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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):

- Amendment
- New
- Repeal

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 Please make sure that **ALL** new rule and repealed rule numbers are listed in the chart below.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

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

Place substance of rules and other info here. Please be sure to include a detailed explanation of the changes being made to the listed rule(s). Statutory authority must be given for each rule change. For information on formatting rules go to http://sos-tn-gov-files.s3.amazonaws.com/forms/Rulemaking%20Guidelines_September2016.pdf.

Chapter 0400-40-07
Aquatic Resource Alteration

Amendments

Rule 0400-40-07-.01 General is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.01 General

- (1) These rules are promulgated ~~in order~~ to prevent the future pollution of state waters and to plan for the future use of such waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters, T.C.A. § 69-3-102(b). Persons who wish to conduct an activity that may impact a ~~water of the state~~ stream or wetland shall consider avoidance and minimization of such impacts. If impacts to ~~the waters~~ a stream or wetland will ~~occur~~ result in an appreciable permanent loss of resource values, mitigation as set forth in paragraph (7) of Rule 0400-40-07-.04 must be ~~proposed~~ provided to ~~offset any lost resource value~~ ensure no overall net loss of resource values.
- (2) ~~The Section 401 of the~~ Federal Water Pollution Control Act or Clean Water Act, ~~§ 401~~ (33 U.S.C. § 1341), provides that an applicant for a federal license or permit for a discharge into the waters of the United States must provide the federal licensing or permitting agency a certification from the State in which the discharge originates or will originate, and that any such discharge will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of that Act.
- (3) Additionally, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-108(b)(1), provides that it is unlawful for any person, except in accordance with the conditions of a valid permit, to carry out any activity which ~~may result~~ results in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the State, including wetlands. These activities include, but are not limited to: the discharge of dredge or fill material, dredging, stream channel modifications, water withdrawals, wetlands alterations including drainage, and other construction activities which result in the alteration of the waters of the State. State permits for these activities are ~~either § 401 Water Quality Certifications or~~ Aquatic Resource Alteration Permits, which also serve as § 401 certifications where required. Alterations of wet weather conveyances are governed by, and must be conducted in compliance with, T.C.A. § 69-3-108(q).
- (4) This Chapter prescribes ~~the~~ procedures peculiar applicable to these aquatic resource alteration permits, in addition to the general requirements and procedures of Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation, and the Tennessee Water Quality Control Act of 1977. ~~This regulation only applies to Permits issued pursuant to this chapter do not authorize activities which do not that require a National Pollutant Discharge Elimination System (NPDES) permit or which do not result from the operation of a treatment system permit, a state operating permit, or an underground injection control permit.~~

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

Paragraphs (3) and (4) of Rule 0400-40-07-.02 Exemptions are amended by deleting them in their entirety and substituting instead the following:

- (3) The Department of Agriculture provides guidance for development of best management practices (~~BMP's~~) (BMPs) for agriculture and forestry. One of the primary goals of these ~~BMP's~~ BMPs is the prevention of soil erosion and discharge of silt and sedimentation to streams. These ~~BMP's~~ BMPs should be followed. If silvicultural activities ~~fail have polluted waters of the state as a result of a failure~~ to use BMP's and a point source discharge results in water pollution BMPs, the Commissioner is authorized to issue a stop work order under ~~P.Ch. 680 of the Acts of 2000~~ T.C.A. § 69-3-133.

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

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

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

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

- (1) "Act" means The Tennessee Water Quality Control Act of 1977, as amended, T.C.A. §§ 69-3-101 et seq.
- (2) "Activity" means any and all work or acts associated with the performance, or carrying out of a project or a plan, or construction of a structure.
- ~~(3) "Adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the State by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands".~~
- ~~(3) "Appreciable permanent loss of resource values" means a reduction in resource values that is expected to continue without fundamental change and is large enough to be observed and measured as resulting in more than minimal adverse effects.~~
- (4) "Aquatic Resource Alteration Permit" or "ARAP" means a permit issued pursuant to T.C.A. § 69-3-108 of the ~~Tennessee Water Quality Control Act of 1977,~~ which authorizes the alteration of properties of waters of the ~~State which state that~~ result from activities other than discharges of wastewater through a pipe, ditch or other conveyance. ~~Such a permit shall impose conditions, including standards and terms of periodic review, as are necessary to accomplish the purposes of the Act.~~
- ~~(5) "Background Conditions" means the biological (plant and animal species), chemical and physical conditions of the wetland or water body prior to the proposed activity. If the water body is disturbed, it may be necessary to use the biological, chemical and physical conditions of a similar water body as a reference condition.~~
- ~~(6)~~(5) "Best Management Practices" 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. BMP's include methods, measures, practices, and design and performance standards.
- ~~(7)~~(6) "Certification" means an Aquatic Resource Alteration Permit under the ~~Tennessee Water Quality Control Act of 1977,~~ as when required by § 401 of the Federal Water Pollution Control Act, which certifies, either unconditionally or through imposition of terms under which the activity must be carried out, that the activity will comply with applicable provisions of §§ 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act and Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation and the Act.
- ~~(8)~~(7) "Channelization" means the alteration of stream channels including but not limited to straightening, widening, or enlarging.
- ~~(9) "Cofferdam" means an enclosure from which water can be pumped to expose the bottom of a body of water or a barrier constructed to divert the flow of water to allow construction work.~~
- ~~(10) "Commence Construction" means the physical initiation of on-site structural or earthmoving work.~~
- ~~(11)~~(8) "Constructed Wetland" means intentionally designed, built and operated on previously nonwetland sites for the primary purpose of wastewater treatment or stormwater retention; such wetlands are not created to provide mitigation for adverse impacts or other wetlands.
- ~~(12) "Clearing and Grubbing" means the removal of vegetation by cutting and digging up roots and stumps.~~
- ~~(13)~~(9) "Cumulative Impacts" means the impact on ~~the environment~~ resource values which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future

actions. ~~A cumulative impact to a wetland can be the loss of the variety of the natural wetland types, wetland acreage, functions and classified uses.~~

~~(14)~~(10) "Debris" means woody materials, trash, flotsam, dislodged vegetation, and other potentially mobile materials which may, when located within a stream channel, contribute to flow blockage. This does not include gravel, sand, soil or its constituents such as silt, clay or other sediments.

~~(15)~~(11) "Ditch" means a man-made excavation for the purpose of conveying water. Ditches do not include streams, modified streams or canals.

(12) "Division" means the Division of Water Resources within the Tennessee Department of Environment and Conservation.

~~(16)~~(13) "Dredging" (sand and gravel dredging) means the removal of sand, gravel and similar sediments or deposits from a stream, river, or lake bed or wetland by any method.

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

~~(18)~~(14) "Emergency" means a situation where life, public health, the environment, or substantive improvements to real property is in immediate danger.

~~(19)~~(15) "Erosion" means the process by which the land surface is worn away by the action of water, wind, gravity, chemicals, or a combination thereof.

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

(16) "Existing Conditions" means the biological, chemical, bacteriological, radiological, and physical conditions of a stream or wetland at the time the project is proposed as measured by a quantitative assessment tool or other defensible scientific method as approved or determined by the Division.

~~(24)~~(17) "General Permit" means a permit issued under the Act and this rule authorizing an alteration to state waters within the state for a specified category of activities that are substantially similar in nature.

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

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

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

(18) "HUC" means the hydrologic unit code assigned by the United States Geological Survey.

~~(25)~~(19) "Individual Permit" means a permit issued by the Division ~~of Water Resources~~ to a specified person to conduct specified activities at a specified location. This type of permit does not authorize an activity by a class of persons or the public in general.

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

~~(27)~~(20) "In the Dry" means in such a manner that no equipment or dredged material is in contact with the stream or wetland and that the soil water boundary is not disturbed by equipment or that no infiltration is pumped to the stream from the dredge site.

~~(28)~~(21) "Minimal Impacts" means an activity for which the scope is very limited in area, the impact is very short in duration, and has no appreciable impact to waters just downstream of the location of the activity. ~~Examples of activities with 'minimal impacts' include, but are not limited to, (1) minor channel changes~~

~~associated with bank stabilization; and (2) an activity typically authorized by General Permit, but which requires an Individual Permit because the project falls under one of the listed exclusions.~~

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

~~(30)(22) "Mitigation" means compensating for impacts in regulated areas the restoration, creation, enhancement, and/or preservation of aquatic resources to compensate for unavoidable impacts as provided by paragraph (7) of Rule 0400-40-07-.04.~~

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

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

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

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

~~(35)(23) "Practicable alternative" is an alternative that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.~~

~~(36)(24) "Resource Values" are the benefits physical, chemical, and biological properties of provided by the water resource that help maintain classified uses. These benefits properties may include, but are not limited to, the ability of the water resource to:~~

- ~~(a) filter, settle and/or eliminate pollutants;~~
- ~~(b) prevent the entry of pollutants into downstream waters;~~
- ~~(c) assist in flood prevention;~~
- ~~(d) provide habitat for fish, aquatic life, livestock and water fowl and wildlife;~~
- ~~(e) provide drinking water for wildlife and water fowl livestock;~~
- ~~(f) provide and support recreational and navigational uses; and~~
- ~~(g) provide both safe quality and adequate quality and quantity of drinking water for domestic water supply and other applicable classified uses.~~

~~(37)(25) "Sediment" means soil or its constituents that has been deposited in water, is in suspension in water, is being transported, or has otherwise been removed or disturbed from its site of origin.~~

~~(38)(26) "Sedimentation or Siltation" means the process by which sediment is deposited in or by the waters of the State.~~

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

~~(40)(27) "Stabilize" means the proper placing, grading, and/or covering of soil, rock, or earth to insure their~~

resistance to erosion, sliding or other movement.

~~(41)~~(28) "Stream" means a surface water that is not a wet weather conveyance. For purposes of this chapter, and permits issued pursuant to this chapter, a wetland is not a stream. See definition of wetland.

~~(42)~~(29) "Structure" means any building, pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, mooring structure, moored floating vessel, piling, aid to navigation, bridge, culvert or any other obstacle or obstruction.

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

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

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

~~(46)~~(30) "Wetlands" "Wetland" means those areas an area that are is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances ~~do~~ does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

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

~~(48)~~(31) "Wet Weather Conveyances" are man-made or natural watercourses, including natural watercourses that have been modified by channelization, that flow only in direct response to precipitation runoff in their immediate locality, whose channels are at all times above the ground water table, that are not suitable for drinking water supplies, and in which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months.

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

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

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

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

Rule 0400-40-07-.04 Permits is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.04 Permits

(1) Application for a Permit.

~~(a)~~ Any person who plans to engage in any of the activities outlined in T.C.A. § 69-3-108 must obtain a permit from the Commissioner to lawfully engage in such activity. When a § 401 certification is required, the ARAP also serves as the § 401 certification. There are ~~three (3)~~ two (2) types of ~~permits ARAPs:~~ Individual Permits; ~~§ 401 Water Quality Certifications;~~ and General Permits. There are several types of General Permits: (1) a General Permit that authorizes the implementation of the activity in accordance

with all the terms and conditions of the General Permit without prior notice and approval from the Commissioner; (2) a General Permit which requires the applicant notify TDEC of the planned activity prior to implementing the activity in accordance with the terms and conditions of the General Permit; and (3) a General Permit ~~which that~~ requires the applicant to notify the Commissioner of the planned activity and receive approval a notice of coverage from the Commissioner prior to implementing the activity in accordance with the terms and conditions of the General Permit. ARAP applications shall be submitted on forms approved by the Commissioner, and include all of the information requested therein. Certain of the General Permits authorize an activity that is authorized by a Nationwide Permit of the U.S. Corps of Engineers and therefore serve as a § 401 Certification. Persons need not file an application with the Commissioner if they are conducting an activity pursuant to a General Permit that does not require Notice notice or approval, but must implement the planned activity in accordance with the terms and conditions of the General Permit. Persons who desire to implement an activity pursuant to a General Permit which requires Notice or Notice notice, or notice and prior approval, must submit the necessary documentation required by the General Permit prior to implementing the planned activity in accordance with the terms and conditions of the General Permit. A person must file an application for an Individual Permit or for a § 401 Water Quality Certification with the Department Division, in accordance with paragraphs (3) and (5) of this rule, to implement any activity requiring an ARAP that is not authorized by a General Permit. ~~All General Permits in effect as of the date of this rule shall continue in effect, and are not revoked by these rules.~~⁴

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

(2) General ~~permits~~ Permits.

The Commissioner may ~~use~~ issue General Permits to authorize alterations to state waters for specific categories of activities that are substantially similar in nature within the state or other specified geographical areas. General Permits for habitat alterations may be issued only for activities that do not result in an appreciable permanent loss of resource values. General Permits may be issued for water withdrawals that cause no more than de minimis degradation. When the Commissioner determines that a category or activity is suitable for coverage by a General Permit, or that substantive modification of existing General Permits is consistent with T.C.A. § 69-3-108 ~~of the Tennessee Water Quality Control Act of 1977~~, the Commissioner will provide notice of, and conduct a minimum of, one public hearing. The public notice will contain the relevant information, as set forth in subparagraph (4)(c) of this rule and will be published along with a copy of the draft General Permit and a rationale explaining the basis for the permit. ~~TDEC~~ The Division will distribute the public notice to interested persons who have requested ~~TDEC~~ the Division notify them of ARAP applications and by posting on the TDEC Tennessee Department of Environment and Conservation's (TDEC) website. Interested persons may submit written comments on the draft General Permit within thirty (30) days of the public notice or such greater period as the Commissioner allows. All written comments submitted shall be retained and considered in the final determination to issue a General Permit. The procedures for obtaining coverage under a General Permit shall be specified in the General Permit.

(3) § Section 401 Water Quality Certification.

(a) — ~~General.~~

~~Any person who plans to engage in any of the activities outlined in § 404 of the Federal Clean~~

⁴ ~~The following activities were authorized by a General Permit on the date these rules were promulgated: Bank Stabilization, Gravel Dredging, Launching Ramps, Road Crossings, Alteration of Wet Weather Conveyance, Stream Restoration and Habitat Enhancement, Minor Wetlands, Bridge Scour Repair, Emergency Road Repair, Utility Line Crossings, Surveying and Geotechnical Exploration, Minor Dredging, Alteration and Restoration of Intermittent Streams for Mining, Maintenance Activities, Relocation of Intermittent Streams, Wetlands Restoration and Enhancement, and Impoundment of Intermittent Streams.~~

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

~~(b) An individual § 404 permit.~~

~~Where the activity requires an individual § 404 permit, the application filed with the Army Corps of Engineers will serve as the application for either the state permit or the state § 401 certification. The applicant must file the completed federal application with TDEC for the Commissioner to process and evaluate. The Commissioner will review a completed application and make a determination whether to issue a § 401 Water Quality Certification. The application must describe the proposed activity and include all the necessary technical information for the Commissioner to make a determination, including an evaluation of practicable alternatives. The practicable alternatives analysis required by this subparagraph shall be satisfied by the applicants' submittal to the Division of a practicable alternatives evaluation for the proposed activity which has been submitted to the Army Corps of Engineers.~~

~~(c) A nationwide permit.~~

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

An applicant for a federal license or permit to conduct an activity which may result in a discharge to the navigable waters must first obtain a § 401 certification from the Division. If the proposed activity requires an ARAP, that permit serves as the § 401 certification and is subject to the application and public notice procedures for obtaining ARAP coverage established by this chapter. Coverage under a General Permit, obtained either through a notice of coverage or automatic coverage under a General Permit for which no prior notice to the Division is required, constitutes a § 401 certification. If the proposed activity does not require an ARAP, the applicant for a federal license or permit may obtain a § 401 certification by submitting a copy of the federal application to the Division and a request for a § 401 certification.

(4) Public Notice and Participation.

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

1. § 401 Certification.

The ~~Department's Division's~~ procedure for issuing public notice for certification of an application for a federal license or permit pursuant to § 401 of the Clean Water Act ~~may be either a public notice issued jointly with the Corps, or for an activity that does not require an ARAP shall be~~ a public notice issued by the ~~Department Division~~. Such notice will describe the ~~activity, activity and~~ advise the public of the scope of certification, their rights to comment on the proposed activity, and to request a public hearing. The notice will also inform the public to whom they should send their requests and comments.

2. Minimal impact activities.

For activities that are projected to have only minimal impacts to ~~state waters streams or wetlands~~, which can be readily addressed, the Commissioner may utilize a twenty (20)

day public notice period.

3. When the Commissioner determines that a proposed permit modification or renewal will not materially change water quality aspects of the project, or will result in an improvement of water quality, as compared to the originally permitted activity, a permit may be modified or renewed without public notice. Otherwise, a renewal or modification requires public notice.
 4. Where the Commissioner determines an emergency situation exists, a permit for remedial action may be issued without prior public notice and participation. The emergency permit shall be advertised by public notice, however, no later than twenty (20) days after issuance. This permit shall be subject to all other provisions of subparagraph (b) of this paragraph. The remedial actions allowed shall be limited to those necessary to remedy the emergency.
- (b) Upon receipt of a completed ARAP application, the Commissioner will review and evaluate the proposed activity or project to make a determination whether to issue an Individual Permit, as described in paragraph (5) of this rule. In order to inform interested and potentially interested persons of the proposed activity, a ~~Public Notice~~ public notice seeking public participation and comment on the activity will be given, along with a draft permit and a rationale explaining the basis for the draft permit, including the basis for determining whether a proposed activity will result in an appreciable permanent loss of resource values. Except as provided in subparagraph (5)(c) of this rule, if an activity will result in an appreciable permanent loss of resource values, the draft permit shall include requirements for mitigation and the rationale shall explain the basis for determining that the mitigation is sufficient to result in no overall net loss of resource values from existing conditions.
- (c) The ~~Public Notice~~ public notice will include the following information:
1. Name, address, and telephone number of the applicant;
 2. Name, ~~and~~ address, telephone number, and electronic mail address of ~~TDEC~~ the Division contact person;
 3. A brief description of the proposed activity;
 - ~~4. A brief description of the scope of the proposed activity;~~
 - ~~5.4.~~ The location of the ~~state waters~~ streams or wetlands impacted by the proposed activity;
 - ~~6. A sketch or detailed description of the location of the proposed activity and the subject waters of the state;~~
 - ~~7. The purpose of the proposed activity;~~
 - ~~8. The watershed of the subject waters;~~
 - ~~9. A description of the conditions of the subject waters and the watershed, (e.g., physical conditions of the waters, quality of the waters such as size, flow, substrate, channel, etc.);~~
 - ~~5.~~ The Division website at which additional information about the permit application can be found;
 - ~~10.6.~~ The procedure to submit comments on the proposed activity;
 - ~~11.7.~~ The procedure for requesting a public hearing; and
 - ~~12.8.~~ A brief description of the procedure for the Commissioner to make a final determination to issue a permit.

- (d) The approved ~~Public Notice~~ public notice shall be distributed to interested persons and shall be circulated within the geographical area of the proposed activity as follows:
1. ~~TDEC The Division~~ will distribute the approved ~~Public Notice~~ public notice to interested persons who have requested ~~TDEC the Division~~ notify them of ARAP applications and by posting on the TDEC website.
 2. The Applicant shall ~~distribute the approved Public Notice to the neighboring landowners by publishing in a local newspaper of general circulation and by posting~~ post a sign within view of a public road in the vicinity of the proposed project site as specified by the Division. The sign shall contain those provisions as specified by the Division. The sign shall be of such size that is legible readily visible from the public road. Also, the sign shall be maintained for at least thirty (30) days following distribution of the approved ~~Public Notice~~ public notice.
 3. The applicant shall provide certification to the Division of compliance with part 2 of this subparagraph.
- (e) A copy of the public notice shall be sent to any person who specifically requests one. Interested persons may submit written comments on the proposed activity within thirty (30) days of public notice or such greater period as the Commissioner allows. All written comments submitted shall be retained and considered in the final determination to issue a permit.
- (f) Interested persons, including the applicant, may request, in writing, that the Commissioner hold a public hearing on any application. Said request from interested persons must be filed as soon as possible, but no later than the end of the period allowed for public comment, and must indicate the interest of the party filing it, must concisely state the water quality issues being raised, and the reasons why a hearing is warranted. If there are water quality issues and significant public interest in having a hearing, the Commissioner shall hold one in the geographical area of the proposed activity. No less than thirty (30) days in advance of the hearing, public notice of it shall be circulated at least as widely as was notice of the application. The Commissioner will distribute notice of the public hearing as set forth in part (d)1 of this paragraph, ~~and by publishing in a local newspaper~~. The notice shall cite the date, time and place of the public hearing, a statement of the issues raised by the person requesting the hearing, and the purpose of the public hearing.

(5) Individual Permits.

- (a) Persons who plan to engage in any activity that requires an Aquatic Resource Alteration Permit which is not governed by a General Permit or a § 401 Water Quality Certification, must submit an application to the Commissioner for review and approval prior to implementing the planned activity. The Commissioner will review a completed application and make a determination whether to issue an Individual Permit. The application must describe the proposed activity and include all the necessary technical information for the Commissioner to make a determination. ~~The applicant shall assess the practicable alternatives for a planned activity. If the activity does not avoid impacts to state waters, the individual must comply with paragraph (7) of this rule. However, if the nature of the affected waters is such that mitigation is not reasonably likely to result in no net loss of water resource values, and if there is a practicable alternative to the activity which through avoidance or minimization of impacts would result in no net loss, then such alternative shall be selected.~~
- ~~(b)~~ The applicant shall submit an alternatives analysis evaluating a range of potentially practicable alternatives to avoid and minimize the loss of resource values consistent with the overall purpose of the proposed activity. For public road projects commissioned by a state, county, or local government, this alternatives analysis does not need to include alternative road locations but must include other measures to avoid and minimize impacts to resource values. No Individual Permit shall be granted if there is a practicable alternative to the proposed activity that would have less adverse impact on resource values, so long as the alternative does not have other significant adverse environmental consequences.

- ~~(b)(c)~~ An ~~The~~ applicant shall describe the proposed project including the use of technical terms defined

in Rule 0400-40-07-.03 where relevant. The sketch or plans and specifications submitted with the application shall describe the method for implementation of the planned activity. Where the proposed activity would result in an appreciable permanent loss of resource value, the applicant must propose ~~adequate~~ mitigation ~~actions so that there is sufficient to result in~~ no overall net loss of state water resource values. ~~The applicant shall set forth in the application a brief summary of the practicable alternatives considered to implement the proposed activity~~ In the case of emergency permits or other situations compelling that measures be taken in a short time, a state, county, or local government applicant for a public works project may propose a specific mitigation plan after an Individual Permit has been issued, provided that the permit shall specify the amount of mitigation required and an implementation timeline. In this case, the permittee shall comply with the mitigation plan approved by the division.

~~(e)~~(d) An Individual Permit is required for water withdrawals which will or will likely result in alteration of the properties of the ~~source~~ affected stream or wetland and will result in more than de minimis degradation as defined in Rule 0400-40-03-.04(4).

1. Persons proposing to withdraw water from waters of the state in a manner which will or will likely result in an alteration of the properties of ~~the source~~ a stream or wetland, shall file an application with the ~~Department~~ Division which includes the following minimum information:
 - (i) proposed withdrawal rates and volumes;
 - (ii) proposed withdrawal schedule; and
 - (iii) flow data of the source stream (if free flowing).
2. Where a permit for water withdrawal is required, the Commissioner shall establish permit conditions which are protective of the ~~source stream's~~ resource values of the affected stream or wetland. These conditions may include flow levels below which no withdrawal may occur. The Commissioner may also establish a maximum withdrawal rate in order to maintain the natural flow fluctuation characteristics of the source stream. Monitoring and reporting requirements may be established to ensure and document compliance with permit conditions.

(6) Permit Evaluation Criteria.

- (a) Some activities may not be entitled to a permit. When a permit is granted, it shall require compliance with all provisions of the Act, the regulations adopted pursuant to the Act, and any special terms or conditions the Commissioner determines are necessary to fulfill the purposes or enforce the provisions of the Act.
- (b) A permit may be modified, suspended, or revoked for cause by the Commissioner upon such notice to the permittee as required by law. ~~Permits for activities that have been completed are not subject to modification. If a modification results in a less restrictive permit, then public notice and opportunity for hearing must be given prior to modification.~~ Cause shall include, but not be limited to the following:
 1. violation of any terms or conditions of the permit;
 2. obtaining a permit by misrepresentation or failure to disclose fully all relevant facts;
 3. causing a condition of pollution;
 4. violation(s) of the Act or other environmental statutes;
 5. a change in the Act or regulations that substantively impacts the content of the permit;
 6. a change in the Federal Clean Water Act that substantively impacts the content of the permit; and

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

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

1. direct loss of stream length, ~~waters flow~~, or wetland area due to the proposed activity;
2. direct loss of in-stream, ~~waters~~, or ~~wetlands 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, stream or~~ wetland, ~~or state waters~~ due to the proposed activity;
5. direct loss of stream canopy due to the proposed activity;
6. whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource;
7. conversion of unique or high quality waters as established in Rule 0400-40-03-.06 to more common systems;
8. hydrologic modifications resulting from the proposed activity;
9. the adequacy and viability of any proposed mitigation including, but not limited to, quantity, quality, likelihood of long term protection, and the inclusion of ~~upland riparian~~ buffers;
10. quality of stream or wetland proposed to be impacted;
11. whether the ~~state waters stream or wetland~~ is listed on the § 303(d) list or otherwise has unavailable parameters; whether the proposed activity is located in a component of the National Wild and Scenic River System, a State Scenic River, waters designated as Outstanding National Resource Waters, or waters identified as high quality waters as defined in Rule 0400-40-03-.06, known as Tier II waters; whether the activity is located in a waterway which has been identified by the ~~Department Division~~ as having contaminated sediments; and whether the activity will adversely affect species formally listed in State and Federal lists of threatened or endangered species; and
12. any other factors relevant under the Act.

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

(7) Mitigation.

~~(a) Mitigation of state waters other than wetlands.~~

~~If an applicant proposes an activity that would result in an appreciable permanent loss of resource value of a state water, the applicant must provide mitigation which results in no overall net loss of resource values. The applicant shall provide the Commissioner with a time schedule for~~

~~completion of all mitigation measures for approval. Further, for any mitigation involving the relocation or re-creation of a stream segment, to the extent practicable, the applicant shall complete the mitigation before any impact occurs to the existing state waters. Mitigation measures include, but are not limited to:~~

- ~~1. Restoration of degraded stream reaches and/or riparian zones;~~
- ~~2. New (relocated) stream channels;~~
- ~~3. Removal of pollutants from and hydrologic buffering of stormwater runoff; and~~
- ~~4. Any other measures which have a reasonable likelihood of increasing the resource value of a state water.~~

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

~~(b) Mitigation of Wetlands.~~

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

- ~~(i) Restoration of a previously degraded or impacted wetland (with emphasis on prior converted areas) on-site or in the immediate project area;~~
- ~~(ii) Restoration, including mitigation banking, off-site but within the eight digit United States Geological Survey hydrological unit in which the project is located;~~
- ~~(iii) Restoration, including mitigation banking, outside of the eight digit United States Geological Survey hydrological unit in which the project is located;~~
- ~~(iv) Creation of wetlands on-site or in the immediate project area;~~
- ~~(v) Creation of wetlands off-site;~~
- ~~(vi) Enhancement of existing wetlands;~~
- ~~(vii) Preservation of existing wetlands; or~~
- ~~(viii) A combination of any of the above activities.~~

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

- ~~3. All wetland mitigation projects shall include a monitoring and reporting program to document timely achievement of a successful mitigation wetland and remedial actions to correct any deficiency.~~

(a) If an applicant proposes an activity in stream or wetland that would result in an appreciable permanent loss of resource values, the applicant must provide mitigation which results in no overall net loss of resource values from existing conditions. Because all streams and wetlands serve important functions, the determination of existing conditions shall ensure at least minimal protection for all streams and wetlands notwithstanding prior degradation.

1. The applicant shall provide the Division with a mitigation plan, including a time schedule for completion of all mitigation measures, for approval. To the extent practicable, the applicant shall complete any required mitigation, excluding monitoring, prior to, or simultaneous with, any authorized impacts. All mitigation shall include a permanent restriction on the use of the mitigation site in a form approved by the Division, including but not be limited to a recorded notice of land use restrictions, conservation easement, or other equivalent mechanism.

2. Acceptable mitigation mechanisms include any combination of permittee-responsible mitigation, in-lieu fee programs, mitigation banks, or other mechanisms that are reasonably assured to result in no overall net loss of resource values from existing conditions.

3. Acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation, or any other measures that are reasonably assured to result in no net loss of resource values from existing conditions.

4. The Division will evaluate resource value compensation through the use of an appropriate quantitative assessment or other defensible scientific method, and where applicable will account for temporal loss of resource values. The Division will use a watershed prioritization approach to evaluate proposed mitigation sites. Mitigation should occur as close to the impact location as practicable, prioritized as follows:

(i) projects providing an increase in resource values to degraded streams or wetlands on site or within the immediate impact area;

(ii) projects providing an increase in resource values to degraded streams or wetlands within the HUC-12 in which the impact is located;

(iii) projects providing an increase in resource values to degraded streams or wetlands within the HUC-8 in which the impact is located;

(iv) projects providing an increase in resource values to degraded streams or wetlands outside the HUC-8 in which the impact is located; or

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

Where appropriate, the Division may apply a multiplier based on items (i) through (v) of this part.

5. All mitigation plans shall include a monitoring and reporting program to document timely achievement of successful mitigation and remedial actions to correct any deficiency.

6. Mitigation for impacts to Tennessee streams and wetlands shall occur in Tennessee.

(b) Mitigation of streams.

Mitigation for impacts to streams must be developed in a scientifically defensible manner approved by the Division that demonstrates a sufficient increase in resource values to compensate for permitted impacts. At a minimum, all new or relocated streams must include a vegetated riparian zone, demonstrate lateral and vertical channel stability, and have a natural channel bottom. All mitigation watercourses must maintain or improve classified uses after mitigation is complete.

(c) Mitigation of Wetlands.

1. Prioritization of mitigation site selection for wetland impacts may also be based on U.S. EPA Level III ecoregions.
2. The ratio of acres required for wetland mitigation should not be less than 2:1 for wetland restoration; 4:1 for wetland creation and enhancement; and 10:1 for wetland preservation. Applicants may propose and utilize, subject to the Division's approval, best professional judgment ratios. The best professional judgment ratios shall be based on the resource values and functions of the affected wetland, anticipated resource value of the proposed mitigation, temporal loss, and the likelihood of success of the proposed mitigation.

(8) Duration and ~~Re-issuance~~ Renewal of Permits.

- (a) Each permit issued shall have a fixed term not to exceed five (5) years.
- (b) ~~Re-issuance~~ Renewal of permits is not required for one-time alterations such as construction, as long as the alterations, mitigation, and monitoring are completed within the time limit established by permit. Any permittee that has not completed the alteration authorized by the permit, or the mitigation and monitoring required by the permit, must apply for renewal at least ninety (90) days prior to the expiration date.
- (c) For on-going alterations, such as water withdrawals, any permittee who wishes to continue the permitted activity after the expiration date of the permit must make application for renewal at least ninety (90) days prior to its expiration date. If an application for permit renewal does not fall within subparagraph (4)(a)3 of this rule, (d) The the Commissioner shall follow the procedures for public notice and participation detailed in paragraph (4) of this rule, regarding each application for ~~re-issuance~~ renewal of a the permit.

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

~~Permittees and applicants for permits who disagree with the denial, suspension or revocation of a permit or the terms and conditions of a permit are entitled to review of the Commissioner's decision by the Board of Water Quality, Oil and Gas pursuant to T.C.A. § 69-3-105.~~

- (a) Permittees, applicants for permits, and aggrieved persons meeting the criteria of subparagraph (9)(c) of this rule who disagree with the denial, issuance, terms, or conditions of a permit may seek review of the Commissioner's decision by the Board of Water Quality, Oil and Gas pursuant to T.C.A. § 69-3-105(i) and § 69-3-110.
- (b) For permit modifications, only those terms that were the subject of the modification may be appealed. For permit renewals, only those terms that were changed in the permit renewal compared to the preceding permit may be appealed.
- (c) To be entitled to a review of the Commissioner's permit decision, aggrieved persons shall:
 1. have submitted a written comment during the public comment period on the permit;
 2. given testimony at a formal public hearing on the permit; or
 3. attended a public hearing as evidenced by completion of a Department of Environment and Conservation Record of Attendance Card or other method as determined by the Division.
- (d) The basis for the appeal for aggrieved persons may only include issues which:
 1. were provided to the Commissioner in writing during the public comment period;

2. were provided in testimony at a formal public hearing on the permit; or
 3. arise from any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment.
- (e) All petitions for permit appeals shall be filed with the Board of Water Quality, Oil, and Gas within 30 days after the date that public notice of the permit issuance, denial, or modification is given by way of posting the notice on the Division's website. All petitioners shall specify the basis for their appeal, and state a claim for relief based on an alleged violation of the Act or the rules promulgated thereunder. Aggrieved persons shall specify facts sufficient to establish that they have satisfied the criteria of subparagraphs (9)(c) and (9)(d) of this rule and otherwise have standing to appeal.
- (f) Any action taken by the Commissioner regarding a permit remains in effect unless and until an order of the Board of Water Quality, Oil and Gas or a reviewing court becomes final.

~~(10) — Alteration of wet weather conveyances~~

- ~~(a) — The alteration of wet weather conveyances, as defined in T.C.A. § 69-3-103, by any activity is permitted by this paragraph and shall require no notice to or approval by the department, provided it is done in accordance with the following conditions:~~
- ~~1. — The activity may not result in the discharge of waste or other substances that may be harmful to humans or wildlife;~~
 - ~~2. — Material may not be placed in a location or manner so as to impair surface water flow into or out of any wetland area; and~~
 - ~~3. — Sediment shall be prevented from entering other waters of the state.~~
 - ~~(i) — Erosion and sediment controls shall be designed according to the size and slope of disturbed or drainage areas to detain runoff and trap sediment and shall be properly selected, installed, and maintained in accordance with the manufacturer's specifications and good engineering practices.~~
 - ~~(ii) — Erosion and sediment control measures shall be in place and functional before earthmoving operations begin, and shall be constructed and maintained throughout the construction period. Temporary measures may be removed at the beginning of the work day, but shall be replaced at the end of the work day.~~
 - ~~(iii) — Checkdams shall be utilized where runoff is concentrated. Clean rock, log, sandbag or straw bale checkdams shall be properly constructed to detain runoff and trap sediment. Checkdams or other erosion control devices are not to be constructed in stream. Clean rock can be of various type and size depending on the application. Clean rock shall not contain fines or other wastes or contaminants.~~
 - ~~4. — Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the state. All spills shall be reported to the appropriate emergency management agency and to the department. In the event of a spill, measures shall be taken immediately to prevent pollution of waters of the state, including ground water.~~
 - ~~5. — There shall be no additional conditions upon a person's activity within a wet weather conveyance. This provision does not apply to National Pollutant Discharge Elimination System Permits.~~

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

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

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Dr. Gary G. Bible (Oil and Gas Industry)					
Elaine Boyd (Commissioner's Designee, Department of Environment and Conservation)					
James W. Cameron III (Small Generator of Water Pollution representing Automotive Interests)					
Jill E. Davis (Municipalities)					
Mayor Kevin Davis (Counties)					
Derek Gernt (Oil or Gas Property Owner)					
C. Monty Halcomb (Environmental Interests)					
Charlie R. Johnson (Public-at-large)					
Judy Manners (Commissioner's Designee, Department of Health)					
John McClurkan (Commissioner's Designee, Department of Agriculture)					
Frank McGinley (Agricultural Interests)					
D. Anthony Robinson (Manufacturing Industry)					

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Board of Water Quality, Oil and Gas on 10/16/2018, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 05/03/18

Rulemaking Hearing(s) Conducted on: (add more dates). 06/27/18

Date: October 16, 2018

Signature: _____

Name of Officer: _____

Title of Officer: _____

Subscribed and sworn to before me on: _____

Notary Public Signature: _____

My commission expires on: _____

Agency/Board/Commission: Board of Water Quality, Oil and Gas

Rule Chapter Number(s): 0400-40-07

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

Herbert H. Slatery III
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.

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

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

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

Comment 2: *A commenter requested a concise statement of the principle reasons for the Board's action in adopting the rules pursuant to T.C.A. § 4-5-205(b).*

Response: This statement is attached hereto as Appendix 1.

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

Response: It is not the intent of the rules to make it either easier or harder to obtain permits, but instead to ensure that the permitting process is transparent, fair, and consistent in implementing the statutory goal of ensuring that the public's rights to unpolluted waters are maintained and that "the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters."

Comment 4: *Several commenters asked that the Board not weaken rules that protect our natural resources.*

Response: The purpose for this rulemaking is primarily to make the rules more clear and transparent, and to update the mitigation rules to be more consistent with Corps Section 404 permitting requirements. The rules are not being weakened, and in some ways are being strengthened, particularly with respect to improving the public notice and comment process.

Comment 5: *Please keep Tennessee's environmental standards stricter and more preservation-conscious than current federal requirements.*

Response: The ARAP rule changes proposed are intended as clarifications and updates of current rules, and it is not the intent or effect of these amendments to weaken the rules from existing requirements.

DEFINITIONS

Comment 6: *Where there are rules in other parts of TDEC's rulebook that cover areas (definitions or interpretations) that are also covered under the ARAP rule, it is important to state a) whether the new definition in this document, for example, is to replace that definition wherever it appears in TDEC rules or only in this case, and b) if a proposed new interpretation is intended to supplant other rules or if those other rules will be used to interpret these rules.*

Response: Rule 0400-40-07-.03 makes it clear that the definitions in the ARAP rules are applied to this rule chapter and to permits issued pursuant to this chapter. These definitions are not intended to apply to the use of these terms in other contexts. Where these rules do not provide a definition, those provided in the Water Quality Control Act apply. If ARAPs require the use of terms that are not defined in the Act or these rules, the permits can establish definitions.

Comment 7: *Per Rule 0400-40-07-.03 Definitions (3) ARAP. The deletion of the sentence about conditions that may be included in the permit seems odd. While it may not need to be here in the definitions section, surely TDEC is not saying that they will not include conditions in future permits.*

Response: The commenter is correct that these elements are being removed from the definitions because that is not the appropriate place for establishing the provisions that are required to be included in a permit. As required by T.C.A. § 69-3-108(g), ARAPs will continue to include conditions necessary to accomplish the purposes of the Act.

Comment 8: *The definition of "resource values" should address all classified uses.*

Response: The TNWQCA does not allow TDEC to issue permits that cause pollution, which the Act defines as impairment of the designated usages of the waters. We agree with the comment, and are expanding the definition of resource values to cover all applicable classified uses.

Comment 9: *Per Rule 0400-40-07-.03 Definitions (8) Constructed Wetland. While this is a perfectly acceptable definition, mitigation for damage to wetlands does indeed sometimes result in the construction of a new wetland where the hydrology will support it. What are these constructed mitigation wetlands then called? Should there be a definition for this included here?*

Response: We generally refer to these as mitigation wetlands. This definition expressly does not apply to mitigation wetlands, which will be subject to site protection under these rules.

Comment 10: *Per Rule 0400-40-07-.03 Definitions (21) Minimal Impacts. The reworking of this definition removes the concept that there could be a project with "no impact," and replaces it with "no appreciable impact" instead. It can certainly be argued that any work within the riparian zone will cause some impact, positive or negative, temporary or permanent. It raises some concerns, however, that the examples which were given, which are current TDEC policy, have been removed.*

Response: Minimal impact activities are those that cause only *de minimis* degradation even without compensatory mitigation. So, for example, the types of activities authorized by general permits would qualify as minimal impacts because those permits cover activities that cause only *de minimis* degradation without

mitigation. The list of examples is removed because there is no realistic way to ensure such a list could be complete given the number of different types of activities that could be authorized by ARAPs.

The term “*de minimis*” is often used informally to describe activities that have minimal impacts. Because the definition of *de minimis* degradation includes both small impacts and larger impacts for which in-system mitigation is provided, the term “minimal impact” is a more appropriate term for activities that cause no appreciable permanent loss of resource values and do not require mitigation.

Comment 11: *Page 7, Item (19) definition of interflow. Delete it because it isn't used anywhere in these rules.*

Response: The commenter is correct and this change will be made.

GENERAL PERMITS

Comment 12: *Please do not delete the sentence, “All General Permits in effect as of the date of this rule shall continue in effect, and are not revoked by these rules.”*

Response: This sentence was based on a previous iteration of the rules and a different set of circumstances. Because the provision for general permits has been in the rules for some time, and because the Division has issued all of its current general permits pursuant to the rules, there is no need to retain this sentence. To be clear, however, the statement remains true even though it is being removed from the rule: nothing in this rule amendment is intended to revoke any existing ARAP General Permits, which shall continue in effect. The existing ARAP General Permits are listed in the response to Comment 14 below, and incorporated by reference here.

Comment 13: *In reference to the phrase, of no “appreciable permanent loss of resource value.” Is this the new standard to separate General from Individual Permits. If so, given the other proposed changes in this document about how to determine when “de minimis” applies and how impacts can be mitigated so that there is no net loss of resource value, does the use of this statement here grant permission for impacts that require mitigation to be covered under a General Permit? We would oppose that.*

Response: The intent of this language is to make it clear that only activities with impacts below the threshold for requiring compensatory mitigation are eligible to be covered by a general ARAP. These are activities that have only minimal impacts. Compensatory mitigation requires site-specific determinations, which are not currently available through the mechanism of general permits. This is the reason the rule does not use the term “*de minimis*” degradation, which includes either minimal impact activities or more than minimal impacts offset through in-system mitigation.

Comment 14: *Rule 0400-40-07-.04 (2) contains the following wording: “General Permits for habitat alterations may be issued only for activities that do not result in an appreciable permanent loss of resource values. General Permits may be issued for water withdrawals that cause no more than de minimis degradation.” This statement should be removed. There is not a qualifier on the extent of permanent loss of resource values. Some could consider some activities that have historically been covered under a general permit as being a permanent loss of resource values for a small segment of a stream. The broad interpretation of this statement could attract litigation. The following sentence says, “When the Commissioner determines that a category or activity is suitable for coverage by a General Permit, or that substantive modification of existing General Permits is consistent with T.C.A. § 69-3-108...”. This has been sufficient in the past and should remain sufficient for determining when to issue a general permit.*

Response: General permits cannot authorize more than *de minimis* degradation because they are not subject to site-specific antidegradation review. Although this would be true even without saying so here, the new language

will be retained because it makes the requirement more transparent to members of the public, including regulated entities.

General ARAPs result in only *de minimis* degradation, both individually and cumulatively. General ARAPs include provisions that ensure minimal impacts in compliance with this provision, including the following General ARAPs currently in effect: General Permit for Bank Armoring and Vegetative Stabilization; General Permit for Construction and Removal of Minor Road Crossings; General Permit for Construction of Launching Ramps and Public Access Structures, General Permit for Construction of Intake and Outfall Structures; General Permit for Emergency Infrastructure Repair, General Permit for Maintenance Activities; General Permit for Minor Alterations to Wetlands, General Permit for Minor Dredging and Filling; General Permit for Gravel Removal; General Permit for Stream Remediation; General Permit for Surveying and Geotechnical Exploration; General Permit for Utility Line Crossings; General Permit for Minor Stream Grade Stabilization; General Permit for Stream and Wetland Enhancement; and General Permit for Recreational Prospecting.

Comment 15: *Per Rule 0400-40-07-.04 Permits (1). The deletion of the footnote at the end of this section makes this section much less understandable. The footnote itself would be better represented by a table that lists the existing General Permits and then states which of the three categories (or more than one) apply and what the criteria are which might move a project from a lower to a higher category. It would answer the question of which General Permits don't require notification, which require notification, and which require notification and approval and what might move an application from one category up to another. Since these General Permits necessarily flow from the authorization in this document, the connection deserves a clear elucidation. This will also greatly help in understanding the next section on General Permits.*

Response: As stated in Rule 0400-40-07-.04(2), "The procedures for obtaining coverage under a General Permit shall be specified in the General Permit." The rule language governs the issuance of general permits, while those permits define the applicable requirements. The footnote is deleted because it was the list of general permits that were being retained in the last rulemaking. Because general permits, like any other permits, may change over time it is not advisable to continue to list all of them in the rule. A list of ARAP general permits is available online, and can be found by searching for "ARAP general permits."

Comment 16: *Given that the previous list of General Permits was dropped from section 1, and neither Habitat Alteration or Water Withdrawals were included in that previous list, or are listed on the current list of General Permits under ARAPs on the TDEC website, it is curious why language about these two (potentially new?) types of General Permits are included here. The language about Habitat Alteration is also notable because it seems to introduce a new standard for a General Permit – no "appreciable permanent loss of resource value." Given that habitat is only one component of a stream assessment, it is hard to imagine an activity that would be so narrow in scope as to only impact habitat, with no impact on hydrology, hydraulics, channel stability, etc. If a new Habitat Alteration General Permit is not anticipated, why include it here? If it is anticipated, the standard being proposed needs to be examined. What does this mean and how is it different from current standards? For that matter, neither in this section or the previous one, is the rationale for distinguishing between General and Individual Permits stated. While we understand that General Permits are designed to cover activities where the impact is considered well understood and acceptable (road crossings, for example, are not always "de minimis," and for a large, wide road, with the use of box culverts can have a considerable impact), such a statement should be made somewhere here, or the reason for having General and Individual Permits remains invisible.*

Response: The division is evaluating the development of new general permit for water withdrawals, which the rule revision will allow so long as the general permit does not authorize more than *de minimis* degradation as defined in Rule Chapter 0400-04-03. Existing general ARAPs all cover habitat alterations. Limiting conditions in

these general permits ensure that their application result in no more than *de minimis* degradation. Please see the response to Comment 13.

PRACTICABLE ALTERNATIVES

Comment 17: *What is a practicable alternative and who decides?*

Response: The term “practicable alternative” is defined in Rule 0400-40-07-.03(23) as “an alternative that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” This definition is based on the Clean Water Act Section 404 rules. The applicant proposes and evaluates what may be a practicable alternative, but the division makes the final determination, subject to permit appeal and review by the Board.

Comment 18: *In 0400-40-07-.04 (5) it appears there is a policy change reflected in the wording of the new (b). The current wording in (a) requires the applicant to list practicable alternatives. However, the applicant may mitigate the effects of the activities. The new wording in (b) indicates the Department will have sole authority to choose an alternative submitted by the applicant regardless of whether the applicant plans to use mitigation. This removes mitigation as an option if the Department chooses an alternative regardless of the needs of the applicant. The previous policy required the alternatives to be used in the event no net loss of water resource values cannot be achieved through mitigation. We would support keeping the current wording and removing the new (b).*

Response: The commenter is correct that the intent of this rule change is to require an applicant to select the least damaging practicable alternative (including avoidance) rather than to simply mitigate for impacts as allowed by the current ARAP rules. This is consistent with federal requirements under Section 404 of the Clean Water Act, so this requirement already applies to projects for which that federal permit is required. This change is intended to maintain the integrity of the ARAP program, consistent with the Act’s purpose of protecting waters of the state. This change also counterbalances contemporaneous changes in the Antidegradation Statement.

Comment 19: *Several commenters expressed concern about moving away from requirements to avoid and minimize impacts rather than merely compensate for them.*

Response: These comments reflect a common misunderstanding of the previous version of the ARAP rules, which did not require avoidance and minimization of impacts, but instead required only that the applicant consider avoidance and minimization. The only time selection of a less damaging practicable alternative was required by the previous ARAP rules was when the impact could not be offset by mitigation, in which case a permit could not have been issued anyway. The new rules require all applicants for individual permits to analyze practicable alternatives and to select the practicable alternative with the least adverse impact on resource values that does not result in other significant environmental impacts. This requirement applies regardless of whether mitigation is required.

Comment 20: *The term “practicable” in regards to alternatives, as the word has been redefined is problematic as the applicant will always want to choose the lowest cost option as the most “practicable.” Pipe culverts will always be cheaper than box culverts, and box culverts will always be cheaper than bridges, but the more expensive option is more protective of the resource.*

Response: The definition of “practicable alternatives” is not proposed to be changed, has been in the ARAP rules for some time, and is based on the Clean Water Act Section 404 rules. If a higher cost option is practicable and would reduce the loss of resource values associated with the proposal, then it must be applied unless the alternative would cause significant adverse environmental impacts. The division, not the applicant, determines practicability. This determination is subject to a permit appeal.

Comment 21: *Restore the determination of practicable to the Individual Permit language, in Rule 0400-40-07-.04 (5)(a) & (b) Individual Permits. The commenter suggests TDEC restore the concept of an applicant assessing and recommending practicable alternatives to meet the permit requirements. The Chamber believes this change will add costs both to the preparation of applications and that more costly alternatives will be selected by the Department. Using the Department's own definition of "practicable alternative" (#23 of this rule) is that "an alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes." The commenter strongly believes that the project applicant has a superior perspective to consider all the factors involved, including cost. Paragraph (5)(a) maintains the requirement that the an application must include "all necessary technical information for the Commissioner to make a determination"; therefore, the Department has sufficient authority to require an applicant to submit additional information to ensure that the suggested practicable alternative satisfies the permitting requirements. We believe that restoring the determination of the applicant for providing a practicable alternative is in the best interest of an efficient and effective permitting process.*

Response: This rule change is critical to maintaining the effectiveness of the ARAP permitting program. The definition allows a demonstration by the applicant that a higher cost design alternative is not practicable, and the division will certainly consider that information in making its permit determination. Again, this requirement already applies to all activities that require a Section 404 permit, so for those projects it imposes no additional regulation. This rule change counterbalances existing provisions in the Antidegradation Statement allowing projects causing only *de minimis* degradation to avoid the alternatives review that would otherwise be required for waters with available parameters and Exceptional Tennessee Waters. The division does not dispute that an applicant often has a more informed perspective on costs, and the division will certainly consider – while reserving the ability to question - the applicant’s documentation of practicability.

Comment 22: *The Division should consider making the following revision:*

""Practicable alternative" is an alternative that is reasonably available and reasonably capable of being done after taking into consideration cost, existing uses and investment, existing technology, and logistics in light of overall project purposes. (In making this determination, the Department shall not be bound by any guidance document created for use in its antidegradation analyses.)"

If TDEC is reluctant to change the above definition as requested due to its desire to maintain a certain consistency of this language with Corps federal definitions, then please consider making these changes and then adding it as a new "practicable alternative" definition that would stand alone and be applied by TDEC only to water withdrawal ARAP’s -- which are unrelated to Corps definitions, processes, and standards.

Response: The definition will be retained as proposed to maintain consistency with federal requirements. Regarding water withdrawals, applicants should demonstrate that less damaging practicable alternatives are not available.

Comment 23: *Regarding Rule 0400-40-07-.04(5)(b), we object to the carve-out of any government funded road project from the alternative analysis requirement. Alternative locations of a roadway are a critical consideration of lessening impacts to natural resource values and should not be exempted from an alternatives analyses, including options to “avoid” impacts altogether.*

Response: This provision simply provides that certain public road projects do not need to demonstrate that alternative road locations are impracticable. This provision reflects the fact that public road projects are subject to multiple levels of review and competing factors in determining appropriate road locations.

Comment 24: *“Shall consider” would need to be changed to “must demonstrate why the impact can’t be avoided and, if not, how impacts will be minimized” to be compliant with Section 404. The proposed rule is not comparable to Section 404 requirements because it does not require rebutting presumptions for the need to fill a wetland or alter a stream.*

Response: Although it does not speak in terms of presumptions, Rule 0400-40-07-.04(5)(b) requires selection of the practicable alternative causing the minimal adverse impact on resource values. This a requirement to avoid or minimize impacts, and is derived directly from the Section 404 requirements.

Comment 25: *Although we support TDEC’s proposed stronger alternatives analyses and required showing of no practicable alternative before granting individual permits, we ask that TDEC eliminate the sentence from Proposed Rule 0400-40-07-.04(5)(b) stating that alternatives analysis for road projects need not include alternative locations. TDEC should strike the sentence creating an exception for road projects. At the very least, we suggest TDEC clarify the requirement as follows: “For public road projects, a state, county or local government agency does not have to submit alternative endpoint locations as part of its alternatives analysis, but the proposal must demonstrate that it has first avoided or minimized impacts to streams or wetlands through alignment and design alternatives. In addition, nothing in this part shall be interpreted to limit the Commissioner’s authority to ensure that public road projects comply with applicable state and federal law.”*

Response: The language will be retained as proposed. Avoidance and minimization apply to such road projects as to design, but in the case of linear roads the options for alternate locations or alignments are very limited and roads will generally intersect streams regardless. The department may consider alternative locations and suggest these to applicants for public road projects, but selection of these alternative locations is not required.

Comment 26: *Restore the determination of practicable to the Individual Permit language, in Rule 0400-40-07-.04 (5)(a) & (b) Individual Permits. The Chamber suggests TDEC restore the concept of an applicant assessing and recommending practicable alternatives to meet the permit requirements. The Chamber believes this change will add costs both to the preparation of applications and that more costly alternatives will be selected by the Department. Using the Department’s own definition of “practicable alternative” (#23 of this rule) is that “an alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.” The Chamber strongly believes that the project applicant has a superior perspective to consider all the factors involved, including cost. Paragraph (5)(a) maintains the requirement that the an application must include “all necessary technical information for the Commissioner to make a determination”; therefore, the Department has sufficient authority to require an applicant to submit additional information to ensure that the suggested practicable alternative satisfies the permitting requirements. We believe that restoring the determination of the applicant for providing a practicable alternative is in the best interest of an efficient and effective permitting process.*

Response: The requested change will not be made. While the project applicant should have the first opportunity to demonstrate a lack of less impactful practicable alternatives, the division should have the authority to make the final determination and to require the applicant to avoid and minimize impacts. The above-referenced authority to require additional information is meaningless absent the requirement to select the least impactful practicable alternative.

This provision is consistent with federal requirements for Section 404 permits, and already applies to any projects for which a Section 404 permit is required. Moreover, this requirement counterbalances the application of de minimis degradation in the Antidegradation Statement to reduce the alternatives requirement for waters with available parameters and Exceptional Tennessee Waters. On balance, this requirement is not expected to impose significant new requirements on applicants.

Finally, if an applicant disagrees with the division’s determination regarding practicable alternatives, the applicant may appeal the permit to this Board.

Comment 27: *It appears that the “practicable alternative” analysis is NOT required for new Tennessee Department of Transportation (TDOT) road projects. There is no justification for creating an exception for a single permit applicant, particularly one which has already had continuous and geographically widespread impacts on water bodies and water quality.*

Response: Qualified public road projects (which include county and local government road projects in addition to TDOT) must demonstrate a lack of practicable alternatives to avoid or minimize impacts, but these do not need to include alternative road locations. These applications must still demonstrate that less impactful designs are not practicable. For example, in some cases a bridge could be designed to span a water body rather than include multiple large pilings or a box culvert with an open bottom could be utilized to span a stream rather than a pipe.

Comment 28: *P. 13, Item 5(b). Revise the sentence saying the alternatives analysis for road projects does not have to include alternative locations as follows, “For public road projects, a state, county or local government agency does not have to submit alternative locations as part of its alternatives analysis, but the Commissioner may require the project to be moved to an alternative location to avoid or minimize impacts to streams or wetlands.” This would clarify that the fact that the alternative locations need not be submitted does not imply that the department will never consider them when a proposed location impacts streams or wetlands.*

Response: The requested change will not be made. It is neither the intent nor the practice of the department to require relocation of public road projects. However, the department can, of course, recommend that public road developers consider alternative impact locations.

Comment 29: *The statement, “For public road projects commissioned by a state, county or local government, does not need to include alternative locations” should be changed to “...may include alternative locations.” TDEC should consider adding a statement to address the fact that TDOT should strive to avoid aquatic impacts wherever possible. Additionally, we feel that it's a bad precedent to identify a specific type of project impact in rule.*

Response: The requested changes will not be made. Of course public road project applications “may” include alternative locations. That is true without the rule saying so. We do encourage sponsors of public road projects to avoid and minimize impacts wherever possible, and the rule still requires consideration of alternative designs to accomplish this. Moreover, road projects that include federal highway funds include a detailed environmental review that includes consideration of avoidance and minimization.

Comment 30: *On page 13, on 5.b. paragraph, the second sentence says that state, county and local governments don't need to include alternative locations in their alternatives analysis. Please clarify that the division can raise alternative locations.*

Response: The division may raise alternative locations, but the intent of the rule is that selection of alternative locations is not mandatory.

Comment 31: *P. 13, Item 5(b). Revise the sentence saying the alternatives analysis for road projects does not have to include alternative locations as follows, “For public road projects, a state, county or local government agency does not have to submit alternative locations as part of its alternatives analysis, but the Commissioner may require the project to be moved to an alternative location to avoid or minimize impacts to streams or wetlands.” This would clarify that the fact that the alternative locations need not be submitted does not imply that the department will never consider them when a proposed location impacts streams or wetlands.*

Response: The department may consider alternative locations and suggest these to applicants for public road projects, but selection of these alternative locations is not required.

Comment 32: *The exemption for road projects should explicitly state that location issues cannot be challenged during the ARAP permitting process because TDOT, counties, and cities utilize public processes for siting roads. This would leave open the possibility for using the ARAP process for challenging siting if there had been no previous opportunity to raise siting issues.*

Response: In the case of linear public works, it is difficult if not impossible to avoid intersecting streams regardless of the final right-of-way selected, which is part of the reasoning behind this proposed revision. However, the Water Quality Control Act authorizes permit appeals. While an ARAP for a public road project may be appealed, an appeal challenging the location of the impact would fail to state a claim on which relief could be granted under this rule, and thus should be dismissed.

Comment 33: *Per 0400-40-07-.04(5)(b). The revisions proposed at this subsection may be the most crucial aspect of this rulemaking. While we understand that for habitat alteration projects there is an interest in conforming to Corps standards (even though ARAP's cover more waters and more activities) and the order of preference to avoid/minimize/mitigate, this strict new permitting standard proposed is a poor fit for water withdrawal permitting. It should not be required for withdrawals, either new withdrawals or especially for ongoing renewals, if an applicant can show lack of harm to the water body affected from the proposed or existing project despite some small level of measurable or potential impact.*

Response: The division believes that the same general provisions for alternatives analysis proposed for other alterations should also be applied to new or expanded water withdrawals, including avoidance, minimization, and an exploration of practicable alternatives. For renewals that do not increase existing withdrawal limits, the applicant will not be required to “re-justify” an amount of withdrawal and location that the division has previously permitted. The division does retain the authority to revisit withdrawal levels if adverse impacts result from the withdrawal or if background conditions change, such as if there were a significant change in the flow regime of a stream.

Comment 34: *The language proposed in Rule 0400-40-07-.04(5)(b) regarding Individual Permits calls for evaluation of “potentially” practicable alternatives. The word “avoid” should be added to this section – “to avoid and minimize the loss of resource values.” If “avoid” is omitted here, it appears that an applicant is never held to the standard of documenting why impacts are unavoidable. Also, if the applicant turns in an alternatives analysis and an in-system mitigation plan, and the in-system plan is unreviewable in the draft permit, challenges remain with respect to reviewing “de minimis” declarations.*

Response: The word “minimize” already includes reduction of the impacts to zero, or avoidance. Nonetheless, for the sake of clarity, the term “avoid” will be added. The Division’s determination of *de minimis* degradation is reviewable through a permit appeal.

Cumulative Impacts

Comment 35: *Per Rule 0400-40-07-.03 (9): (13)(9) - definition of "Cumulative Impacts" - Please clarify if actions resulting in “cumulative impacts” are the actions of a single permit applicant. The use of the term “past actions” is currently open to interpretation; we recommend more clearly defining the term “past actions” and how it relates to “common plan of development”.*

Response: The wording used is intended to apply to both past actions or a single applicant. Because the language used does not specify the actions of a single landowner or applicant, the definition as written includes all past or present impacts.

Comment 36: *Per Rule 0400-40-07-.04(6)(c)6.: whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource (p. 15). We recommend removal or definition of the word “secondary.”*

Response: The term ‘secondary impacts’ is already in the current rule, and the division has not proposed to add or change it. This means impacts that are unintentional or indirect, such as impacts that occur upstream or downstream of the direct impact area as a result of the permitted activity.

Comment 37: *The imperative of considering cumulative impacts is nowhere present in this document. While the definition remains in this definition section, the term is completely absent from the document. As consideration of cumulative impacts is explicit in the Clean Water Act, it would of necessity be required to be part of the consideration in issuing permits for impacts under ARAPs. Necessarily, the impacts of previous degrading activities or general human impacts such as development in the watershed (cumulative impacts) would need to be part of assessing “baseline conditions” as defined here. The TN SQT tool, as written and where applicable, would capture the current conditions, but lacks the tracking function that only TDEC can provide for cumulative impacts. Perhaps even more important, there is no guidance here, or in any referenced documents, that set limits for when cumulative impacts can be said to have met the allowable limits (except for chemical pollution), that would prevent the issuance of an ARAP.*

Response: Rule 0400-40-07-.04(6)(c)6. Lists cumulative impacts among those factors the Commissioner should consider when evaluating the loss of resource values for the purpose of determining mitigation. The commenter is correct that there is no explicit requirement for the applicant to provide an analysis of cumulative impacts. Because habitat is a narrative, rather than a numeric water quality criterion, the Board has not attempted to set specific numeric limits in rule for how much of various types of alterations can be allowed in a given watershed or segment. The Stream Mitigation Guidelines are expected to offer some guidance on this subject.

Compensatory Mitigation

Comment 38: *The rules should express a preference for mitigation banks, which reduce the level of uncertainty associated with permittee responsible mitigation.*

Response: The rules are intended to be neutral with respect to the mitigation provider. However, where proposed habitat alterations also require Section 404 permits, the Corps’ preference for mitigation banks would apply through the Corps’ permitting process.

Comment 39: *P.17, Item (c)1. Revise sentence as follows, “When practicable, mitigation for wetland impacts should occur within the same US EPA level III ecoregion as the impacts.” The “may be based on” language in the proposal is so weak as to be almost meaningless. This clarifies that the preference for wetland mitigation is that the mitigation be in the same level III ecoregion as the impacts, while still allowing it in the HUC 8 or 12 if the same ecoregion is not practicable.*

Response: The division finds this revision too restrictive to be universally applied. The intent is to make clear that ecoregion similarity is one of several factors the division may consider when reviewing mitigation sites, and that in some cases closer proximity to the impact and staying in the same ecoregion is preferable to a site further away in the same HUC 8.

Comment 40: *Mitigation needs to be located as close to the impact as possible.*

Response: We agree with the principle that mitigation should be located close to the impact, and Rule 0400-40-07-.04(7)(a)4. reflects this preference.

Comment 41: *The order of mitigation stated in Rule 0400-40-07.04(7)(a)4 is contrary to the Federal 2008 Mitigation Rule, where the preferential order of mitigation is Mitigation Banks first, In-lieu-fee programs second, and Permittee-Responsible Mitigation (PRM) third. The State's order of preference places an undue burden upon the applicant to potentially provide two mitigation plans, one to satisfy the Corps of Engineers requirements and one to satisfy the States requirements.*

Response: The rule expresses a preference, but not an absolute requirement. One of the goals of this rulemaking is to avoid situations in which an applicant would be required to mitigate twice for the same impact because of direct conflicts between the ARAP rules and Section 404 requirements. However, the State's policy has been, and remains, to promote compensatory mitigation close to the impact site because when mitigation is provided farther away from the impact site, it is more difficult to ensure no overall net loss of resource values. Moreover, the Corps' rules encourage watershed-based mitigation. In order to balance these two policy goals, which are in tension with each other, the rule is expressed in non-mandatory language but allows the division to develop a multiplier to be applied to mitigation that is farther from the impact site.

Comment 42: *The text says after the prioritization process that multipliers "may" be used as the benefits move further away from the impact site. This should say "will" or "shall" in order to incentivize mitigation that truly compensates for the damage.*

Response: The division requires some flexibility to meet the widely varied situations that arise in ARAPs, and to attempt to coordinate with Corps permitting.

Comment 43: *P. 17, Item (a)4. Revise the sentence before the listing of five priorities to read, "Mitigation, whether done by the permittee or another mechanism, should occur as close to the impact..." This would clarify that the location priorities apply to banking and in-lieu fee as well as permittee-responsible mitigation.*

Response: The rule language proposed does not specify permittee-responsible, banking, or in-lieu fee mitigation. Therefore the wording is intended to include all mitigation scenarios.

Comment 44: *Please add the following language to avoid taking of private property:*

(c) Mitigation of Wetlands.

...

2. The ratio of acres required for wetland mitigation must be reasonably related and roughly proportional to the impacts and, in general, should not be less than 2:1 for wetland restoration....

Response: The Division believes the wording in 7(a) of this same section ("..the applicant must provide mitigation that results in no overall net loss of resource value from existing conditions.") to be adequate to address the commenter's desire for mitigation to be related and proportional.

Comment 45: *Per 0400-40-07.04(7)(a)4. The Division will evaluate resource value compensation through the use of an appropriate quantitative assessment or other defensible scientific method, and where applicable will account for temporal loss of resource values. This provision should also allow use of "quantitative assessment tool" to determine baseline conditions and suggest using qualitative tools.*

Response: It is indeed the intent of the division to both allow and encourage the use of quantitative assessment tools for assessing existing conditions. The division does not intend to make the use of any specific tool mandatory. Some proposed alterations are easily assessed with much less cost and effort. The division will address this issue in greater detail in our Stream Mitigation Guidelines.

Comment 46: *The Rule states that where applicable the Division will account for temporal loss of resource values. TDEC should demonstrate how this will be done so that temporal loss is factored into the value of the mitigation.*

Response: As stated at the end of section 7(a)4., the division would use a multiplier added onto to the mitigation ratios to account for significant temporal losses. Specifics on how a multiplier will be applied will vary with the temporal loss.

Comment 47: *There are two kinds of temporal loss and both should be compensated. The first is the loss of resource values from the time of the destruction to the time of the compensatory mitigation completion. If there is a two year time lag, for example, there should be a charge for that lag with funds directed to other kinds of restoration and enhancement projects. The second temporal loss is the loss of full function from the time of the construction until the project is fully functioning. This is often seen in the time lag to repopulate a stream segment with aquatic species, or in the growth required to create a well-rooted bank and riparian zone. It is only after a number of years (5-10?) that it can be determined whether the ecological functions have been replaced. (7)(a)(4) This is a very important addition, the temporal factor as noted above. Either a multiplier could be applied to the debit and additional credits would be needed to balance, or a flat fee calculated for an average delay based on the nature of the damage and restoration time, say two to five years, would be paid to TDEC and used to fund restoration and enhancement on impaired streams on the 303(d) list.*

Response: The division proposes to utilize a multiplier, as the commenter suggests, for any significant temporal losses. See Comment #46 and associated response.

Comment 48: *Per 0400-40-07.04(7)(a)4. How will the Division "apply a multiplier" based on items (1) through (v)? Please provide rationale for applying a multiplier? If a multiplier is to be provided and used on mitigation projects, we suggest including the procedure in the Rule.*

Response: The use of a multiplier to require more mitigation for significant temporal losses is more consistent with our concept of 'no net loss' than charging additional fees or other cost-incentives. This requirement applies only when there is an appreciable permanent loss of resource values such that mitigation is required. When mitigation occurs years after the impact, this lag time further magnifies the loss of resource values. Specifics on how a multiplier will be applied will vary with the temporal loss. The division plans to provide more specifics in the Stream Mitigation Guidelines.

Comment 49: *Regarding Rule 0400-40-07-.04(5)(c), there is no bar to government joining as a co- applicant or a co-holder of a permit and use this status to facilitate a private for profit activity. This is an open invitation to local governments as well as state agencies to facilitate permits which previously would have been denied. Regulations to allow government to pick economic winners and losers is bad public policy.*

Response: The division concurs with the commenter. Language will be added specifying that only in the case of a public works project may a government entity propose mitigation after a permit has been issued. The division retains the authority to judge what constitutes unusual circumstances in this context; the intent is that this only be applied in urgent situations and for legitimate public projects.

Comment 50: *The draft regulation fails to acknowledge the EPA rules governing stream and wetland protection under Clean Water Act Section 404.*

Response: While the division has endeavored to avoid direct conflicts with federal requirements, the ARAP rules do not substitute for the CWA Section 404 rules, which will apply separately to any projects that require a Section 404 permit in addition to an ARAP.

Comment 51: *The term “appreciable” is used in the definition of “Minimal impacts”. This term is also used throughout the rule to make similar references. This term is not defined in the rule. We assume this term will be applied using the normal and ordinary meaning as defined in the dictionary. If this term will be used broader than the normal and ordinary meaning, the Department should define the term within the rule and make available for public review*

Response: The commenter is correct. It is the intent of the division to apply the term “appreciable” in the ordinary and normally accepted meaning. However, we are also adding a definition of “appreciable permanent loss of resource values” due to comments received reflecting a lack of clarity about this threshold.

Comment 52: *We recommend that when an applicant provides reasonable justification, e.g. due to small size and location of the HUC-12, why mitigation within a HUC-12 cannot be found then a multiplier should not be added.*

Response: The division agrees that there are some scenarios where mitigation outside the HUC 12 would not have a multiplier applied. (For example, if an excellent mitigation site is in close proximity and in the same ecoregion but just outside the HUC 12). The wording used in section 7(a)4 on page 17 (“Where appropriate...”) allows for the division flexibility in applying multipliers.

Comment 53: *Per 0400-40-07.04(7)(c)2 - “4:1 for wetland creation and enhancement ; and 10:1 for wetland preservation” ∴ Section (7)(a)3. Indicates the order of acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation. If enhancement and preservation are preferred ahead of creation then one would assume the mitigation ratios for these two methods would be better than for creation. Since wetland enhancement already has some wetland characteristics, the chances of success are much greater than creation; likewise, with high quality wetlands that are in much need of protection, one would assume a much better ratio would be provided. It is suggested that a 2:1 enhancement ratio be considered and a 5:1 to 10:1 range be considered for preservation.*

Response: The commenter makes a logical point, but enhancement and preservation, while more likely to be successful, do not necessarily meet the goal of ‘no net loss’ at a low ratio. For example, the division cannot claim to have met the no net loss standard if it issues a permit that allows an acre of wetland to be filled, and mitigated for by enhancing and/or preserving the same amount of an already existing wetland. For this reason creation is granted a lower ratio and requirements for monitoring the success of the creation are included in the permit. Preservation is generally acceptable as part of an overall mitigation package, but at a higher ratio. The division considers the conversion of unique or high quality wetland resources when determining how much, and what type, of mitigation should be required in a permit. A high quality mitigation wetland may, for example, be required to compensate for the loss of a high quality impacted wetland, and no downward ratio adjustment should be made in this situation.

Comment 54: *Per Rule 0400-40-07-.04 (7.a.3): Acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation, or any other measures that are reasonably assured to result in no net loss of resource values from baseline conditions. (p. 16). We recommend this statement be eliminated or revised to better align with federal rule. Federal rule prefers restoration first, then other methods of mitigation in no particular order:*

Response: With the language as proposed, the rule has laid out a prioritization more specific than the federal rule, but does not conflict with it, since as the commenter points out, the federal rule expresses no priority preference after restoration. This is the intent.

Comment 55: *The goal of the proposed rule changes should focus on providing greater transparency,*

consistency, and equivalency in the mitigation permitting process. It is the responsibility of the Department to promote a level playing field with respect to all mitigation mechanism providers. Greater oversight should be placed on providers who fail to meet the goals and objects of an approved mitigation plan. Specifically, in-lieu fee (ILF) programs are allowed to pre-sell credits based on a commitment, and often unproven track record, to provide successful mitigation in the future. This not only hurts the environment, it creates an uncertain marketplace holding back responsible and timely economic development and job creation. When advanced mitigation is purchased, but never performed or fails to perform, the Department should review the associated permits and ensure the proper environmental benefits are achieved by another proven provider.

Response: We appreciate the comment, which raises valid issues. However, ILFs are primarily governed under federal rules through the Interagency Review Team, of which the division is a member. Recent actions by the IRT have facilitated the development of a broader marketplace of third-party mitigation providers in Tennessee. Federal rules require the IRT to secure financial assurances, which should ensure eventual mitigation. The remedy for failed performance of purchased credits, however, generally lies with the ILF provider, not the permittees.

Comment 56: *Per Proposed Rule 0400-40-07.04(7)(a)1. -- Suggested change:*

The applicant shall provide the Division with a mitigation plan, including but not limited to site selection and control, credit / debit determinations, performance standards, credit release schedule, financial assurance, site protection, long-term management plan, and monitoring a time schedule for completion of all mitigation measures, for approval. To the extent practicable, the applicant shall complete the required mitigation, excluding monitoring, prior to, or simultaneous with, any authorized impacts.

Justification:

It is important all mitigation mechanisms are held to highest performance standards by demonstrating control over critical elements of a valid mitigation plan, as outlined above, and presented to the Division for review. Furthermore, the Division, or other relevant agencies, should hold applicants accountable for any site failures or delays in implementing mitigation projects in a timely and consistent manner.

Response: The commenter raises a good point with respect to site protection. The draft rules had overlooked this requirement, which is routinely applied in ARAPs and is required to ensure that compensatory mitigation sites are protected from later development. Accordingly, the rules will be updated to include an express requirement for permanent protection of compensatory mitigation sites consistent with current practice.

The balance of these measures may not be applicable to all mitigation scenarios, so the rule language will not be changed.

Comment 57: *Per Proposed Rule 0400-40-07.04(7)(a)4.(iv) - Suggested change:* projects providing an increase in resource values to degraded streams or wetlands outside adjacent to the HUC-8 in which the impact is located; or ...

Justification:

The proposed change will create greater consistency when determining the service area of a mitigation mechanism. This would follow similar practices used by the U.S. Army Corps of Engineers when permitting mitigation banks or determining the location of a permittee responsible mitigation (PRM). Overall, mitigation mechanism should be given same determination when selecting a service area in order to drive more private investment through the establishment of traditional mitigation banks or choosing the appropriate area for a (PRM). With greater service area certainty, private investment will follow leading to more advanced ecological restoration through the development of mitigation banks, competitive pricing, and a greater supply of credits.

Response: The requested change will not be made. This language is in the current rule, and has not proven to create problems when combined with the Corps' priorities. Specifically, mitigation in an adjacent HUC 8 is a subset of mitigation outside the HUC 8, so the two sets of rules do not conflict.

Comment 58: *Mitigation banks and in lieu fee programs often have several HUC 8 watersheds as a service area; and federal mitigation rule gives preference, in order, to mitigation banks, in lieu fee programs, then permittee responsible mitigation. An applied multiplier to use a bank or in lieu fee program may favor permittee responsible mitigation. If permittee responsible mitigation is favored over banks and in lieu fee programs, then this may discourage mitigation sponsors from developing banks and in-lieu fee programs in Tennessee. In order to keep TDEC's permitting process predictable and ordinary as outlined in the Bill of rights for permit applicants (69-3-141), we recommend that clarification be provided that TDEC rule is consistent with the preference outlined in the federal mitigation rule.*

Response: While the division endeavors to avoid any conflicts between state and federal requirements, in order to avoid or minimize appreciable loss of resource values, it is important to keep the mitigation as close as practicable to the site of the proposed impacts. The division works collaboratively with the Corps and other members of the Interagency Review Team to avoid conflicting requirements, and will continue to do so. Moreover, there is a subset of applications that require ARAPs but do not require Section 404 permits, and in these cases the state's preference for mitigation close to the impact site applies without any potential tension with other rules.

Comment 59: *Per Proposed Rule 0400-40-07.04(7)(a)5. Suggested change:*

~~All mitigation plans shall include a monitoring and reporting program to document timely achievement of successful mitigation and remedial actions to correct any deficiency.~~

Justification:

This section is unnecessary if the critical elements of a mitigation plan are clearly outlined in the Proposed Rule 0400-40-07.04(7)(a)1. Applicants should describe their future monitoring events as well as adaptive management (remedial actions) through the mitigation plan submission and approval process. While the Division retains the final authority to determine each critical element of an acceptable mitigation plan, these changes provide an overview of the most important elements and allow an applicant to see them listed in a concise and comprehensive manner.

Response: Monitoring and reporting are critical elements of mitigation and will be retained in the rule as is.

Comment 60: *Per Proposed Rule 0400-40-07.04(7)(c)1. - Suggested change:*

~~Prioritization of mitigation site selection for wetland impacts may also be based on U.S. EPA Level III ecoregions.~~

Justification:

This section creates confusion with Proposed Rule 0400-40-07.04(7)(b)(i) – (7)(b)(v). All mitigation mechanisms should follow a consistent service territory and be prioritized in manner that minimizes temporal loss when and where available.

Response: There are multiple factors to consider when selecting sites for wetland mitigation, including proximity, geology and ecoregion, and likelihood of success. Wetlands share similarities within watersheds and

also within ecoregions. The division prefers to reserve enough flexibility in the rule to allow for the best mitigation options in each situation.

Comment 61: *Per Proposed Rule 0400-40-07.04(7)(c)2. - Please confirm whether the ratios listed here are for calculating compensation/impact ratios for impactors or ratios given to mitigation providers for the work they perform on wetland sites.*

Response: These ratios establish the amount of mitigation to be required to offset permitted impacts, depending on the type of mitigation provided. These ratios affect both the permittee and the mitigation provider.

Comment 62: *Mitigation outside of an area that is degraded or removed has no effect whatsoever on water quality and potentially serves to degrade water quality not only the new use area but in a newly developed offset area.*

Response: The rules require, and the division ensures, that compensatory mitigation results in no overall net loss of resource values. The division must ensure that an impact does not cause pollution, including downstream impacts. Moreover, the division recognizes that compensatory mitigation itself is an impact, and imposes measures to ensure these projects have a net positive effect on water resource values.

Comment 63: *One of the proposed rule changes would open the door to disturbance of pristine aquatic ecosystems by developers (known as "exceptional Tennessee waters") as long as they mitigate the damage within a defined nearby area that could potentially be some distance from the impacted aquatic system. This kind of remote mitigation would be inadequate to provide the necessary protection of the system's water quality.*

Response: There are few if any truly pristine (which is usually defined as completely undisturbed by human contact) aquatic ecosystems in TN, and 'pristine' is not part of the definition of Exceptional Tennessee Waters. We also disagree that in-system mitigation is insufficient to compensate for the loss of ETWs. The ARAP rules require consideration of the "conversion of unique or high quality waters as defined in Rule 0400-40-03-.06 to more common systems" as a factor in evaluating a mitigation package. Therefore, an activity that impacts and ETW is going to require more and/or higher quality mitigation to offset the loss of resource values.

Comment 64: *Wetlands filter our water, for drinking water quality, and are home to many unique species. Wetlands should be protected, approval of projects and mitigation should be permitted only when true duplication of habitat can be found within the same habitat/watershed.*

Response: The division agrees with the commenter, and the language proposed herein is intended to better achieve avoidance, minimization, and mitigation in proximity to the proposed impact.

Comment 65: *Wherever and to the fullest extent possible, TDEC should work to ensure that degradation of streams due to mitigation moving away from the impacts (proximity) is minimized.*

Response: The division agrees with the commenter and believes the proposed changes strengthen the priorities in favor of proximity.

Comment 66: *Rule 0400-40-07-.04(7)(a) where acceptable mitigation mechanisms are described, it lists PRM, ILF, and mitigation banks but does not specify the hierarchical preference of each mechanism. As such, it is unclear whether the Rule will follow the 2008 Federal Mitigation Rule's hierarchical preference (i.e. mitigation banks, ILF, and then PRM). It seems appropriate to indicate Division preference (or no preference) under this section as it may imply that PRM is the #1 choice since it is listed first.*

Response: These rules do not establish a preference for the type of mitigation provider.

Comment 67: *Per Rule 0400-40-07-.04(7)(a)6.: Mitigation for impacts to Tennessee streams and wetlands shall occur in Tennessee. (p. 17). We recommend eliminating this wording. Where the goal of TDEC is to assure no net loss of resource value with a watershed prioritization approach, out-of-state mitigation should be allowed regardless of state boundary when proposed mitigation is located within the same watershed or major drainage basin as impacts.*

Response: The commenter makes a valid point. However, the division has no authority or right of entry outside the bounds of the state of Tennessee, making it difficult to effectively regulate out-of-state sites. Furthermore, the division has a responsibility to ensure that no appreciable loss of resource values occurs to waters of the state of Tennessee. If an authorized impact reduces resource values to waters of the state, the offsetting mitigation must be provided in waters of the state.

Comment 68: *Given there is no “scientific” bases for selecting mitigation ratios, language should be added that the mitigation required must be reasonably related and roughly proportional to the resource value lost to assure compliance with the Attorney General guidelines to avoid regulatory takings... Suggested language is underlined.*

(c) Mitigation of Wetlands.

...

2. The ratio of acres required for wetland mitigation must be reasonably related and roughly proportional to the impacts and, in general, should not be less than 2:1 for wetland restoration; 4:1 for wetland creation and enhancement; and 10:1 for wetland preservation.

*The federal mitigation rule is clear on this issue - Federal compensatory mitigation policy dictates that the amount of mitigation required must be “**roughly proportional with the permitted impacts**, so that it is sufficient to offset those lost aquatic resource functions.” Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,633 (Apr. 10, 2008) (emphasis added).*

Response: The division believes the wording proposed in section -.04(7)(a) “...the applicant must provide mitigation which results in no overall net loss of resource values from existing conditions” ensures that the mitigation is roughly proportional with permitted impacts. The ratios established in the rule for wetland mitigation are roughly proportional. An applicant has no requirement to provide more mitigation than needed to achieve ‘no overall net loss’ of resource values. However an applicant may choose to offer a higher level of mitigation than required by rule.

Comment 69: *The expansion of this section introduces a completely new process for determining impacts of projects. Under current rules, TDEC was required to determine under its antidegradation guidance whether there was an appreciable impact on the resource, i.e., that resource values would be lost. This determination then triggered the requirement for documentation that all avoidance and minimization options had been explored, and that mitigation would be required. The application would then be reviewed to ascertain compliance with these requirements, including how the mitigation requirement would be met. The expanded language appears to say this very thing, but that sense of clarity is lost with the final phrase, referencing “baseline conditions.” Baseline conditions, as defined in the definition section (not adequately), is based on an assessment of the stream (or wetland). The assessment is of precisely a particular stream segment or wetland and is not generalized to a watershed. Therefore the only way that mitigation could meet the standard in this paragraph is if the mitigation is contiguous to the impact area so that a subsequent assessment of the site would score the same as the original assessment. It is clear, however, from other parts of this document, that acceptable compensatory mitigation need not occur contiguously and that TDEC is willing to accept permanent loss of resource value at a particular site in exchange for an increase in resource value at some other, perhaps quite*

distant, site. While such mitigation arrangements may sometimes be unavoidable, it cannot take the place of a determination that the degradation is NOT “de minimis” and therefore all requirements of projects that cause degradation must apply, including compensatory mitigation and a documented analysis of options to avoid and minimize as well as socio-economic justifications for the project.

Response: There is no requirement, express or inherent in these rules, that mitigation must be provided “contiguous to the impact area.” The use of the term “existing conditions” in this ARAP rules (substituting for “baseline conditions”) simply reemphasizes the current rule that mitigation must compensate for the lost resource values associated with the impact. The Board and EPA have both previously approved the use of in-system compensatory mitigation as resulting in only *de minimis* degradation, appropriately encouraging mitigation close to the impact site.

Comment 70: *We recommend that assessments not be limited to quantitative methodology, but also allow for the use of qualitative assessments. Quantitative assessments are not required in the federal mitigation rule, Compensatory Mitigation for Losses of Aquatic Resources (2008.) The federal mitigation rule allows for several types of assessment methods and does not specifically call out quantitative assessments. For more timely and cost effective mitigation decisions, we recommend the use of either a qualitative or quantitative methodology. Such quantitative methodology, like TDEC’s Stream Quantification Tool (SQT), can be costly to implement, labor intensive, and result in a more arduous regulatory process. Other states around Tennessee are currently using a qualitative assessment because permitting and mitigation decisions can be made using a much simpler, rapid, method than a qualitative method to collect baseline data and evaluate mitigation site success. There is concern that specifically calling out ‘quantitative’ assessment in rule will result in only the use of the SQT. If other assessment methods are truly acceptable there is no need to specially call out quantitative assessment.*

Response: There is no intent on the part of the division to make the specific use of the SQT or other quantitative tool mandatory. The commenter is correct that there are common scenarios where a much less intensive process may be adequate to assess existing conditions. The division will express a preference for the use of the SQT or other quantitative tool for the purposes of mitigation banking crediting and debiting in the Stream Mitigation Guidelines.

Baseline/Existing Conditions

Comment 71: *A number of commenters expressed support for assessing mitigation based on baseline conditions. However, some commenters noted that this term is used in the field of mitigation with a different meaning and asked that a different term be used.*

Response: We appreciate these comments and will retain the substance of the proposal. However, to avoid confusion with other commonly-accepted uses of the term “baseline conditions,” the term “existing conditions” will be used instead.

Comment 72: *The definition of baseline condition in the ARAP regulations grandfathers in existing pollution contrary to the spirit and letter of the Tennessee Water Quality Control Act where all waters are supposed to be held in the public trust, and that Tennesseans have the right to unpolluted waters, and polluted waters are supposed to be abated, reclaimed and prevent future pollution.*

Response: The commenter correctly, though only partially, references the overall mission statement of the TWQCA, and the division indeed has this mission. An applicant proposing an alteration on their property, however, does not. The intent behind this definition is to make clear that the applicant’s responsibility for mitigation is not to conduct stream restoration to remediate all past degradation regardless of whether it was associated with the development activity at that site. Their responsibility is to show the division and the public that the alteration they are proposing, along with past activities associated with the same development, will not cause a violation of water quality standards, nor an overall net loss of resource values.

This principle is reflected in the previous version of ARAP Rule 0400-40-07-.04(6)(c), which required the Department to ensure no lost resource values “associated with the proposed impact” and to determine “the lost resource value associated with the proposed impact and the resource value of any proposed mitigation.” The rules have never required an ARAP permittee to provide mitigation beyond that required to compensate for the permitted impacts within the development.

Comment 73: *The rules should better define baseline conditions.*

Response: To avoid confusion with other commonly-accepted uses of the term ‘baseline’, the division will change to the term “existing conditions,” meaning the habitat and water quality status of the waterbody in question at the time of the application. These existing conditions are those that are present at the outset of a common plan of development. For example, if a developer undertakes minimal impact activities under a general ARAP, but later exceeds that threshold with additional impacts, mitigation would be required for the entire loss of resource values from the outset of the development work at the site.

Comment 74: *The new definition “Baseline conditions,” contains the following language: “other defensible scientific method as approved or determined by the Division.” We do not object to this language however, we believe any scientific methods used by the Department to make assessments should be made available for public review. The regulated community depends on private environmental consultants and federal agencies such as USDA for technical guidance. Transparency regarding scientific methods used by the Department ensures consistency between the Department and regulated community when making decisions.*

Response: The situations encountered in Individual ARAPs are widely varied, and it is for this reason that the rules are not more specific as to methods. In addition, new methods are constantly being developed, so to name preferred methods specifically in rule would require a rule change every time a new viable method became available. Under the proposed requirement for a draft permit and a permit rationale to be made available for public review, the regulated community will be able to see and question any methodologies proposed by an applicant.

Comment 75: *The stream quantification tool is not appropriate for determining baseline conditions in urban streams.*

Response: Urban streams can indeed be problematic. However, we disagree that the SQT is inappropriate for use in urban settings. By adopting a resource value scoring system which assigns mitigation credit based upon functional value lift from the existing conditions, the division believes that mitigation opportunities in urban settings will be improved. The rules are being revised to reflect that the division may set a lower limit on the score that can be assigned to a severely impaired stream so that the goal of no overall net loss is assured. In addition, the SQT is not a requirement, and rules provide for other alternative assessment methods to be proposed by an applicant.

Comment 76: *Exceptional Tennessee Waters (ETWs) have a higher baseline resource value.*

Response: The commenter is generally correct. The purpose of using existing conditions is to require mitigation to offset the loss of resource values. This loss is typically greater for ETWs and Outstanding National Resource Waters than for other types of waters because the quality of the impacted resource values is higher. But some ETWs are identified for reasons other than having high resource values, and these would not necessarily have a higher existing condition level.

Comment 77: *Mitigation should be assessed based on the ecoregional reference stream rather than baseline conditions due to urban stream syndrome.*

Response: Mitigation is intended to compensate for the loss of resource values resulting from a permitted impact. However, we are modifying Rule 0400-40-07-.04(7)(a) slightly to clarify that the division can set a lower limit on existing condition values, recognizing that all streams and wetlands provide important resource values even if some of their designated uses have been degraded. The commenter correctly points out that without this lower limit, an applicant could propose a loss of resource value to an urban stream that exhibits extremely low existing condition scores and provide relatively little mitigation elsewhere to compensate.

Comment 78: *Per 0400-40-07-.03(4)definition of "Baseline Conditions", and 0400-40-07.04(6)(c) ."the Commissioner shall determine the loss of resource values from baseline conditions associated with a proposed impact and the increase in resource values " – the commenter suggests replacing "quantitative" with "qualitative". Many of the current protocols are qualitative in nature. If the state is requesting a quantitative approach, then it is suggested that some guidance on which approach the Division will accept would be appreciated.*

Response: Please see responses to Comments #70 and #74. There are some situations where a quantitative methodology will be required (consistency in assessing mitigation debits and credits makes this a necessity). However, the division agrees that there are many common ARAP scenarios where a more qualitative approach will be adequate for permit decisions.

Comment 79: *I oppose the rule changes that propose setting "baseline conditions" when a developer applies for a permit. Any impacts to the stream or wetlands would be judged based on the conditions present at the time the project is proposed, as opposed to more pristine levels. Such an approach would potentially weaken future pollution limits if the baseline is inaccurate.*

Response: Please see response to Comment #77. We agree that the determination of existing conditions must be accurate, and division staff will review these conclusions.

Comment 80: *We urge that TDEC establish processes and maximize use of all available science and resources to optimize the agency and others' ability to conduct accurate resource value calculations. This should ideally include considerations related to ecosystem service values that may be adversely impacted, like recreational uses, one of Tennessee's primary stream-use classifications, identified for the protection of the public's ability to swim, wade and fish. Regarding baseline conditions, if the revised rules for determination of baseline conditions are approved, we encourage TDEC to test the assumption that permittee-determined baseline assessments are equal to or better than the agency's.*

Response: The rules reflect no assumption that permittee-determined assessments are equal to or better than the agency's. The Division is expected to review such assessments and to make its own determination of what the actual baseline condition is.

Comment 81: *The Rule revision states that baseline conditions are the biological, chemical, bacteriological, radiological, and physical conditions of a stream or wetland as measured by a quantitative assessment tool or other defensible scientific method as approved by the Division. As we understand it, the Stream Quantification Tool has not yet been finalized. TDEC should clarify what other methods are permissible for use and are most appropriate for evaluation of streams, especially those in urban settings.*

Response: Please see the response to Comment #74.

Comment 82: *The introduction of the "baseline condition" definition (0400-40-07-.03) is problematic, as it replaces any consideration of the resource values in a reference stream with those of the stream(s) or wetlands(s) affected by a proposal. Many streams in urban, suburban, and agricultural areas are already listed*

as impaired for habitat alterations. Many of these alterations have come from legacy impacts (e.g. – land use changes in the watershed) and/or unregulated nonpoint source land management practices (e.g.- livestock or crop production). These are precisely the streams and wetlands under most threat from further degradation by new construction and land use changes.

Does the new definition of “baseline conditions” suggest that if a stream is already impaired for habitat alteration, that this impairment negates the requirement to even propose mitigation? Does the definition of “significant degradation” (0400-40-03.04(29)) and the language under 0400-40-03.06(2)(c) allow more degradation to a particular urban stream so long as the offset is proposed in the same HUC 8 watershed? In addition, would any entity covered by a Municipal Separate Storm Sewer System permit become unaccountable for existing or new habitat alterations that fall under its jurisdiction simply because the alterations already exist? Urban watersheds provide substantial health, recreation, and aesthetic values to Tennesseans, and any changes to TDEC rules should promote their restoration and enhancement rather than allow additional degradation that is not adequately compensated for nearby.

Response: We understand and agree that urban streams are more likely to be degraded and under threat due to development, which is true regardless of what requirements these rules establish. However, the ARAP permitting program is not the proper vehicle with which to achieve restoration of urban streams: that would effectively require the permittee to compensate for the damage caused by all of us.

Moreover, we must reiterate that this is a clarification, and not a substantive change, of the previous rules. Specifically, although the previous rules defined the term “background conditions” in relation to reference streams, that definition was not used again in the rules or applied to determinations of mitigation requirements, so it had no effect whatsoever on permitting.

This introduction of existing conditions was never intended to imply that mitigation would not be required for urban streams. In response to comments on this issue, Rule 0400-40-07-.04(7)(a) is revised to reflect the intent that all streams and wetlands have value and will require at least a minimal level of mitigation for activities causing an appreciable permanent loss of resource values notwithstanding prior degradation.

The definition of “significant degradation” does not require mitigation in the same HUC 8, which is only required for “*de minimis* degradation.”

The Municipal Separate Storm Sewer System permit is a NPDES permit authorizing the discharge of pollutants. It does not satisfy ARAP permitting requirements for habitat alterations.

Comment 83: *Because multipliers are being suggested in terms of proximity and temporal loss to ensure proper compensation, we believe there is also a role for multipliers on the debit side as well. 303(d) streams, especially those suffering from “urban stream syndrome” should have multipliers that partially dis-incentivize further degradation, because the loss itself may be minimal due to previous degradation. We know that urbanized streams can be improved, but the straight scoring on resource loss of an additional project may be minimal. This is the potential downside of baseline resource value scoring, using the SQT or other means. Under the current ratio system, the applicant is charged on the number of feet of stream impacted, regardless of its condition. Adding a multiplier would still result in a lower mitigation cost than the ratio system, but not so low that no benefits could be provided.*

Response: We agree with the principle that adequate mitigation should be provided, even to compensate for impacts to a degraded stream. Instead of applying a multiplier as proposed by the commenter, the rules are being further revised to allow the division to apply minimum existing condition values. The rules have always required mitigation to offset the lost resource values associated with the proposed impact, and although ratios were applied, less mitigation was required for lower value streams than for higher value streams.

Comment 84: *The changes make attaining compensatory mitigation easier and cheaper by instituting the use of an untested Stream Quantification Tool for both assessing damage as well as compensating “lift.” In describing the use of the tool, it introduces the concept of measuring the damage against the current “baseline conditions” of the resource. Unfortunately the SQT guidance document which was put out for comment earlier in the year and the published TDEC response to the comments, suggested that the tool would not be used for this purpose and that many types of streams could not be accurately represented with the tool. The ARAP document contains no mention of these identified problems or how TDEC intends to address them in using this tool. The streams that are most likely to suffer due to this shift of policy and incomplete thinking are headwaters streams and urbanized streams already on the 303(d) list for impairments. Because their “baseline conditions” under the SQT will score relatively low, the expected compensatory mitigation will be less than under current policy, resulting in a loss to resources. There might be ways to fix this problem of less compensation either by the use of multipliers (mentioned in the document but not fully developed), or in the Stream Mitigation document which has not yet been released, but as written, this ARAP document simply suggest a lowered expectation for compensatory mitigation.*

Response: The ARAP rules do not specifically reference or require use of the SQT. Although it is true that degraded streams will score lower than high quality streams, that outcome is entirely consistent with the long-standing requirement to compensate for the loss of resource values associated with the proposed impacts. The rules are being modified to allow for a “floor” of existing conditions.

Comment 85: *Per Rule 0400-40-07-.03 Definitions (4) Baseline Conditions. This is problematic for two reasons. The first is that in replacing the previous “Background Condition” definition, it drops the idea of using a “reference stream” instead of the actual stream when the stream has already been degraded. This suggests a policy shift to accept degraded streams as “normal,” rather than as a priority to restore. The second problem is that the definition leaves open how the Department or the applicant will determine baseline conditions.*

Response: In the previous rules, the term “background conditions” was defined, but never used. Therefore, that term had no regulatory effect. As explained previously, there is no policy shift here, just an attempt to be clearer and more transparent.

REFERENCE TO GUIDANCE DOCUMENTS

Comment 86: *P.17, Item (b). To avoid the potential for a future change in the guidelines document changing the rules without going through the process of amending the rules, make this reference to a version of a particular date, rather than to the most recent version.*

Response: The proposed reference to the Stream Mitigation Guidelines has been eliminated. Instead, several key performance standards are being added to the rule. The division is still expected to proceed with preparation and public notice of a guidance document, to reflect the division’s interpretation of the stream mitigation requirements.

Comment 87: *These rules create new unreviewable powers in TDEC staff through the incorporation of guidance documents.*

Response: The comment is incorrect that use of guidance documents creates unreviewable powers. ARAPs, like other permits, are subject to statutory permit appeal in which the petitioner has the opportunity to demonstrate that the permit does not comply with the statute or the rules. Such an appeal could challenge the application of guidance documents to a specific permit decision. Nonetheless, the proposed rule reference to the Stream Mitigation Guidelines has been eliminated.

Comment 88: *Several comments were received objecting to the draft rule's reference to as-yet-published Stream Mitigation Guidelines.*

Response: The reference to the Stream Mitigation Guidelines has been removed from the rule.

DRAFT PERMITS AND PUBLIC NOTICE

Comment 89: *The proposal to provide a draft permit is a device to cut off antidegradation review. The draft permit idea coming out of this is in fact a device for cutting off anti-degradation reviews, because once you find you've got de minimis and you don't have to have anti-degradation, you just stop the internal process for that as part of the permit. Once you have draft permit, the TN Supreme Court has said that the only route of appeal is to challenge the permit. The permit is issued, it goes into effect and the activity goes on notwithstanding any appeal. Since even the fastest appeals of permits that may raise anti-degradation would take at least 6 months, many projects will have done damage to the waters that are at issue and that will be irretrievable. So, the remedy of antidegradation as something that could really go to the board and be decided adversely to the permit applicant and degradation disallowed has really disappeared as a practical matter under these regulations*

Response: The purpose of a providing a draft permit is to ensure a greater level of transparency for both members of the public and the permit applicant. Moreover, the Antidegradation Statement - both before and after the proposed amendments - combines the public notice and comment period for the purposes of antidegradation and permit review. That is not a change to the rules.

Comment 90: *Under the Proposed Rule 0400-40-07-.04(4)(c), ETW waters which would previously have triggered antidegradation review and an opportunity for public participation in the antidegradation determination need not be identified as such.*

Response: These are rules for public notice of ARAPs, not the Antidegradation Statement, which provides that the antidegradation status should be included in the public notice.

Comment 91: *If Rule 0400-40-07-.04(1)(c) is intended to be a mandatory and universal requirement it belongs in the list of notice requirements in Rule 0400-40-07-.04 (4)(c). As written, the public notice posted online will not include this information.*

Response: See response to Comment 90. However, it is the intent that the antidegradation status be included in the public notice that is posted online, as provided for under the Antidegradation Statement.

Comment 92: *Per 0400-40-07-.04(4)(b). We support the proposed changes and improvements about using draft permits, explanatory rationales, and mitigation discussions, so long as these features do not materially slow down the TDEC permitting process for ARAP's or cause Division staff to be unable to meet their duties under the "permittee bill of rights" statute in Tennessee.*

Response: The time requirements that the division must meet in permitting reviews will remain the same under these rule changes. Nothing in these proposed changes will affect division's ability to comply with the permittee's bill of rights because no additional steps are being added to the process.

Comment 93: *Per 0400-40-07-.04(4)(d). We support the elimination of the newspaper publication of notice by the applicant as burdensome for many small applicants and redundant given modern forms of electronic notification and communication (and given retention of the site signage requirement).*

Response: Thank you for your comment. The division agrees that electronic notification and signage are sufficient. In addition, the rising costs of newspaper ads was becoming problematic, particularly given the small

marginal effectiveness in reaching the general public.

Comment 94: *We support removing many of the requirements for public notice in (4)(c). Making the public aware of more information on the Department's website through number 5 will remove burdensome requirements in the public notice process*

Response: Thank you for your comment – please see previous response to Comment #93. It is the intent of these rule revisions to provide for a more efficient and transparent process. A number of the items in (4)(c) were removed from the public notice document because they will be incorporated into the draft permit instead.

Comment 95: *Per 0400-40-07-.04(4)(f). We support the change proposed that would encourage interested persons requesting public hearings to do so as soon as possible in the process.*

Response: Thank you for your comment. We are aware that sometimes, members of the public deliberately wait out the clock before requesting a public hearing for the purpose of delaying permit issuance, which is why this change is being made.

Comment 96: *To reduce the timely discovery of proposed activities which will, by definition, cause "appreciable permanent loss of resource values" in a community the revised rules eliminate the requirement that notices of a completed application be summarized in a Public Notice published in a local paper at the applicant's expense. (Revised ARAP Rule 0400-40-07-.04(4)(d)(2))*

All that is left is email notice to those who have previously requested such notice. In your response to comments please tell us how many subscribers there are for notices of ARAP permits. The email notices are required by Tenn. Code Ann. § 4-29-120 (Tennessee Governmental Entity Review Law).

Response: The newspaper notice is being eliminated as outdated, inefficient, ineffective, and unduly expensive. The rules actually provide three means of public notice: email, signage at the site, and posting to the division's website. In the division's experience, members of the public who are generally interested in water quality matters sign up for the email list and/or check the division's public notice website regularly. Local residents have generally learned of proposals by seeing the project sign at the site or by word-of-mouth, and not through newspaper notices.

Comment 97: *The tiny 8 1/2 by 14 inch signs which TDEC provides to applicants are a farce. To make sure that they are useless the proposed regulations no longer require that they be "legible" which suggests readable but only "visible". There is no requirement that a sign be readable. There is no requirement that the proof of posting photos show the sign as it would be seen from an actually accessible vantage point from which it is safe for an observer to occupy given the traffic conditions, nearby construction or other factors which could make stopping to actually read or photograph the sign unsafe or infeasible.*

Response: The division provides blue signs that are significantly larger than 8 ½ by 14 inches. These signs are modeled on land use notice signs commonly used by municipalities for local zoning issues. While a person driving by on a busy street may not be able to read the words on the sign at 40 mph, most people understand that the sign indicates a proposed development of some sort and can figure out how to find a way to read the sign if they want to learn more. Obviously, sites vary significantly in their visibility and safety of access. Often these factors are offsetting – a busier site will result in more people seeing the sign, while a less well-travelled site will often be safer to access. But, it is important that the signs be posted at the site to fulfill their intended function of notifying local residents who may not be on the division's email notice list.

Comment 98: *Only 30 calendar days for comments is provided, a very short time for agencies which should review hundreds of permit applications each year if TDEC is to have the benefit of input from TWRA, U.S. Fish and*

Wildlife which administers the Endangered Species Act and TVA. Local government environmental and stormwater managers will have only a few days to review a permit that may be as much as 100 pages long for major projects which may affect large acreages and have several streams and wetland impacts.

Response: These rules seek to balance competing priorities: achieving timely permit processing as required by the Permit Applicant's Bill of Rights while ensuring effective public notice. 30 days is a very common permit comment period for the Department, but the division also may allow more time for complicated projects. Moreover, when a proposed project is known to be of particular importance to a specific government agency, the division will often have communicated with that agency prior to the formal public comment period to determine how to address those concerns in the draft permit, especially if threatened or endangered species are potentially present.

Comment 99: *The draft regulations do not require a permit application to be posted to the Water Resources Permits dataviewer at any point. The regulations should require posting of the application and other documents and email and hard copy communications no later than the working day following receipt of the permit application fee. TDEC is rightly proud of the "Waterlog" and it should be made widely known as a timely source of detailed information which is proposed to be omitted from the email notices of permit applications as well as complaints, inspections, etc.*

Response: The division's intent is to post permit applications to Waterlog in a timely manner. The division does not have the resources to ensure that applications will be posted within a day, and especially not to mail hard copies. We appreciate the comment about the effectiveness of Waterlog, and will continue to publicize the availability of this resource.

Comment 100: *In all permitting scenarios (general and individual), we urge that TDEC maintain the greatest level of transparency and provide satisfactory opportunities for comment through the permitting process. This should include providing full disclosure about potentially impacted waters (the scope of the project, location, purpose of the proposed activity, the watershed, and description of the condition of the impacted waters), and antidegradation protection and mitigation, at opportune times (prior to final determinations) in order that issues related to comments can be considered before permits are issued.*

Response: We agree that transparency and opportunity to comment is important. The list of items to be included in a separate public notice of an individual ARAP is trimmed down in these rules because equivalent information will be included in the new draft permit and rationale. As a result, the public will actually be given more, and better quality, information about exactly what is being proposed and how the division derived the proposed conditions of the permit.

For general permits, the opportunity for public notice and comment is provided in the issuance of the general permit. Although the division also posts information about requests for coverage under general permits in Waterlog, no public notice is required.

Comment 101: *The proposed language under 0400-40-07-.04 suggests that only in those cases where "appreciable permanent loss" will occur will the draft permit put on public notice explain how the mitigation is sufficient to achieve no net loss. The proposed language does not appear to support that TDEC's, or the permit applicant's, proffered in-system mitigation plan is subject to review as part of a draft permit issuance declaring "de minimis" impact. All proposed mitigation options and rationale should be subject to public review.*

Response: Public notice is required for all new or expanded individual ARAPs, regardless of whether mitigation is required. If mitigation is required, the rationale will explain how both the "debits" and the "credits" are determined to demonstrate that there will be no overall net loss of resource values. There are limited situations for urgent public projects where this may not be possible, so the public notice will include information defining

how much mitigation will be required. If an in-system mitigation plan is proposed prior to the public notice, it will be discussed in the rationale and the draft permit. However, in order to retain the ability to meaningfully respond to comments, this can be changed between the draft permit and the final permit without additional public notice as expressly authorized by T.C.A. 69-3-105(i).

Comment 102: *Per Rule 0400-40-07-.04 (4.a.2):For activities that are projected to have only minimal impacts to ~~state waters~~ streams or wetlands, which can be readily addressed, the Commissioner may utilize a twenty (20) day public notice period. (p. 11). We recommend clarifying “minimal impacts” as they relate to Individual ARAPs. Minimal impacts are normally associated with General ARAP conditions. TDOT also recommends that government agencies providing infrastructure facilities to the public be allowed to use the 20 day public notice periods. This will save the citizens of TN time and money.*

Response: This is a long-standing provision of the rules that has rarely been used. This provision should be applied where an activity is so small that it does not require mitigation, yet it does not fit into any of the existing general permits.

Members of the public often have a great interest in public infrastructure projects, and these projects sometimes cause significant impacts. The 20-day public notice process is intended to be used rarely and to apply only to truly minimal impacts. However, some public infrastructure projects that do not require mitigation may appropriately have a 20-day notice period.

Comment 103: *(1)(a) (2) This section allows (“may”) the Commissioner to have a 20 rather than 30 day public notice. Where and how in the application process does the applicant learn about this option and apply for it?*

Response: If a permit writer believes that the abbreviated public notice process may be appropriate for a particular proposal, they will discuss the issue with the permit applicant. Again, this notice period is not intended to be used commonly.

Comment 104: *Per Rule 0400-40-07-.04 (4.f): The Commissioner will distribute notice of the public hearing as set forth in part (d)1 of this paragraph, and by publishing in a local newspaper. (p. 13). We support elimination of the requirement for publication in newspaper. We recommend removing the referenced sentence.*

Response: We appreciate the comment. The continued inclusion of this provision was an oversight, and the rule will be revised to delete this newspaper notice requirement for the reasons previously explained.

Comment 105: *In Section (2) on page 10 (General Permits) and Section (4) on page 11 (Public Notice and Participation), it is unclear to us whether activities covered under Aquatic Resource Alteration General Permits now require a public-notice period as part of the permitting process, or whether the public-notice requirement still applies only to activities that require coverage under an ARAP Individual Permit. Could clarification be made of these sections?*

Response: Rule 0400-40-07-.04(2) establish the procedures for providing public notice and comment for issuance of general permits. The reference to subparagraph (4)(c) only identifies what information needs to be included in the public notice of the general permit. The “location of the state waters” for a general permit would be statewide, or a smaller area if the general permit has limited geographically applicability. This public notice requirement applies only to the general permit itself, and not to applications for coverage under the general permit.

Rule 0400-40-07-.04(4)(a) begins, "An ARAP individual permit or a § 401 certification requires the issuance of a public notice." Accordingly, the requirements in Rule 0400-40-07-.04(4) do not apply to applications for coverage under a general permit.

WATER WITHDRAWALS

Comment 106: *P. 13, Item (5)(d). I understand that the intent of the first sentence is to allow for general permits for minor withdrawals. Therefore I would revise it to read, "Unless authorized by a general permit, an individual permit is required for water withdrawals which will or will likely result in alteration of the properties of the source stream."*

Response: Paragraph -.04(5) concerns only individual permits. The last phrase of this provision limits it to withdrawals that result in greater than de minimis degradation, so general permits are not an option in this case. To be clear, water withdrawals that are subject to general permit coverage do not also need to obtain an individual permit.

Comment 107: *In many ways the ARAP rules do not fit well with how TDEC could best process the infrequent but highly important applications it receives for water withdrawal permits due to a withdrawal having an actual or potential impact on surface water quality by removal of a portion of stream flow. For example, having ARAP definitions or terms match what is used by the Corps in Section 404 permitting may be helpful in TDEC Section 401 water quality certifications and even in TDEC's independent ARAP permitting of physical alterations in state streams and wetlands. However, use of the federal language may not relate to separate water withdrawal-only ARAP's and can lead to unintended negative consequences for those applicants.*

Response: This comment illustrates that the impacts to resource values caused by water withdrawals are measured differently than physical habitat alterations for which mitigation can offset impacts. Water withdrawals can affect resource values for long segments of rivers or streams. As stated in the rule, protection of resource values will be accomplished through maintenance of flow levels below which no withdrawal may occur together with maximum withdrawal rates.

Water withdrawals are akin to NPDES permits, in that assimilative capacity can effectively be quantified and regulated through a permit. Because these regulated water withdrawals do not result in the same type of resource loss as wetland fills or stream alterations, compensatory mitigation is not required for water withdrawals.

Comment 108: *Per 0400-40-07-.03(4): We strongly support the revision proposed to use "Baseline Conditions" rather than more amorphous "Background Conditions" as the realistic reflection of the condition of a stream or wetland at the time that a project is proposed. It should also be clarified that (1) for an ongoing water withdrawal coming up for 5-year ARAP renewal, the "baseline" includes the permittee's existing water withdrawal, and only if withdrawal rate changes are proposed by the renewal applicant will that be considered a "new or increased" water withdrawal; and (2) in addition to citing the TDEC quantitative assessment tool for measuring the conditions of the resource or another "defensible scientific method" approved by TDEC, the Division should clarify that methods used by existing permittees and approved by the Division in the past may be among the other methods deemed approved going forward for use in renewals of the same water withdrawal permits. Wetland and habitat measurements and resource scoring tools are not the only context for determining "baseline conditions" in ARAP permitting because ARAP's include regulated water withdrawals and not just habitat-altering development projects*

Response: The division agrees with the commenter in principal. However, the methods proposed in a specific ARAP situation to assess existing conditions may not necessarily be deemed appropriate just because

that method was utilized and approved in the past. New methods and better information may dictate a different approach moving forward.

Comment 109: *Per 0400-40-07-.04(2). We strongly support the Division's efforts to create and adopt a reasonable General Permit for new water withdrawals that rise to the level of requiring an ARAP but involve no more than de minimis degradation. At the same time, we reserve the right to comment on the details of any such draft General Permit whenever it appears for public review.*

Response: We appreciate the comment. Any general permit would be subject to public notice and comment and anyone may submit comments.

Comment 110: *On page 13, Paragraph D, I'm concerned about the exemption for water withdraws that result in no more than de minimis degradation not needing a permit. As we talked about earlier, de minimis still needs a permit. The statute requires activities that result in alterations; it's still going to be an alteration even if its de minimis. So it's taking it out of the anti-degradation realm into the permitting realm which I think is a problem.*

Response: This addition is being made in light of the new provision in Rule 0400-40-07-.04(2) allowing for general permits for water withdrawals that cause no more than *de minimis* degradation. In either case, a new or expanded water withdrawal would require a permit: the distinction is whether that is an individual permit or a general permit.

Comment 111: *Per 0400-40-07-.04(4)(a)3. We strongly support this proposed amendment: for a "no change" water withdrawal ARAP renewal, one that requests simply a continuation of the previously permitted activity on the same terms, no new public notice should be necessary or required. It should also be clarified that in such "no change" permit renewals, since no new terms are proposed, there is nothing that can be appealed by any party except for any new terms that TDEC might add or change (or deny) on its own initiative in the renewed permit. Likewise, a "no change" water withdrawal ARAP renewal is not a "new or increased" water withdrawal proposal. Thus, it should not be subjected to or required to meet antidegradation analysis if the original permitted withdrawal satisfied such analysis, even if the ongoing conditioned water withdrawal to be renewed and continued is at a level that the Division would otherwise deem to be above de minimis degradation.*

Response: The division agrees that the renewal of a previously authorized water withdrawal does not represent a new or increased withdrawal, and therefore no new antidegradation analysis would be required. If there is no public comment period, then no one other than the permittee would have standing to appeal the permit renewal pursuant to T.C.A. § 69-3-105(i).

Comment 112: *Per 0400-40-07-.04(5)(d). We support retention of the water withdrawal provisions stated here and the addition of monitoring and reporting requirements to ARAP's, when applied consistently, as the Division has already been doing for many permits.*

Response: Thank you for your comment.

Comment 113: *The Rule states that a [individual] permit is required for water withdrawals which will or likely will result in alteration of the properties of the stream and more than de minimis degradation. This suggests that there are rivers and streams where withdrawals would not have a discernible impact and individual permits would not be required. What is the threshold for assuming impacts? How does TDEC account for multiple withdrawals on a single stretch of stream or in a river system? Is this based on minimum flow conditions for each stream? It also states that monitoring and reporting requirements may be established to ensure and document compliance with permit conditions. If they are not required, how will the permit be enforced?*

Response: The threshold for evaluating impacts for water withdrawals is a numeric comparison of the rate of withdrawal to the rate of flow in a river or stream. A single water withdrawal will be considered de minimis if it removes less than five percent of the 7Q10 flow of the stream. Multiple authorized withdrawals are considered de minimis if they use ten percent or less of the 7Q10 flow.

The division may issue a permit with no monitoring and reporting where other assurances exist. This typically involves a nonadjustable pump rate and intake design where the permit limits of minimum instream flow and rate of withdrawal cannot physically be non-compliant without structural modification.

Comment 114: *Under the “General Permits” proposed language, we note that the standards for what constitutes de minimis degradation for water withdrawals is also unclear. Does this mean a substantial water withdrawal in one location that is offset by increasing discharges in another location constitutes a “de minimis” impact and could, therefore, be covered by a General Permit? The same question is asked for other types of habitat alterations – does a submitted in-system mitigation plan equate to “de minimis” and then allow an activity to be covered under a general permit?*

Response: The rule is being clarified to refer back to the definition of *de minimis* degradation for water withdrawals and the water quality standards. Proposed impacts cannot use mitigation to become eligible for an ARAP general permit. Mitigation requires an individual ARAP.

Comment 115: *Per 0400-40-07-.04(7). Mitigation in these rules seems to relate almost entirely to habitat/stream/wetland physical alterations. We believe that TDEC should consider adding mitigation methods whereby a proposed new or increased ARAP water withdrawer can have its degradation status reduced to de minimis up front by use of off-setting gains to the resource in other ways, even if a water withdrawal under a properly conditioned permit typically does not result in appreciable permanent loss of resource values. Other than reducing a proposed withdrawal to 5% or less of the stream's 7Q10 low flow (a very strict standard for what is de minimis), or adding new compensating water flows to the stream from some other source, typically no realistic avenue exists for water withdrawers to use up-front mitigation for this purpose as done by ARAP applicants proposing habitat alterations.*

Response: The water quality standards apply different definitions of *de minimis* degradation for water withdrawals and habitat alterations because the former can be easily evaluated numerically. The case law affirms the same numeric limitations for NPDES permits for discharges, so the standard is well-supported as constituting *de minimis* degradation. The addition of water upstream could result in *de minimis* degradation as defined in those rules.

Comment 116: *The modification of this section implies that there is a water withdrawal rate that would have a “de minimis” impact and would therefore be covered under a General Permit, hinted at in section 2 above. Obviously, this rate would be dependent on the size of the stream and the time of the year, with the possible exception of the Tennessee and the Cumberland Rivers. In any case, the state has an interest in monitoring withdrawals in order to ensure adequate drinking water in drought years, so all withdrawals above a certain volume level should require at least notification.*

Response: The division is contemplating the development of a general permit for water withdrawals that cause no more than *de minimis* degradation, which is a term defined in the Board’s water quality standards as a percentage of the 7Q10 low flow of a stream. Accordingly, the upper threshold for the general permit will be based on the size of the stream and drought conditions.

In addition, any permit for water withdrawals would need to contain the necessary provisions and conditions to be protective of all types of waters under all hydrologic circumstances, including drought.

At present, the division believes that there are certain withdrawals such as individual residential landscape irrigation from large lakes that should not require notification. In other cases, such as long term water supply withdrawals that are nonetheless de minimis, notification would be required.

Comment 117: *Page 13, Item (5)(d) on water withdrawals. Please make the following changes:*

An Individual Permit is required for water withdrawals which will or will likely result in alteration of the properties of a stream or wetland and will result in more than de minimis degradation.

1. Persons proposing to withdraw water from waters of the state in a manner which will or will likely result in an alteration of the properties of a stream or wetland, shall file an SS-7037 (September 2017) RDA 1693 14 application with the Department Division which includes the following minimum information:

- (i) proposed withdrawal rates and volumes;*
- (ii) proposed withdrawal schedule; and*
- (iii) flow data of the affected stream (if free flowing).*

2. Where a permit for water withdrawal is required, the Commissioner shall establish permit conditions which are protective of the resource values of the affected stream or wetland. These conditions may include flow levels below which no withdrawal may occur. The Commissioner may also establish a maximum withdrawal rate in order to maintain the natural flow fluctuation characteristics of the affected stream. Monitoring and reporting requirements may be established to ensure and document compliance with permit conditions.

Response: The rule has been modified as requested, except that it does not refer to a specific application form. Although application forms do not change frequently, we need to be able to use new forms without amending the rules.

PERMIT APPEAL, RENEWALS, AND MODIFICATIONS

Comment 118: *P. 18, Item (d)3. This looks like language that was copied and pasted from a provision addressing permit appeals. My suggestion is to delete this item and just have the two options of (d)1. and 2. Although an oral comment should be a basis for someone to be aggrieved, as provided by (c)2., I don't think it is advisable for the basis of the appeal to be an oral statement so I wouldn't include something like (c)2. in (d)3. Since the department shouldn't be making changes except in relation to a comment, I don't think it is necessary to allow an appeal to be made on the basis of a change made after the public hearing.*

Response: We agree that the provision in (c)2. should be eliminated and the rule is changed accordingly, and additional changes are made to further define appeal requirements. It is very difficult to track "other direct communication," and an interested member of the public could qualify under part (c) by sending a simple email or brief letter to the permit writer expressing concerns about the project. The provision in (d)3. is based on the statutory permit appeal provision in T.C.A. 69-3-105(i), which authorizes an appeal based on material changes between the draft and final permit. This provision is important if, for example, the division makes a change in response to a comment by one party, but a different party objects to it.

Comment 119: *Per 0400-40-07-.04(9), we request that TDEC alter subsection (b) here to read as follows:*

"For permit modifications, and for permit renewals, only those terms that were the subject of the modification, or that were changed (or were proposed for change but denied) in the permit renewal compared to the preceding permit, may be appealed."

This clarification and refinement would further serve to allow "no change" ARAP permit renewals, such as for ongoing compliant water withdrawals, to proceed forward quickly, smoothly, and fairly without undue use

of Division resources to "reinvent the wheel" in each such circumstance. At the same time TDEC would retain flexibility to adapt the terms and conditions in renewal permits to changed circumstances if and when necessary, and parties would retain the right to contest such changes.

Response: We agree that for habitat alteration ARAPs, only terms that are changed from the prior permit should be appealable. This is especially true given that in most cases, the alteration will have already occurred during the original 5-year term and all that remains is mitigation and monitoring. Under these rules, there is no public comment period for a no-change renewal of a habitat alteration ARAP. Therefore, third parties would not have standing to appeal. We do not agree that a permittee should be allowed to appeal the original mitigation provisions in a renewal permit.

Accordingly, we will add language to the rule limiting appeals of permit renewals for habitat alterations to conditions that have been changed from the preceding permit.

Comment 120: *Per 0400-40-07.04(8)(b). Renewal of permits is not required for one-time alterations such as construction, as long as the alterations, mitigation, and monitoring are completed within the time limit established by the permit. Any permittee that has not completed the alteration authorized by the permit, or the mitigation and monitoring required by the permit must apply for renewal at least ninety (90) day prior to the expiration date.*

This issue of re-applying for a permit for the mitigation and monitoring would only apply in the instance of PRM. If the permit that was issued to impact the stream or wetland has expired then, likewise, the mitigation permit has expired. This scenario, in essence, requires the applicant to go through the permit process again, including public notice expense, and also requires the resources of the Division staff to be used for a permit action that was previously approved. Typically permits are valid for a period of five (5) years, but almost every mitigation project takes longer than five (5) years to complete the construction and monitoring. The Division should consider, in the instance of PRM that the permit duration be extended beyond five (5) years or for the anticipated length of the required mitigation monitoring. This would make the permit process more streamlined and less burdensome on both the applicant and the State.

Response: The proposed change cannot be made because T.C.A. 69-3-108(g) limits the permit term to five years. However, we recognize that for ARAPs, the authorized impact typically will have already taken place during the first five-year term and all that remains to be regulated is mitigation and monitoring. This is why the rules allow no-change renewals without public notice.

Comment 121: *An ARAP is not required for mitigation monitoring actions. We recommend that the ARAP life be extended to include the mitigation monitoring period or that an ARAP extension process be developed to specifically to address post-construction mitigation monitoring.*

Response: See response to Comment 120.

Comment 122: *There is no reason that the "permit evaluation criteria "should be revised to delete: "~~Permits for activities that have been completed are not subject to modification. If a modification results in a less restrictive permit, then public notice and opportunity for hearing must be given prior to modification.~~" This invites and allows modifications which go undisclosed contrary to the transparency expected of a state agency and allows potentially harmful permit modifications as permit writers allow modifications which may only appear in the waterlog based upon a simple but unreviewable assertion that a modification is "less restrictive".*

Response: The referenced statement was contained in Rule 0400-40-07-.04(6)(b), a section addressing modification, suspension, or revocation for cause. The deleted language does not make sense in that context.

Rule 0400-40-07-.04(4)(a)3. addresses public notice for renewals and modifications. The following sentence will be added to the end of that rule for clarification, "Otherwise, a renewal or modification would require public notice."

Comment 123: *Per Rule 0400-40-07-.04 (1a):A person must file an application for an Individual Permit or for a § 401 Water Quality Certification with the Department Division, in accordance with paragraphs (3) and (5) of this rule, to implement any activity requiring an ARAP that is not authorized by a General Permit. ~~All General Permits in effect as of the date of this rule shall continue in effect, and are not revoked by these rules.~~ (p. 10). We recommend that the last sentence remain in rule. Removal of this sentence has the potential to impact an excessive number of GARAPs already issued for TDOT projects that are currently under construction.*

Response: See response to Comment 12. Current general permits remain in effect, notwithstanding this amendment.

JURISDICTIONAL WATERS

Comment 124: *The Chamber supports the change in terminology from "waters of the state" to the more specific phrase "stream or wetland" to more accurately represent the scope of the aquatic resource alteration regulatory framework. The terms stream or wetland have a common understanding and will lead to a better understanding of when parties should pursue the ARAP permitting process. Likewise, the Chamber supports the removal of the references to "wet weather conveyances" instead relying on the Tennessee statute in T.C.A. § 69-3-108(q) to serve as the governing text for these limited drainage features.*

Response: Thank you for your comment. Given that alterations of wet weather conveyances are permitted by statute, the division agrees that the new wording is more accurate.

Comment 125: *Provide Clarification on the Exception under 0400-40-07-.04 (3) Section 401 Water Quality Certification. This portion of the rule has been substantially rewritten to clarify the 401 certification process. The final sentence describes activity that will not require an ARAP and reads as follows.*

"If the proposed activity does not require an ARAP, the applicant for a federal license or permit may obtain a § 401 certification by submitting a copy of the federal application to the Division and request for a § 401 certification."

We recommend providing a footnote to provide examples of activities, described in the previous sentence, those that would qualify for the exception from an ARAP. It should be noted that the purpose of the 401 certification is for the state to certify that the proposed federal activity does not violate state water quality standards. Since wet weather conveyances have no established uses, certification appears to be a formality, and we would recommend that the rule be amended to state that an approved wet weather conveyance hydrologic determination either expressly granted or waived in accordance with the procedures in this chapter constitutes a certification and/or waiver of a requirement to obtain such certification under the Clean Water Act, 33 U.S.C. 1341(a).

Response: It is not practicable to specifically list activities that would qualify under this clause because the Corps periodically revises its Nationwide general permits, and then rule revisions might be required to update our list of activities. Also, unforeseen situations could arise that require a Section 401 certification.

The Department will retain the specific authority to make Section 401 certifications. Alterations of wet weather conveyances must be done in accordance with the requirements of T.C.A. 69-3-108(q). If not, the alterations could result in violation of Tennessee's water quality standards downstream of wet weather conveyances.

Comment 126: *It is unclear whether the rules intend to exclude jurisdictional waters other than streams or wetlands from the requirement to obtain an ARAP.*

Response: Tennessee Code Annotated section 69-3-108(q) establishes that ARAPs are not required for wet weather conveyances. This is the first time the ARAP rules have been amended since this provision was adopted, and the intent is to conform the rules to the statute. The definition of “stream” includes any surface water that is not a wet weather conveyance or a wetland, which would include lakes, reservoirs, ponds, springs, seeps, and other surface waters. The ARAP rules do not apply to groundwater, which is regulated through other mechanisms such as underground injection control or state operating permits.

Tennessee does not define “jurisdictional waters,” which is a term more applicable to the Clean Water Act. There is a possibility that waters may be jurisdictional under the Clean Water Act such that a Section 404 permit is required, but are wet weather conveyances not subject to ARAP requirements.

Comment 127: *Per 0400-40-07-.01(1), we strongly support the clarifications being made here, including the "stream or wetland" applicability reference, and the "resource value" references subject to the definition thereof appearing later*

Response: Thank you for your comment.

Comment 128: *Per 0400-40-07.04(4)(c). The location of the state waters impacted by the proposed activity. Section (4)(a)2. Replaces "state waters" with "streams or wetlands". Should this reference to "state waters" be changed to read "streams or wetlands" to be consistent?*

Response: The proposed change will be made.

Comment 129: *Per 0400-40-07.04(6)(c)l. "Direct loss of stream length, water, or wetland area due to the proposed activity" - to be consistent should "water" be deleted and just use reference to stream or wetland?*

Response: The use of the word ‘water’ in this sentence was intended to refer to loss of flow, or natural water volume. The division will revise the language to “flow” make this intent more clear.

Comment 130: *After reviewing the document, it is unclear to me whether or not the purpose of replacing waters of the state with stream or wetlands if that intent was to not include jurisdictional waters that aren't a stream or wetland. So I'm wondering if an impact to a jurisdictional water that isn't a stream or wetland would require a permit and if so, what that mitigation would require.*

Response: The intent of the language change is to exclude wet weather conveyances, as provided for by the General Assembly in adopting T.C.A. § 69-3-108(q), and to clarify that ARAPs are not required for alterations to groundwater. See Response to Comment 126.

Comment 131: *Since the stream definition which is included says it's not a wet weather conveyance, the definition of Wet Weather Conveyance should not have been deleted, though it certainly could be updated to match current definitions.*

Response: The term “wet weather conveyance” is defined in the Water Quality Control Act, so it does not necessarily have to be included in this rule chapter. However, we will add the definition of “wet weather conveyance” back to the rules to ensure ease of reference.

Comment 132: *Page 5, Item .01(1), please add the following sentence at the end of the paragraph:*

Persons who wish to conduct an activity that may impact a wet weather conveyance shall only do so in accordance with the conditions stated in Tenn. Code Ann. § 69-3-108(q).

This clarifies the intent (as I understand it) of changing “waters of the state” to “stream or wetland.”

Page 5, Item .01(3) Delete the sentence proposed to be added at the end, “Alterations of wet...” It’s not needed with the above change to .01(1), which is worded in a stronger fashion and in a better place.

Response: We agree that it would be more clear to specify that compliance with T.C.A. 69-3-108(q) is required for alterations of wet weather conveyances and will amend the rules accordingly.

OTHER

Comment 133: *P. 13, Item 5(c). Revise the last sentence as follows, “In the case of emergency permits or other situations compelling measures be taken in a very short time, a permit may be issued to a state, county or local government agency that specifies the amount of mitigation required and an implementation timeframe and the agency may submit a specific mitigation plan after the permit is issued, and the agency shall comply with the plan as approved by the Commissioner.” This limits the applicability of this procedure more than “unusual circumstances” and it revises the sentence structure to follow the sequence of the actions it describes. It also specifies that there is still an approval step for the plan, the division does not have to accept whatever is submitted.*

Response: We agree that more precise wording is advisable, and will revise the language.

Comment 134: *Per 0400-40-07.04(6)(c)5. Direct loss of stream canopy due to the proposed activity: How would the loss of stream canopy be determined and/or regulated? How would tree clearing be regulated if no permit was required (i.e. a landowner or developer was avoiding any impact to the stream or wetland other than clearing trees outside of the regulated stream or wetland)? Propose deleting this item.*

Response: Tree clearing alone is generally not regulated by the division unless it violates the conditions of the NPDES Construction Stormwater Permit as it applies to buffer zones, or unless the streamside canopy removal or resulting bank destabilization causes an appreciable permanent loss of resource values. The division will retain this language as an example of one of many factors potentially affecting water quality that the Commissioner is allowed to consider as part of a permit review. This language is not intended to imply that the division seeks to exercise regulatory authority over the cutting of individual trees by landowners, or over normal silvicultural activities.

Comment 135: *Per Paragraph (3) of 0400-40-07-.02 - The wording change relative to silviculture BMPs currently reads: “BMP's and a point source discharge results in water pollution...”. The new wording removes the reference to point source discharge. We believe the terminology requiring a point source discharge should remain in the rule. T.C.A. § 69-3-133 is unique because it allows the Department to issue a stop work where timber harvesting operations take place. It is our understanding a stop work order of this nature is only available for silviculture activities. We believe T.C.A. § 69-3-120(g) limits the Department to regulatory actions on agriculture and forestry operations only if a point source of pollution exists.*

Response: The intent of the change proposed is to make clear that the division may issue a stop work order whether or not a point source discharge has been documented if pollution of waters is occurring, as expressly authorized by T.C.A. 69-3-133, which provides, “When certain silvicultural activities have polluted waters of the

state as a result of an operator’s failure or refusal to use forestry best management practices, the commissioner of environment and conservation may issue a stop work order to the operator.”

Comment 136: *Per Rule 0400-40-07-.04 (6.c.4): diminishment in species composition in any stream, stream or wetland, or state waters due to the proposed activity; Species composition can fluctuate naturally making this an unreliable measure when evaluating a permit application or other permit action. Diminishment of species composition would be difficult, if not impossible, to determine and therefore we recommend it be removed or clearly defined.*

Response: The division agrees that species composition can fluctuate via natural conditions or activities outside the control of the applicant, hence the inclusion of the wording “...due to the proposed activity.” Should enforcement actions arise based upon this clause, the burden of proof that diminishment was due to the applicants activity would fall upon the division.

Comment 137: *Per Rule 0400-40-07-.04(6)(c)11.: whether the ~~state waters~~ stream or wetland is listed on the § 303(d) list ... We recommend removing “or wetland”, since wetlands are not routinely included on the 303(d) list.*

Response: The commenter is correct that wetlands are not often included on the 303(d) list. However, this does not preclude the possibility that the division would include wetland listings in the future, and so the language will be retained, and modified to include actual impairment that is not 303(d) listed.

Comment 138: *There is another, less urgent, concern about the changes that were not proposed, specifically around defining activities that might fall under the two categories described as not needing permits – those where the activity is so “de minimis” that no permit or notification is required, and those where no permit is required, but notification is required. Giving the punitive fee structure that TDEC has adopted for small restoration and enhancement projects where the impact is not only “de minimis” but actually positive, it would clearly be in the public interest to encourage more such projects. One way to do so would be to create a category, with descriptions, of such restoration and enhancement projects that would be exempt from permitting. While we believe that notification is appropriate with sufficient information to assure TDEC that there is no potential for damage to the resource, it seems inappropriate to require a permit designed to regulate damages to an activity that enhances rather than damages a resource.*

Response: The division has an ARAP general permit that covers small- to medium-scale enhancement projects. Revegetating streambanks is expressly exempted from the permit requirement by statute. Activities with more significant impacts, even if the intent is to achieve an overall positive impact, require site-specific consideration and thus an individual permit.

Comment 139: *Per Rule 0400-40-07-.01(3) - The change from “may result” to “results” “in alterations...of properties...” is very significant on two levels and may well weaken permitting authority. The first level is that it may put the burden of proof on TDEC rather than the applicant to prove there will be alterations that change properties of the waters of the state. The second level, which could be positive if applied to enhancement and restoration projects, is that it would remove permitting requirements for projects that don’t cause alterations of resource properties. The phrase “may result” allows more flexibility while maintaining TDEC’s regulatory authority to provide oversight of any activity that has the potential to cause a change in properties.*

Response: This change is not intended to substantively change permitting requirements or to shift burdens of proof. The Water Quality Control Act provides that it is unlawful to “carry out any of the following activities, except in accordance with the conditions of a valid permit: (1) the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state.” Thus, the statutory permit requirement hinges upon an actual alteration, not a potential alteration, of such properties, which is the reason for the language change. The purpose of restoration and enhancement projects is to alter such properties (albeit

for the better) and ARAPs will continue to be required for such activities.

Comment 140: *There is no justification for requiring the public notice for a draft ARAP to include the applicant's address and phone number. Particularly when an applicant is an individual seeking a permit, this requirement has the potential for negative outcomes concerning privacy.*

Response: We agree with the comment and will change the rule accordingly. However, applicants should be aware that their contact information is required to be included in an application and remains public record even if it is not included in the formal public notice document.

Comment 141. Since most all waters of the State are also waters of the U.S., I am confused regarding how changes to the rules are not contrary to CWA Section 404(b)(1) guidelines requiring that avoidance must be considered first, minimization second and only then, mitigation.

Response. These rules do not supersede or substitute for the 404(b) rules. If a proposal affects waters of the United States and is otherwise subject to the Section 404 permit requirement, then the applicant must obtain that permit from the U.S. Army Corps of Engineers in accordance with the 404(b) rules. Tennessee rules do not alter or affect that requirement.

Comment 142. The draft regulation fails to acknowledge the EPA rules governing stream and wetland protection under Clean Water Act Section 404.

Response. These rules do not alter or affect requirements imposed separately under Section 404 of the Clean Water Act or the 404(b) rules promulgated thereunder.

Comment 143. Please clarify how the changes in the proposed regulations can be reconciled with the obligations and procedures in the General Wetland Banking Memorandum of Agreement dated June 12, 1995 (the "1995 MOA"), as well as in the prior agreement it references, the "Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning determination of mitigation under the Clean Water Act, Section 404 (b)(1) Guidelines, 1990."

Response. The "1995 MOA" was supplanted with the promulgation of the 2008 mitigation rules. Those rules established the Interagency Review Team (IRT) which oversees third party mitigation banking. As to the MOA between the Army and EPA it is not clear that it is still in effect, and even if it is, it only applies to the relationship between those parties which signed it of which TDEC was not a signatory.

Comment 144. Under the proposed rule language, potential "new" habitat alterations requested by permit can also come in many forms, from the building of an impoundment to the straightening, fill, or other alteration of a stream channel. In applying the new rule language, could TDEC determine that a new proposed impoundment, causing "habitat alteration," results in "de minimis" degradation so long as some other stream channels somewhere in the HUC 8 watershed are restored or enhanced?

Response. Regardless of the type of habitat alteration, the division cannot issue a permit if the impact's appreciable and permanent resource value loss cannot be offset through compensatory mitigation. Many impoundments are simply not eligible for permitting because they would cause permanent resource loss that cannot be compensated for through traditional compensatory mitigation. While it is possible that on-site mitigation could be provided to offset the loss of resource values caused by an impoundment, it is difficult to foresee a situation in which off-site mitigation for an impoundment would be permitted, much less count as de minimis degradation.

Comment 145. Because TDEC proposes to rely so heavily on mitigation throughout the proposed rules (including those for ARAPs), any such reliance must be demonstrated to be effective. Commenters would support a thorough and objective survey of the effectiveness and longevity of mitigation measures already approved throughout the State, taking into account all the factors relevant thereto, including the potential for “remedy failure” and financial assurance therefor. Commenters would be ready to assist TDEC in scoping and implementing such a survey.

Response. This comment does not address a specific rule, or proposed rule change. The Department appreciates the recommendation of a study of mitigation.

Rule Chapter 0400-40-07
2018 Amendments – Appendix 1
T.C.A. § 4-5-205(b) Concise Statement of Principal Reasons for Rulemaking

Rule 0400-40-07-.01 General. This rule is amended to refer to “streams or wetlands” instead of “waters of the state” in light of T.C.A. § 69-3-108(q), which was enacted by the General Assembly after the last time this rule chapter was amended.

Rule 0400-40-07-.02 Exemptions. This rule is amended to fix grammatical errors and to more closely track the provisions for silvicultural activities provided by T.C.A. § 69-3-133.

Rule 0400-40-07-.03 Definitions. This rule is amended principally to eliminate terms that are defined, but not used later in the rules. For example, the term “background conditions” was previously included in this section, but was never used again in the rest of the chapter.

Rule 0400-40-07-.04 Permits.

(1) Application for a Permit. This paragraph is amended for clarity. The amendments also eliminate the joint public notice with the U.S. Army Corps of Engineers, because that process had not been fully implemented and did not comport with the Corps’ public notice and comment procedures.

(2) General Permits. This paragraph is amended to make it clear that general permits can only be issued for activities that result in minimal impacts, such that no compensatory mitigation is required and site-specific review under the Antidegradation Statement is not required for permit applicants to obtain coverage. “Minimal impacts” was effectively the threshold for general permits previously, and this amendment simply makes that requirement more transparent. All general ARAPs in effect as of the adoption of this rule remain in effect, and comply with this requirement. In addition, the rule is revised to allow for general permits for water withdrawals requiring ARAP coverage, but which fall within the definition of *de minimis* degradation in Rule Chapter 0400-40-03.

(3) Section 401 Water Quality Certification. This paragraph was redrafted to more clearly state a streamlined process for obtaining a Section 401 certification, particularly for activities that do not otherwise require ARAP coverage.

(4) Public Notice and Participation. In the past, the ARAP rules have only required public notice of a complete permit application. Unlike nearly all other permits issued by TDEC, the rules did not require public notice of a draft permit. The amendments improve the public notice process for both permit applicants and members of the public alike by requiring the division to publish a draft permit and a rationale for its proposed action. A number of specific pieces of information are eliminated from the public notice requirement because the draft permit will include this information. As a result, people participating in the public comment period will know

what the division proposes to require, not just what the applicant requested. This process is a significant improvement for transparency and public process, and will not interfere with the division's ability to comply with the Permit Applicant's Bill of Rights.

(5) Individual Permits. The primary change to this paragraph is to require applicants for individual permits to not only submit an alternatives analysis, but to select the practicable alternative with the least adverse impacts on water quality, so long as that alternative does not have significant adverse environmental impacts. This rule is consistent with federal requirements for Clean Water Act Section 404 permits, and offsets the reduction in comparable requirements under the Antidegradation Statement for activities that result in only *de minimis* degradation. This provision includes a small carve-out for public road projects: although these projects are also subject to the alternatives requirement, they do not need to evaluate alternative road locations. This provision is intended to reflect existing practice and the practical reality that public road projects are subject to a range of competing demands, and that linear road projects cannot be designed to entirely avoid impacting streams and wetlands.

(6) Permit Evaluation Criteria. This paragraph is revised to delete a misplaced public notice requirement for permit renewals (which is, more appropriately, addressed in section (8)) and to eliminate a prohibition on changing permits "for activities that have been completed." The latter provision was unclear regarding whether it applied to permitted impacts, or permitted mitigation and monitoring, and prevented the division from making appropriate modifications to mitigation requirements in light of additional information that arises after permit issuance. Additional amendments reflect the wet weather conveyance statute (T.C.A. § 69-3-108(q)) and clarify that compensatory mitigation is only required to offset the loss of resource values actually caused by the permit applicant/permittee.

(7) Mitigation. This paragraph is rewritten to improve clarity and transparency. This section provides key performance standards for compensatory mitigation for impacts to both streams and wetlands. The prior version of the rules provided that mitigation should offset the loss of resource values associated with the proposed activity. The amendments more clearly establish that compensatory mitigation must ensure no net loss of resource values from existing conditions, which are the resource values of the impact site at the time of a permit application. Also, although it was the Department's practice to require a notice of land use restriction or similar protection at mitigation sites, the rules did not expressly require such restrictions, and the rules are amended to make this logical requirement more clear.

(8) Duration and Renewal of Permits. Other than for water withdrawals, ARAPs typically authorize one-time impacts. When these impacts result in an appreciable permanent loss of resource values, individual ARAPs require mitigation and monitoring. When such requirements are provided by the permittee, the length of time required for mitigation and monitoring often exceed the five-year limit on permit terms established by T.C.A. § 69-3-108(g)(2). The prior version of the rule did not clearly provide a mechanism for renewal of ARAPs.

(9) Permit Appeals. This paragraph is amended to conform to T.C.A. § 69-3-105(i), which allows for third party appeals. The prior version of the rule did not comply with this provision, because it only allowed appeals by permittees and applicants for permits. The division has not enforced that limitation because it is inconsistent with statutory requirements. However, the rule clarifies the specific preconditions to appeal applicable to third-party petitioners.

(10) Alteration of Wet Weather Conveyances. This paragraph is deleted because alterations of wet weather conveyances are now governed entirely by T.C.A. § 69-3-108(q).

Regulatory Flexibility Addendum

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

- (1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

Aquatic Resource Alteration Permits (ARAPs) are most often required by real estate developers, large companies, the Tennessee Department of Transportation, homeowners, mining companies, and municipalities. TDEC does not specifically ask whether permit applicants qualify as small businesses, so it is difficult to precisely estimate how many small businesses will be affected by this rulemaking. Currently, there are approximately 2,400 ARAP files that are active or for which complete applications have been received. Based on a review of a sample of this list, somewhere between 50% to 60% of applications appear to involve small businesses.

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

The changes in the ARAP rules will not require either more, or less, reporting or recordkeeping than the previous version of the rules. The primary rule change that will affect compliance costs for permit applicants is the elimination of the requirement to publish a public notice in a local newspaper. This cost varies significantly depending on the newspaper, and is generally more expensive in larger communities. In large markets, the cost of the advertisement can range from \$3,000 to \$6,000. We estimate the current total cost of newspaper notices for ARAPs to exceed \$100,000 annually for all applicants, so this change will result in a substantial cost savings.

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

Overall, the rulemaking is expected to have a modest positive effect on small businesses by eliminating the requirement for newspaper notices.

This rulemaking is being conducted in conjunction with a parallel rulemaking for water quality standards. Those rules are being amended in a manner that will reduce the frequency with which individual permit applicants must demonstrate a lack of practicable alternatives. In order to maintain that requirement, and to be more consistent with federal requirements for Section 404 permits, these rules will require applicants for individual permits to demonstrate a lack of practicable alternatives rather than simply analyze alternatives. The changes to the two rule chapters, on balance, are expected to have a neutral impact on small businesses.

These rules are not expected to affect consumers.

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

TDEC seeks to reduce the burden of obtaining ARAPs by issuing a number of general permits for a common set of minimal impact activities. Applicants may seek coverage under these general permits through a relatively simple application, and do not need to undergo public notice and comment for each proposed activity, making it faster and less costly to obtain permit coverage than the individual permit process. Currently, there are 15 such general ARAPs which cover the majority of permittees. These rules clarify the requirements for general permits and allow for a new general permit for de minimis water withdrawals.

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

The most comparable rules are the U.S. Army Corps of Engineers and EPA rules for federal Clean Water Act Section 404 permits. Overall, the ARAP rules are comparable to, although less prescriptive than, these federal rules.

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

T.C.A. § 69-3-108(b) requires all persons to obtain and comply with ARAPs prior to altering the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Therefore, the Board lacks the authority to exempt small businesses from the provisions of this rulemaking.

Impact on Local Governments

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

This rulemaking will have a modest impact on local governments, who are among the entities who are required to obtain ARAP coverage.

Additional Information Required by Joint Government Operations Committee

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

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

The Aquatic Resource Alteration Permit (ARAP) rules are being amended for the first time since December 2013. ARAPs authorize habitat alterations and water withdrawals and, where required, serve as certifications of compliance with state water quality standards under Section 401 of the Clean Water Act.

The revisions clarify that ARAPs are required only for alterations of streams and wetlands, and would remove references to wet weather conveyances because these are now governed by T.C.A. § 69-3-108(q).

This rulemaking introduces the new term “existing conditions” to reflect actual pre-impact resource values. The rules require compensatory mitigation to ensure no overall net loss of resource values from existing conditions. The new term is intended to ensure that this mitigation is limited to what is necessary to offset the harm actually caused by the permitted activity, and not to compensate for pre-existing degradation. This change is also intended to ensure appropriate mitigation for impacts to high quality waters, including Exceptional Tennessee Waters. However, this change is primarily to clarify the mitigation requirements from the prior version of the rules, which only required mitigation for the loss of resource values associated with the permitted activity.

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

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

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

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

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

This rulemaking is required to implement permitting requirements established in T.C.A. § 69-3-108(b).

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

The people most directly affected by this rule are the permittees, who consist of property developers, TDOT, mining companies, individual property owners, and local government. Overall, the regulated community supports adoption of the proposed rules, and is particularly supportive of eliminating the requirement to provide public

notice in newspapers, which was expensive and ineffective. Public notices will instead be provided by email, on TDEC's website, by mail, and by signs posted at the site, which are more effective and less costly means of reaching the public.

Environmental nongovernmental organizations generally do not support adoption of the rule changes. This opposition is largely based on policy differences and a mischaracterization of the previous version of the rules. A number of NGOs commented that permittees should be required to compensate for pre-existing degradation, even if that degradation was caused by other people and activities. These groups characterize the adoption of "existing conditions" as a major policy change, even though the previous version of the rules only required mitigation to offset resource loss associated with the permitted activity. Also, a number of NGOs opposed the rule's provision not requiring public road projects to select alternative road locations, even though the rule otherwise requires these projects to demonstrate a lack of practicable alternatives.

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

This rulemaking is not affected by any opinions of the attorney general and reporter or any judicial ruling.

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

This rule is expected to have a neutral effect on state and local government revenues and expenditures, with the exception of some savings to local government applicants who will no longer be required to publish notices in local newspapers.

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

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

Mallorie Kerby
Assistant General Counsel
Office of General Counsel

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

Office of General Counsel
Tennessee Department of Environment and Conservation
William R. Snodgrass Tennessee Tower
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- (I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

The Board of Water Quality, Oil and Gas is not aware of any requests.