



# TENNESSEE CHAMBER of Commerce & Industry

TENNESSEE MANUFACTURERS ASSOCIATION

July 25, 2019

Division of Water Resources  
Tennessee Department of Environment and Conservation  
Attention: Vojin Janjic  
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312 Rosa L. Parks Avenue, 11th Floor  
Nashville, Tennessee 37243

**VIA ELECTRONIC MAIL**

Vojin.Janjic@tn.gov

**Re: Comments to Proposed Rules, Chapter 0400-40-05: Permits, Effluent Limitations and Standards (Individual NPDES) & Proposed Rules, Chapter 0400-40-10: National Pollutant Discharge Elimination System General Permits**

Division of Water Resources,

On behalf of the Tennessee Chamber of Commerce and Industry (the “Chamber”) we are submitting the following comments to the Tennessee Department of Environment and Conservation (“TDEC” or the “Department”) regarding proposed amendments to the water permitting regulations contained in Chapter 0400-40-05, Individual NPDES Permits and Chapter 0400-40-10, General NPDES Permits. TDEC held a public hearing concerning the proposed regulatory amendments on July 15, 2019, and announced they would receive comments regarding the proposed amendments through close of business on July 25, 2019.

The Chamber serves as the primary voice of diverse business and manufacturing trade interests on major employment, economic and environmental issues facing public policy decision-makers in Tennessee. We also work to foster harmonious relationships between the various elements of the Tennessee business community and to serve as an umbrella organization for companies, trade associations and chambers of commerce to work together for the economic health of the state. The Chamber’s members operate both large and small businesses throughout Tennessee and in this capacity, the Chamber represents a large and diverse portion of the regulated community that will be affected by proposed changes to Tennessee’s water quality regulations.

The Chamber believes strongly in the importance of protecting the natural environment, including water quality, but doing so in a manner that appropriately balances the many facets of environmental regulation. The Chamber appreciates the opportunity to provide the comments presented below to TDEC. The Chamber would be happy to discuss any of these comments with TDEC as the Department moves ahead with efforts to finalize the proposed changes to Tennessee’s water permitting regulations.

**Comments:****II. 0400-40-05-.02 (76) New definition for “new or increased discharge”**

(57): *“A ‘new or increased discharge’ is a new discharge of pollutants to waters of the state or an increase in the authorized loading of a pollutant above either (1) numeric effluent limitations established in a National Pollutant Discharge Elimination System permit for that discharge, or (2) if no such limitations exist, the actual discharges of that pollutant.”*

The Chamber recognizes that the Department modified this definition to include “either” following a separate rulemaking hearing in 2018 for General Water Quality Criteria. Thank you for maintaining that change, indicating a separation between the two parameters of the definition. However, since the 2018 proposed rule is not yet effective, we do harbor concerns about the implantation of this term.

The new definition of “new and increased discharge” is used in 0400-40-05-.05(3) and in 0400-04-05-.08. After reviewing those sections we again express our view that changes to effluent discharge that does not exceed a permit’s limitations should not trigger these Parts of the regulations, and therefore should not require a new application or modification of a permits requirements. If the Department agrees, please affirm. If the department disagrees with this assessment, we submit the following additional question.

Is it the department’s position that a permittee may have a higher level of discharge within its permitted limits due to a temporary production increase or process modification, under 0400-04-05-.08 they shall submit a new application, then under 0400-40-05-.05 this application shall include a consideration of alternatives? Please explain how the department anticipates the previous scenario working for part two of the new of increased discharge definition “(2) if no such limitations exist, the actual discharges of that pollutant”.

**II. 0400-40-05-.02 (76) New definition for “release”**

The new definition (76) “release” appears to limit this term to sewage. We encourage you to review all the uses of the term release in further portions of the rule and determine if all uses of “release” in fact do refer to sewage. If not, TDEC might consider revising this definition to “sanitary sewer release” and revise the rest of the rule with this clarified term, where the department intends to indicate a sewage release.

**III. 0400-40-05-.06 (9) Recommend ECD is consulted on this phrasing.**

The Chamber strongly encourages TDEC to consult with the Department of Economic Development (ECD) on the phrasing of these sentences. ECD is familiar with the minute details of economic development issues that arise when a new company sets itself up for operation in Tennessee. We do not want to place an unintentional hurdle to economic development.

#### **IV. 0400-40-05-.06 (3)(g) Department's reasonable contemplation**

Explain the purpose for (3)(g) to be added to the regulation. Identification of outfalls, pollutants and the amount of pollutants are covered under (a) through (f); the only additional phrase is "within the Department's reasonable contemplation" is new language. How does the Department foresee this phrase being used in the drafting of permit applications?

#### **V. 0400-40-05-.06 (9) Public Notice**

The Chamber notes that the department is maintaining the public notice requirement (9)(a) for major NPDES permits in newspapers and periodicals of general circulation and removing this requirement for new and general permits from this rule. Other NPDES permits will now be required to comply with the provisions of subpart (9)(b) to provide public notice.

(9)(c) "signs" – At the public hearing a question was asked about the dimensions of signs. Please, clarify the intent of the Department over the dimensions and frequency of signs.

#### **VI. 0400-40-05-.06 (9) Public Notice, Decision to Issue or Deny a Permit**

The Department has improved its ability to provide public notice electronically to interested parties and stay up to date with its online notices. The Chamber does ask that the Department preserve a priority order and the courtesy of informing the applicant of a final decision, posting a final permit decision online and then using "any other means reasonably calculated" to inform the public.

#### **VII. 0400-40-05-.07 (2) (h) 2. Check 40 CFR references.**

The EPA Regulations are at times difficult to follow. Please verify the references to 40 CFR Chapters N or O (2018) to confirm these are chapters, as opposed to subchapters.

#### **VIII. 0400-40-05-.07(2)(i) Signatory requirements**

The Department is clarifying who can sign and submit reports or information to the Commissioner. Our reading is that the intent is to provide additional flexibility to corporations and local governments by allowing senior officers to appoint "duly authorized representatives" to complete these duties, sign and submit the reports or information. Is that an accurate reading?

Additionally, are multiple individuals allowed to serve as a duly authorized representative on a permit or permits?

Does the department intend to keep records of "duly authorized representatives" for each permit?

The use of the word “person” in the rule seems to disallow a specific staff position not identified in 0400-40-05-.05(6)(a) through (c). If so, how do they recommend permitted facilities update these records when staff changes occur?

**0400-40-05-.07 (2) (m) 2. Conflicts with sections above and should be deleted.**

Part (l) of this rule prohibits a bypass except in certain conditions (prevent loss of life, personal injury or severe property damage) included under this part. Subpart (m)(2) indicates that a bypass is prohibited under all circumstances. These concepts are in conflict, therefore we recommended preserving part (l) and deleting part (m)(2). Additionally, the last sentence regarding 40 C.F.R. Part 112 requirements is unnecessary.

**0400-40-05-.07 (2) (n) & (2)(o) Twenty-Four Hour Reporting & Other Noncompliance**

We suggest separating or restructuring (n)(2)(iv) to more clearly state the requirements for industrial discharges twenty-four human health or environment reporting requirements “with respect to bypasses only”. This paragraph would also benefit from listing the required reporting information as articles 1 through 7, rather than including these items in an extended paragraph.

Likewise (2)(o) this is structured in a confusing manner. We suggest beginning each sentence with the types of permittees each paragraph it applies to, i.e.. 1. All permittees; 2. POTWs and domestic wastewater treatment plants, and 3. Industrial dischargers. Subparts (o)(2) & (3) would also benefit from listing the required reporting information as individual articles 1 through 3 or 1 through 7, as mentioned above.

**0400-40-05-.07 (2) (p) 4. Burden of Proof**

New language: *“In any enforcement proceeding, the permittee seeking to establish the affirmative defense of an upset has the burden of proof.”*

Please respond, explaining the current practice. During an enforcement action does the permit holder currently have the burden of proof and must establish an affirmative defense? If this is the current practice we fail to understand the need for this sentence. If this is a change, please explain the rationale for this change.

**0400-40-05-.09 (2)(b) - Whose professional judgment is used?**

We recommend the current verbiage of “to determine” remain in the regulation. The change in the current verbiage “to determine” to a proposed “to establish” is a significant shift in whose professional judgement is used on appropriate effluent limitations for industrial discharges without applicable effluent limits. Determine means to ‘decide or ascertain’ which would allow for a detailed process using the best professional judgment to decide or determine acceptable limitations for a facility and

its location. On the other hand establish means to 'fix firmly or found', implying an institutional permanence that in this context could only be done by the state, excluding private sector professionals.

Additionally, please respond on how the department believes 0400-40-05-.09 (2)(c) will operate, since it is a combination of (a) "with applicable federal effluent limitations guidelines" and (b) "without applicable federal effluent limitations guidelines". An initial reading indicates that the state would establish limitation guidelines in a permit as needed.

**0400-40-05-.14(9)(c)(3)(iii) Changes to a nutrient management plan**

We recommend the Department restructure this section. Our suggestion would be to organize this section in a similar manner to (b)(1) Linear approach and (b)(2) Narrative approach for initial nutrient management plans. We believe having a similar organizational structure for the requirements for changing or updating a nutrient management plan will lead to a better understanding of the information the regulations demand.

In closing we renew our request for the Department to hold ongoing periodic conversations on water related issues to ensure that proposed modifications to the rules do not disrupt the permitting process.

The Chamber hopes the Department and the Division of Water Resources find our comments informative and helpful. The scope of our comments are intended to both make recommendations on the substance of the proposed regulations and to request clarifications to ensure there is a common understanding between the regulated community and the Department. We applaud efforts to build consistency across the Division and provide clarifications to the rule.

Sincerely,



Charles Schneider  
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Tennessee Chamber of Commerce & Industry  
Tennessee Manufacturing Association