine the loss of resource values from existing conditions associated with a proposed impact and the increase in resource values of any proposed mitigation and shall consider the following factors:

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

2. Direct loss of in-stream or wetland habitat due to the proposed activity;

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

4. Diminishment in species composition in any stream or wetland due to the proposed activity;

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

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

7. Hydrologic modifications resulting from the proposed activity;

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

9. Quality of stream or wetland proposed to be impacted;

10. Whether the 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 that has been identified by the Department as having contaminated sediments; and whether the activity will adversely affect species formally listed in State and federal lists of threatened or endangered species; and

11. Any other factors relevant under the Act.

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

(e) The Department will consider cumulative impacts when evaluating the need for compensatory mitigation as set out in this subparagraph.

1. Multiple aquatic alterations on a construction site, including adjacent sites that are part of a common plan of development or sale, conducted within a five-year period will be evaluated as a whole.

2. Multiple aquatic alterations associated with a linear project will be evaluated as a whole.

3. Multiple aquatic alterations described in parts 1 or 2 of this subparagraph that cumulatively exceed the threshold for General Permit coverage may require compensatory mitigation in accordance with paragraph 7 of this rule, taking into account any compensatory mitigation required by the General Permit. Multiple stream alterations will be considered within the same stream segment (Waterbody ID). Multiple wetland alterations will be considered within the same HUC 12 subwatershed.

4. Impacts to isolated wetlands and artificial isolated wetlands shall not be considered as part of any cumulative impact analysis.

(7) Mitigation.

(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 that results in no overall net loss of resource values from existing conditions, as provided by this paragraph. 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 Department 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 Department, 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. Permittee-responsible mitigation cannot be authorized through a General Permit.

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 Department 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 Department 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 Department may apply a multiplier based on subparts (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 Department 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. Except as provided in part 3 of this subparagraph, 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 Department'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.

3. For isolated wetlands:

(i) No mitigation is required for a low-quality isolated wetland up to one acre in size, for a moderate-quality isolated wetland up to 0.25 acres in size, or for an artificial isolated wetland of any size.

(ii) General Permits for the alteration of a low-quality isolated wetland shall require compensatory mitigation for an area greater than one acre up to two acres in size at a 1:1 ratio.

(iii) General Permits for the alternation of a moderate-quality isolated wetland shall require compensatory mitigation at a 1:1 ratio for the acreage greater than 0.25 acres up to one acre, and at a 2:1 ratio for the acreage greater than one acre up to two acres.

(iv) Compensatory mitigation for all other isolated wetlands shall be required at the ratios established in part 2 of this subparagraph.

(v) Existing onsite permanent stormwater control measures must be accounted for when determining the amount of mitigation required for alteration to any isolated wetland where mitigation is required.

(8) Duration and Renewal of Permits.

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

(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 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 90 days prior to the expiration date.

(c) For 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 90 days prior to its expiration date. If an application for permit renewal does not fall within subparagraph (4)(a)3 of this rule, the Commissioner shall follow the procedures for public notice and participation detailed in paragraph (4) of this rule, regarding each application for renewal of the permit.

(9) Permit Appeals.

(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 Record of Attendance Card or other method as determined by the Department.

(d) The basis for the appeal for aggrieved persons may only include issues that:

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) 1. 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 Department'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.

2. Appeal petitions should be filed by electronic mail at TDEC.Appeals@tn.gov. Persons filing an appeal by electronic mail to this address do not need to send a paper copy. Although filing by electronic mail is strongly encouraged, appeals may also be filed by mail or delivery

to the Department, c/o Office of General Counsel, Davy Crockett Tower, 5th Floor, 500 James Robertson Parkway, Nashville, TN 37243.

(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.

Authority: T.C.A. §§ 4-5-201 et seq. and 69-3-101 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)					
Elaine Boyd (Commissioner's Designee, Department of Environment and Conservation)					
Mayor Kevin C. Davis (Counties)					
Dodd Galbreath (Environmental Interests)					
Brent Galloway (Oil or Gas Property Owner)					
Amanda Goff (Commissioner's Designee, Department of Health)					
Sam Marshall (Commissioner's Designee, Department of Agriculture)					
Frank McGinley (Agricultural Interests)					
John Schwartz (Public-at-large)					
Neal Whitten (Manufacturing Industry)					
Terry Wimberley (Municipalities)					
Vacant (Small Generator of Water Pollution representing Automotive Interests)					

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 06/16/2026, 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: 02/06/2026

Rulemaking Hearing(s) Conducted on: (add more dates). 04/07/2026

Date: ______________________

Signature: ______________________

Name of Officer: ______________________

Title of Officer: ______________________

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.

____
Jonathan Skrmetti
Attorney General and Reporter

____
Date

Department of State Use Only

Filed with the Department of State on: ______________________

Effective on: ______________________

____
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.

This rulemaking conforms the ARAP rules to Tennessee Code Annotated section 69-3-106 (isolated wetlands), clarifies jurisdictional limitations on ARAPs, addresses long-standing confusion concerning cumulative impact analysis, eliminates the requirement to publish public notice in a newspaper, and makes other minor changes. The Board of Water Quality, Oil, and Gas (Board) received comments from mitigation providers, NGOs, TVA, TDOT, and the TN Chamber of Commerce. These comments largely focus on exemptions and changes to cumulative and secondary impacts, with NGOs and mitigation providers requesting increased regulation and regulated entities agreeing with the proposed changes.

Rule 0400-40-07-.01 General

Comment 1: The draft rule proposed amending paragraph (1) to replace "a stream or wetland" with "waters of the state." A commenter suggests replacing the term "stream or wetland" with "waters of the state" consistently throughout the rule.

Response 1: This change was proposed because for some isolated wetlands, the new statute does not require avoidance and minimization. However, the term "waters of the state" includes groundwater and water flowing in wet weather conveyances. These waters of the state are not regulated under the ARAP program, so the term "stream or wetland" is appropriate. The final rule provides, "Except as provided by T.C.A. § 69-3-106, persons who wish to conduct an activity that may impact a stream or wetland…" to more accurately reflect the statutory change.

Rule 0400-40-07-.02 Exemptions

Comment 2: Several commenters opposed changing Rule 0400-40-07.02(1) to exempt activities "outside the top of stream banks" or "outside of the top stream banks" such as directional boring and certain span bridges. Commenters cited stormwater buffers as an example of appropriate regulation outside of stream banks.

Response 2: This amendment aligns with the scope of the ARAP requirement under the Water Quality Control Act of 1977 (WQCA), which does not extend to regulation of all physical changes in a watershed that have the potential to affect water quality. With respect to aquatic alterations, the WQCA does not govern activities that occur outside of the stream channel and immediate bank structure of a stream.

Directional borings that limit the surface disturbance to entry and exit points outside the stream banks do not constitute a physical alteration of the stream channel or banks within the scope of the WQCA's ARAP requirement. Similarly, a span bridge that does not require any physical alteration to the channel or banks to construct footers does not constitute a physical alteration subject to the WQCA. Both exemptions conform the rules to the WQCA.

The regulation of physical alterations to streams and wetlands is not analogous to National Pollutant Discharge Elimination System (NPDES) stormwater regulation, where vegetated buffers are required to reduce pollutant loading to the maximum extent practicable.

Comment 3: Major infrastructure projects like pipelines and bridges should not be exempt from ARAP regulations. It is critical that companies which undertake activities like directional boring be subject to state water permits that contain restrictions on when and where they can drill and blast, as well as provisions requiring that they develop and utilize containment and clean-up plans when accidents inevitably occur. It is also critical that these companies be subject to mandatory reporting requirements so that the state is able to monitor incidents, including inadvertent discharges, promptly and effectively.

Response 3: The amendments do not categorically exempt major infrastructure projects from ARAP regulation. Rather, if the activity occurs outside the bank of a stream or outside of a wetland, it is outside of ARAP jurisdiction. However, such impacts may separately require NPDES stormwater regulation. Further, if such an activity inadvertently alters a stream or wetland or causes pollution, it would be subject to enforcement rather than permitting.

Comment 4: Several commenters expressed appreciation for the clarification that construction activities outside the top of stream banks and crossings that completely span the channel are exempt. One of these commenters requested clarification on whether an ARAP is still required for such spans if the stream is classified as an "Exceptional Tennessee Water."

Response 4: The exemption applies to the activity regardless of the waterbody classification.

Rule 0400-40-07-.03 Definitions

Comment 5: A commenter requests a definition of the term “common plan of development.”

Response 5: The following definition is adapted from the context of construction stormwater permitting, and has been added to the final rule:

> “Common plan of development” means a contiguous area where multiple separate and distinct aquatic alterations may be taking place at different times on different schedules under one common plan. The common plan of development or sale is broadly defined as any announcement or piece of documentation or physical demarcation indicating (construction, development, physical alteration) activities may occur on a specific plot.

Comment 6: Several commenters opposed removing the definition of “cumulative impacts.”

Response 6: The current definition of “cumulative impacts” has been retained with a non-substantive edit.

Comment 7: A commenter suggested that if the Board chooses to update its current definition of cumulative impacts, it should adopt the following definition:

> “Cumulative impacts” means the combined, compounding, or incremental impacts on resource values from repeated, related, or interacting activities when considered with past, present, and reasonably foreseeable future activities.
>
> (a) Cumulative impacts to surface waters shall be considered within the same stream segment (Waterbody ID) as well as the immediately upstream and downstream stream segments and any tributary stream segment that discharges into the same stream segment and shall include consideration of impacts to hydrologically connected wetlands and groundwater.
>
> (b) Cumulative impacts to wetlands shall be considered within the same Waterbody ID as well as the immediately upstream and downstream Waterbody IDs and shall include consideration of impacts to hydrologically connected surface waters and groundwater, but impacts to isolated wetlands and artificial isolated wetlands are excluded from this definition.

Response 7: The current definition of “cumulative impacts” has been retained.

Comment 8: A commenter questioned deletion of the definition of ground water. Ground water constitutes waters of the state subject to the protections and requirements of the WQCA. See Tenn. Code Ann. § 69-3-103(48).

Response 8: The commenter is correct that ground water constitutes waters of the state. However, ARAPs do not regulate alterations to ground water and the defined term is not used in the rule chapter, except in the definition of “wetland” and “wet weather conveyance,” both of which are defined by statute.

Comment 9: Several commenters requested a definition of “in-system mitigation.” One commenter requested that the definition be based on federal mitigation service areas.

Response 9: This term is part of the definition of de minimis degradation as applied in the Antidegradation Statement. “In-system mitigation” is defined in Rule 0400-40-03-.04(12) as:

> 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).

This definition has been added to the final ARAP rule, but substituting “Department” for “Division.” This definition recognizes that some federal mitigation service areas span more than one eight-digit HUC.

Comment 10: A commenter recommended defining "points of impact" as "the number of distinct locations within a project where an activity results in an alteration of waters of the state. Impacts shall be considered a single point of impact when they are co-located or immediately adjacent and occur as part of the same permitted activity/permit type."

Response 10: A modified version of this definition has been added.

Comment 11: A commenter requested adding the following definition:

> "Secondary impacts" means reasonably foreseeable indirect impacts on resource values that are caused by or result from an activity or the direct impacts of that activity, including impacts that occur later in time or at a different location than the activity.

Response 11: The definition has not been adopted. The scope of the ARAP program does not extend to permitting all possible ancillary impacts.

Rule 0400-40-07-.04 – Permits

Comment 12: A commenter asserts that Rule 0400-40-07-.04(1)(d) regarding consent to entry is overly intrusive, especially for activities that do not require notification. The commenter suggests limiting this authority to responding to reports of specific violations unless a search warrant is obtained.

Response 12: Consent is a well-recognized exception to the search warrant requirement. Applying for a permit requires the applicant to agree to the Commissioner's statutory authorities, which include Tennessee Code Annotated section 69-3-107(6) with respect to property access. The rule incorporates statutory limitations ("at all reasonable times" and "other than dwelling places") and is limited to enforcing the WQCA. The Commissioner's agents must be able to inspect permitted sites to evaluate compliance regardless of whether a violation has been reported. However, the final rule deletes the reference to no-notice General Permits, and provides that consent can be withdrawn by withdrawing the permit application, or if a permit has been issued, by surrendering the permit.

Comment 13: Rule 0400-40-07-.04(2)(a) incorrectly references subparagraph (c) of this paragraph. That should be subparagraph (d).

Response 13: The commenter is correct and this change has been made.

Comment 14: Rule 0400-40-07-.04(2)(a) limits General Permits to "in-system mitigation." Because in-system mitigation is often unavailable, the rule should allow for an "outside-system" option if the applicant can demonstrate that in-system mitigation is not feasible.

Response 14: Under the Antidegradation Statement, Rule 0400-40-03-.06, an activity that results in greater than de minimis degradation requires public notice, comment, opportunity for a hearing, and in some situations a demonstration of economic or social necessity in addition to a demonstration of a lack of practicable alternatives. The Antidegradation Statement is required by federal law. 40 C.F.R. § 131.12. Obtaining coverage under a General Permit does not allow for compliance with the Antidegradation Statement for activities that result in greater than de minimis degradation.

By definition, habitat alterations that either do not require mitigation or that provide in-system mitigation constitute de minimis degradation. Rule 0400-40-03-.04(4)(b). Therefore, General ARAPs that require mitigation must require in-system mitigation.

Out-of-system mitigation is an option, but it requires an Individual Permit.

Comment 15: A commenter suggests amending Rule 0400-40-07-.04(2)(b) to reference parts 1 and 2 of subparagraph (5)(d).

Response 15: Subparagraph 5(d) includes only parts 1 and 2, so the proposed change is not necessary.

Comment 16: Regarding Rule 0400-40-07-.04(2)(c), the fundamental purpose of a General Permit is to provide a streamlined authorization for common, de minimis alterations. Allowing for a public hearing on General Permit coverage is contradictory to this goal and creates unnecessary delays. A commenter recommends removing the public hearing option for activities covered by a General Permit.

Response 16: This rule does not require a public hearing (or any other form of public notice or comment) to issue coverage under a General Permit. See Rule 0400-40-07-.04(4)(a) ("public notice is not required for an activity authorized by a General Permit…"). Rather, this rule refers to the issuance of a General Permit to cover a category of activities.

Comment 17: A commenter recommends the bolded language for Rule 0400-40-07-.04(2)(d):

> The General Permit **for low-and moderate-quality isolated wetlands** may not impose any requirements related to riparian buffer, cumulative impact analysis, or antidegradation.

Response 17: The second sentence of this rule has been changed to refer to "This" General Permit, referencing the previous sentence that correctly states the scope of the statutory prohibition, including size limits.

Comment 18: A commenter suggests that it would be beneficial to clarify that low quality isolated wetlands less than 1 acre and moderate quality isolated wetlands less than 0.25 acre do not require notice or permit.

Response 18: The ARAP rules govern permits, not activities that are exempt from permits. This exemption is established by Tennessee Code Annotated section 69-3-106, and does not need to be restated in permit rules.

Comment 19: With respect to Rule 0400-40-07-.04(2) for General Permits, a commenter requested that the rule explicitly provide that "permit stacking" is not allowable, by adding the following language:

> While the Commissioner may issue general permits for alterations to waters of the state for categories of impacts that are similar in nature, multiple general permits may not be issued for multiple categories of impacts. If multiple categories of impacts are required for completion of a project, those impacts may only be covered by an Individual Permit. Additionally, for single categories of impacts that may be covered by one general permit, the applicable general permit may limit the number of points of impact.

Response 19: The requested language conflicts with statutory requirements for small low- and moderate-quality isolated wetlands, which do not allow consideration of cumulative impacts. Further, the Board does not agree with a blanket prohibition on using multiple General Permits on the same site. For example, multiple temporary alterations that do not result in permanent resource loss may be appropriate under General Permits.

Comment 20: A commenter requested amending Rule 0400-40-07-.04(3) to remove the public notice requirement for section 401 certifications for impacted resources that require federal permitting but meet the terms and conditions of state regulations without notice or a general or individual ARAP (e.g., wet weather conveyances).

Response 20: Alterations to wet weather conveyances are permitted by statute and do not require ARAPs. Tenn. Code Ann. § 69-3-108(q). To provide further clarification, the following language has been added to the end of the first sentence of Rule 0400-40-07-.04(3): ", except for the alteration of a wet weather conveyance as authorized and certified by T.C.A. § 69-3-108(q)."

Comment 21: TDOT supports the removal of the requirement to post public notices in local newspapers from Rule 0400-40-07-.04(4)(d)2. As the prevalence of locally circulating newspapers decreases this requirement has become more burdensome and has cost TDOT both time and expense that could be better utilized serving the public elsewhere.

Response 21: The Board agrees. In the modern communications environment, the effectiveness of and need for newspaper notice has become questionable, and does not merit the considerable expense. Very few members of the public learn about a permit through a newspaper notice.

Comment 22: A commenter recommends adding the bolded language to Rule 0400-40-07-.04(5):

> (a) …. **All activities that are functionally interconnected, geographically related, or reasonably foreseeable as part of the overall activity shall be included within a single permit application.**
>
> ….

(c) The applicant shall describe the proposed project including **all activities that will be conducted as part of an entire or complete project, and** the use of technical terms defined in Rule 0400-40-07-.03 where relevant.

Response 22: While the Board appreciates the intent behind this suggested language, the proposal cannot be practically implemented. In many cases an applicant legitimately does not know "all activities that will be conducted," or what the "entire or complete project" will be at the time of application. A common example is a city or county proposing an industrial park. The intent of the applicant in this case is to prepare a large site to attract potential industries, whose specific lot needs are unknown in advance. In many subdivisions, the development proceeds in "phases," which may occur at unknown intervals, sometimes years apart. Economic variables may dictate significant changes in subsequent phases from the original plans. In some cases the later phases may never be completed.

Comment 23: A commenter requests the Board take steps to better understand and evaluate the impacts that adjacent and upland activities can have on surface waters when issuing ARAPs for major construction activities, and requests the following subparagraph be added to Rule 0400-40-07-.04(5):

() The applicant shall submit a description of all activities, including all activities that will be conducted as part of an entire or complete project, that will occur in upland areas and that may foreseeably result in a discharge to state waters, including activities in or related to (i) slopes with a grade greater than 10 percent; (ii) karst geology features, including all known sinkholes and underground springs; (iii) seasonal high water tables; and (iv) areas with highly erodible soils, low pH, and acid sulfate soils. Upland activities within 300 feet of the ordinary high-water mark of surface waters are presumed to foreseeably result in a discharge to state waters unless the applicant demonstrates otherwise.

Response 23: The Board declines to adopt the requested subparagraph, which exceeds statutory authority for the ARAP program. This comment relates to stormwater discharges, which are separately regulated through the NPDES program and, relative to sinkholes, through the underground injection control program.

Comment 24: Several commenters opposed the deletion of "secondary impacts" from Rule 0400-40-07-.04(6)(c)(6). Federal laws like the Clean Water Act and the National Environmental Policy Act ("NEPA") both require evaluation of indirect and secondary effects to natural systems. Tennessee should not now depart from its past precedent nor misalign itself with federal practice.

Response 24: Tennessee is not subject to NEPA analysis when issuing ARAPs. Further, these rules do not limit the scope of Clean Water Act permitting. Secondary impacts may be regulated through the NPDES permits, including stormwater permits, but under the ARAP program only direct physical alterations to an aquatic resource are regulated.

Comment 25: Several commenters opposed changes to Rules 0400-40-07-.04(6)(c)(6) and 0400-40-07.04(6)(e) they assert result in the deletion of consideration of cumulative impacts.

Response 25: The rule does not delete consideration of cumulative impacts, but instead moves it to a new subparagraph and provides clear directions for implementation. While some changes to cumulative impact analysis are required by recent wetland legislation, overall this rule reflects that evaluation of cumulative impacts must have reasonable limits. Cumulative impact review cannot be extended indefinitely back through time, nor can it hold adjacent or future landowners accountable for the actions of others. Rule 0400-40-07.04(6)(e) reflects an appropriate, balanced, and consistent approach to consideration of cumulative impacts in aquatic resource permitting.

Comment 26: The proposal to add Rule 0400-40-07-.04(6)(e) takes it upon itself to create new parameters for cumulative impacts, including cumulative impacts for streams (which have not been changed by statute). This change is far outside the scope of recent legislation and should not be adopted.
Response 26: This rulemaking is not limited to addressing recent wetland legislation. Moreover, this change is consistent with the Wetlands Report: Stakeholder Engagement & Commissioner Recommendations (September 2024). Specifically, Commissioner Recommendation 7 provides:

Amend the ARAP rules to clarify how consideration of cumulative impacts applies to permitting determinations. Change the ARAP rules to clearly establish when, how, and on what scale consideration of cumulative impacts applies to permitting decisions.

This recommendation was not limited to wetlands, and was made in response to numerous stakeholder comments both in that process and more generally. The new rule reflects the need to provide clarity about how to address cumulative impacts in the ARAP program.

Comment 27: The language in Rule 0400-40-07-.04(6)(e) does not clearly state how TDEC expects impacts to be cumulated. Language regarding cumulative impacts for linear and non-linear projects already exists in a more succinct state in the General ARAP for Minor Stream Crossings. It is recommended that the General ARAP language be replicated here.

Response 27: While the referenced General Permit language applies well to minor stream crossing activities, the more general language of this rule is broadly applicable to all project types.

Comment 28: Rule 0400-40-07-.04(7)(a)2 excludes permittee-responsible mitigation as an option for General Permits. While we recognize the administrative burden of monitoring such sites, this option should not be eliminated entirely. We suggest allowing permittee-responsible mitigation for General Permits in cases where the applicant can demonstrate it is appropriate or that mitigation banks or in-lieu fee programs are unavailable.

Response 28: Permittee-responsible mitigation is allowable, but only through an Individual Permit. This type of mitigation is site-specific and requires in-depth review and long-term monitoring that can only be provided through an Individual Permit.

Comment 29: A commenter requested addition of the following to Rule 0400-40-07-.04(7)(b):

> The Division allows for the placement of clean rock fill material within 25 linear feet upstream and 25 linear feet downstream of existing or proposed structures. For existing structures this can be done through a no-notification General Permit. In both cases applicants are not required to provide compensatory mitigation if the placement of rock fill does not exceed a cumulative total of 50 linear feet (25 feet on each end), regardless of the structure length.

This language is found in the TN SQT Manual and in the TN Stream Mitigation Guidelines; however, it is not found in the language of any General ARAP nor is it in rule. Since TDEC has stated that this is accepted policy it should be placed in rule.

Response 29: This language is specific to road crossing and maintenance activities, and is not necessary for inclusion in the ARAP rules, which apply more broadly. However, the concept can be applied to permits as appropriate.

Comment 30: Rule 0400-40-07-.04(7)(c)3(v) is unclear regarding the link between Permanent Stormwater Control Measures (SCMs) and mitigation for isolated wetlands. It appears to be stating that existing SCMs will offset mitigation needs for isolated wetlands? However; proposed SCMs are not mentioned, so it would be assumed that these could not be used to offset mitigation needs. Why is this the case?

Response 30: The language applies only to isolated wetlands and is taken directly from the isolated wetlands statute. The statute requires the Commissioner to consider permanent SCMs on a site to offset some isolated wetland functions (infiltration, pollutant filtration, flood storage, etc); some SCM designs could potentially reduce isolated wetlands mitigation requirements at a site, to be determined on a case-by-case basis. More information about SCMs can be found in Rule 0400-40-05-.15 relative to NPDES permits for municipal separate storm sewer systems.

Comment 31: A commenter suggests amending Rule 0400-40-07-.04(7) to add a requirement for proof of credit purchase (or a credit reservation and payment schedule, as applicable) prior to any authorized impacts occurring. This process needs to ensure that compensatory mitigation is not speculative.

Response 31: Both the mitigation rule and the permits require mitigation. If the required mitigation is not provided, then the permittee is in violation and the Commissioner may take enforcement action. The proposed rule change is overly restrictive.

Comment 32: A commenter objects to Rule 0400-40-07-.04(7)(c)3(vi), which states that "implementation of this subparagraph ensures no overall net loss of resource values from existing conditions as established by statute." Although the new mitigation requirements in that subsection are mandated by recently enacted legislation, the

proposed language stating that those new mitigation requirements achieve no overall net loss of resource values is not.

Response 32: When the General Assembly adopted the wetland amendments, it effectively established that compliance with the new law does not result in pollution. A contrary interpretation would result in a conflict of laws between Tennessee Code Annotated sections 69-3-106 and 69-3-108(g)(2), the latter of which prohibits the Commissioner from issuing a permit for an activity that would cause a condition of pollution either by itself or in combination with others. However, in response to this comment, the final rule does not adopt Rule 0400-40-07-.04(7)(c)3(vi). Instead, the first sentence of Rule 0400-40-07-.04(7)(a) is amended to add "as provided by this paragraph" after "no overall net loss of resource values from existing conditions" to clarify that part (7)(c)3 complies with the no net loss requirement.

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 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 rule being proposed that would bear the cost of or directly benefit from the rule being proposed.

Small businesses that develop property are expected to benefit from this rulemaking. It is difficult to estimate how many small businesses obtain ARAPs because many applicants are site-specific subsidiaries of larger development entities.

(2) The projected reporting, recordkeeping and other administrative costs required for compliance with the rule being proposed, including the type of professional skills necessary for preparation of the report or record.

This rule does not impose new compliance costs. Consistent with the statute, the rule reduces the scope of wetlands subject to permitting requirements.

(3) A statement of the probable effect on impacted small businesses and consumers.

Consistent with the statute, the rule reduces the scope of wetlands subject to permitting requirements.

(4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the rule being proposed that may exist, and to what extent the alternative means might be less burdensome to small business.

This rule reduces the scope of regulation while maintaining important environmental protections. The Board is not aware of a less burdensome method to achieve the purpose and objectives of the rule.

(5) A comparison of the rule being proposed with any federal or state counterparts.

The ARAP program is generally analogous to the U.S. Army Corps of Engineers Clean Water Act Section 404 program, except that the latter is limited to waters of the United States.

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

The Water Quality Control Act of 1977 requires that any person obtain a permit prior to altering the properties of waters of the state. The rule cannot exempt small businesses from this statutory requirement.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228, “On any rule and regulation proposed to be promulgated, the proposing agency shall state in a simple declarative sentence, without additional comments on the merits or the policy of the rule or regulation, whether the rule or regulation may have a projected financial impact on local governments. The statement shall describe the financial impact in terms of increase in expenditures or decrease in revenues.”

The rule will not result in an increase in expenditures or decrease in revenues for 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 rulemaking updates the Aquatic Resource Alteration Permit (ARAP) rules to conform to Public Chapter 437 (2025), which amended the Water Quality Control Act of 1977 with respect to regulation of isolated wetlands.

In addition, this rulemaking:

- Clarifies the effect of ARAPs with respect to other laws and property rights;
- Clarifies ARAP exemptions;
- Changes references from the Division of Water Resources to the Department of Environment and Conservation (Department) because the new Division of Mineral and Geologic Resources also issues ARAPs;
- Specifies that applying for an ARAP constitutes consent for Department staff to enter the property as provided by statute;
- Specifies how the Department evaluates cumulative impacts;
- Details where to file appeals; and
- Edits the rule for clarity.

(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 401 of the Clean Water Act, 33 U.S.C. § 1341, requires state certification that discharges to waters of the United States will not violate state water quality standards. Tennessee Code Annotated section 69-3-108(b)(1) requires permits to alter the properties of waters of the state.

(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;

TDOT, TVA, and the Tennessee Chamber of Commerce and Industry submitted comments generally supporting adoption of the rule. Environmental NGOs and mitigation bankers submitted comments opposing changes to exempt activities and cumulative and secondary impacts.

(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;

No opinions of the attorney general and reporter or of a court directly relate to the rule.

(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 rule is expected to have a minimal impact on state and local government revenues and expenditures.

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

Eddie Gordon, Division of Water Resources
Stephanie Durman, 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;

Alli F. Williamson
Legislative Director
Commissioner's Office

(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

Commissioner's Office
Tennessee Department of Environment and Conservation
Davy Crockett Tower, Floor 5
500 James Robertson Parkway
Nashville, Tennessee 37243
(629) 401-9485
Alli.F.Williamson@tn.gov

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

(1) A description of the action proposed, the purpose of the action, the legal authority for the action and the plan for implementing the action.

This rulemaking updates the Aquatic Resource Alteration Permit (ARAP) rules to conform to Public Chapter 437 (2025), which amended the Water Quality Control Act of 1977 with respect to regulation of isolated wetlands.

In addition, this rulemaking:

- Clarifies the effect of ARAPs with respect to other laws and property rights;
- Clarifies ARAP exemptions;
- Changes references from the Division of Water Resources to the Department of Environment and Conservation (Department) because the new Division of Mineral and Geologic Resources also issues ARAPs;
- Specifies that applying for an ARAP, or conducting an activity under a no-notification general ARAP, constitutes consent for Department staff to enter the property as provided by statute;
- Specifies how the Department evaluates cumulative impacts;
- Details where to file appeals; and
- Edits the rule for clarity.

Tennessee Code Annotated section 69-3-105(b) gives the Board of Water Quality, Oil, and Gas the authority to promulgate rules to administer the Water Quality Control Act of 1977 (Act). Section 69-3-108(b)(1) of the Act requires a person to obtain a permit prior to altering the properties of waters of the state. Once effective, these rules will be implemented through the Division of Water Resources and, for alterations associated with mining and quarrying, the Division of Mineral and Geologic Resources with existing staff.

(2) A determination that the action is the least-cost method for achieving the stated purpose.

The rule is the least-cost method for achieving the stated purpose.

(3) A comparison of the cost-benefit relation of the action to nonaction.

Nonaction is not an option, because the rules must be amended to conform to T.C.A. § 69-3-106 regarding isolated wetlands. The benefits of other amendments outweigh potential costs because they eliminate the requirement for newspaper publication for individual permits, expressly state the limits of ARAP authority, and detail how the Department will evaluate cumulative impacts.

(4) A determination that the action represents the most efficient allocation of public and private resources.

The rule represents the most efficient allocation of public and private resources. Aside from conforming the ARAP rules to new statutory provisions.

(5) A determination of the effect of the action on competition.

The rule does not affect competition.

(6) A determination of the effect of the action on the cost of living in the geographical area in which the action would occur.

The rule does not impact the cost of living in Tennessee.

(7) A determination of the effect of the action on employment in the geographical area in which the action would occur.

The rule has a neutral impact on employment in Tennessee.

(8) The source of revenue to be used for the action.

No revenue is required for the action.

(9) A conclusion as to the economic impact upon all persons substantially affected by the action, including an analysis containing a description as to which persons will bear the costs of the action and which persons will benefit directly and indirectly from the action.

The rule implements T.C.A. § 69-3-106, reducing regulation of isolated wetlands in accordance with statute. Applicants for individual ARAPs will save the cost of publishing public notice in a newspaper This action will have little to no impact on the effectiveness of public notice, but will modestly reduce income for newspapers. The new exemptions clarify limits of statutory authority of the ARAP program, which is expected to result in a slight decrease in regulation with minimal impact on water resources. Finally, clarification of cumulative impact analysis is not expected to have an economic impact.