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# Notice of Rulemaking Hearing

*Hearings will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, T.C.A. §4-5-204. For questions and copies of the notice, contact the person listed below.*

<b>Agency/Board/Commission:</b>	Environment and Conservation
<b>Division:</b>	Water Resources
<b>Contact Person:</b>	Bob O'Dette
<b>Address:</b>	6 <sup>th</sup> Floor, L & C Annex 401 Church Street Nashville, Tennessee 37243-1531
<b>Phone:</b>	(615) 253-5319
<b>Email:</b>	<a href="mailto:Robert.Odette@tn.gov">Robert.Odette@tn.gov</a>

*Any Individuals with disabilities who wish to participate in these proceedings (to review these filings) and may require aid to facilitate such participation should contact the following at least 10 days prior to the hearing:*

<b>ADA Contact:</b>	ADA Coordinator
<b>Address:</b>	12 <sup>th</sup> Floor L&C Tower 401 Church Street Nashville, Tennessee 37243
<b>Phone:</b>	1-866-253-5827 (toll free) or (615) 532-0200 Hearing impaired callers may use the TN Relay Service at 1-800-848-0298.
<b>Email:</b>	<a href="mailto:Beverly.Evans@tn.gov">Beverly.Evans@tn.gov</a>

**Hearing Location(s)** (for additional locations, copy and paste table)

Address 1:	17 <sup>th</sup> Floor Conference Room A, L & C Tower		
Address 2:	401 Church Street		
City:	Nashville, Tennessee		
Zip:	37243		
Hearing Date :	04/09/13		
Hearing Time:	9:00 a.m.	<input checked="" type="checkbox"/> CST/CDT	<input type="checkbox"/> EST/EDT

**Additional Hearing Information:**

This rulemaking is intended to move the rules from Chapter 1200-04-08 to Chapter 0400-40-08 and to edit the document to correct typos and incorrect references.

Oral or written comments are invited at the hearing. In addition, written comments may be submitted prior to or after the public hearing to: Tennessee Department of Environment and Conservation, Water Resources Division; Attention: Mr. Bob O'Dette, 6<sup>th</sup> Floor, L & C Annex; 401 Church Street; Nashville, Tennessee 37243; telephone 615-532-0445 or fax 615-532-0199. However, such written comments must be received by 4:30 PM CDT, April 9, 2013, in order to assure consideration. For further information, please contact Mr. Bob O'Dette at the above address or telephone number or by e-mail at [Robert.Odette@tn.gov](mailto:Robert.Odette@tn.gov).

**Revision Type (check all that apply):**

- Amendment
- New
- Repeal

**Rule(s)** (ALL chapters and rules contained in filing must be listed. If needed, copy and paste additional tables to accommodate more than one chapter. Please enter only **ONE** Rule Number/Rule Title per row.)

<b>Chapter Number</b>	<b>Chapter Title</b>
0400-40-08	Rules and Regulations Applied to T.C.A. § 69-1-117
<b>Rule Number</b>	<b>Rule Title</b>
0400-40-08-.01	General
0400-40-08-.02	Definitions
0400-40-08-.03	Permits

<b>Chapter Number</b>	<b>Chapter Title</b>
1200-04-08	Rules and Regulations Applied to T.C.A. § 69-1-1
<b>Rule Number</b>	<b>Rule Title</b>
1200-04-08-.01	General
1200-04-08-.02	Definitions
1200-04-08-.03	Permits

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

Repeal

Chapter 1200-04-08  
Rules and Regulations Applied to T.C.A. § 69-1-1

Chapter 1200-04-08 Rules and Regulations Applied to T.C.A. § 69-1-1 is repealed.

Authority: T.C.A. §§ 69-1-117 and 4-5-201 et seq.

New Rules

Chapter 0400-40-08  
Rules and Regulations Applied to T.C.A. § 69-1-117

Table of Contents

0400-40-08-.01 General  
0400-40-08-.02 Definitions  
0400-40-08-.03 Permits

0400-40-08-.01 General.

This Chapter prescribes those requirements for Department of Environment and Conservation permits to authorize certain structures or work in or affecting navigable waters of the State of Tennessee pursuant to T.C.A. § 69-1-117 (hereinafter referred to as the Act). Certain structures or work in or affecting navigable waters of the State of Tennessee are also regulated under T.C.A. § 69-3-101 et seq., T.C.A. § 70-5-1 and § 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323). Applicants for a Department of Environment and Conservation permit under this Chapter should refer to the other cited authorities and implementing regulations for those permit requirements to determine applicability to their proposed activities.

Authority: T.C.A. §§ 69-1-117 and 4-5-201 et seq.

0400-40-08-.02 Definitions.

- (1) For the purpose of this Chapter, the following words shall have the same meaning as in the Water Quality Control Act and the rules adopted thereunder: Board, Commissioner, construction, Department, Director, discharge, Division, person, pollution and waters.
- (2) For the purpose of this regulation, unless the context requires otherwise, the following words shall have the definitions given.
  - (a) "Activity" means the performance, or carrying out of a project or construction of a structure.
  - (b) "Alteration" means any repair, change, removal, or addition to a structure which may affect the navigability of rivers, lakes, streams or watercourses subject to this Act.
  - (c) "Commence Construction" means the physical initiation of on site structural or ground work.
  - (d) "Navigable Waters" means any river, lake, stream or watercourse, natural or man-made, or their tributaries which have been adjudicated and held to be navigable in the technical or legal sense, pursuant to T.C.A. § 69-1-101 et seq. and are not subject to the Rivers and Harbors Act, 33 U.S.C., § 401 et seq.
  - (e) "Obstruction" means any work, project, activity, or structure that obstructs or impedes the capability, in the usual stage of the water, of unencumbered navigation by such vessels as are employed in the ordinary purposes of commerce or recreation.

- (f) "Ordinary High Water Mark" means the mark on the shore established by the fluctuations of water and indicated by physical characteristics such as: the residual particulate matter impressed on the bank and vegetation, the presence of litter and debris, changes in the character of soils and vegetation, or other appropriate means that consider the characteristics of the surrounding areas.
- (g) "Ordinary Low Water Mark" means the line which constitutes the usual or ordinary stage of a river or lake, when the volume of water is not increased by rains or freshet, nor diminished below such usual stage or volume by long continued drought.
- (h) "Project" means any dredging or disposal of dredged material, excavation, filling, construction of a structure or modification to an existing structure, or diversion of waters.
- (i) "Structure" means any building, pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, mooring structure, moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

Authority: T.C.A. §§ 69-1-117 and 4-5-201 et seq.

0400-40-08-.03 Permits.

(1) Purpose of a Permit:

Under the Act, it is not lawful, without a permit, to authorize, undertake, or engage in any activity which has or is likely to have the effect of impairing or obstructing the navigability of any river, lake, stream or watercourse within the state which has been adjudicated and held to be navigable in the technical or legal sense pursuant to T.C.A. § 69-1-101 et seq. and is not subject to the Rivers and Harbors Act, 33 U.S.C., § 401 et seq. The Act is intended to delimit permissible structures and activities. A permit under the Act is designed to define and impose circumstances and conditions necessary to prevent any encumbrance to the navigability of navigable waters which may otherwise result from those structures or activities.

(2) Application:

- (a) Except as otherwise provided in these regulations, a person who plans to engage or who is engaging in an activity below ordinary high water which may affect the course, location or condition of navigable waters must make application in writing to the Commissioner for a permit, or for modification of an existing permit.
- (b) Applicants must complete and submit standard application forms supplied by the Commissioner together with such engineering reports, plans and specifications as are required. The Commissioner may subsequently request additional information as he deems necessary in order to make the permit decision.
- (c) All activities which the applicant plans to undertake which are reasonably related to the same project for which a permit is required under the Act should be included in the same application.
- (d) The Commissioner may reject, as incomplete, any application which does not provide all information requested on the standard application form or does not comply with subparagraph (c) of this paragraph.

(3) Notice and Public Participation:

- (a) Each completed application shall be evaluated and a tentative determination of whether to issue or deny a permit shall be made. If a tentative determination is made to issue a permit, a draft permit shall be prepared that includes a proposed schedule of completion, including interim dates and requirements, and a brief description of any other proposed special conditions.
- (b) In order to inform interested and potentially interested persons of a proposed activity and of the tentative determinations regarding it, public notice shall be circulated within the geographical area of the proposed activity. Upon receipt of a complete application and after a determination has been made that a permit is required, any of the following methods for distribution may be

employed:

1. Posting in and public places within the municipality nearest the premises in which the activity is proposed; or
  2. Posting near the entrance to the applicant's premises and in nearby places; or
  3. Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation.
- (c) A copy of the public notice and accompanying descriptive information shall be sent to any person who specifically requests one. In addition, a copy shall be sent to any state whose waters may be affected by the proposed activity: to any interstate agency having water quality control or navigation authority over affected waters; to the appropriate District Engineer of the U.S. Army Corps of Engineers; and to other State and Federal agencies. If so requested, the State or Interstate agency shall be provided a copy of the permit application and a copy of the proposed permit. The Commissioner shall send a copy of each notice of application and accompanying descriptive information within the state or a certain geographical area thereof to those persons who have requested the addition of their names to a mailing list. The Commissioner may annually purge the mailing list of those persons who do not renew their requests.
- (d) Public notice of applications shall include the following:
1. Name, address, and phone number of the Division;
  2. Name and address of the applicant(s);
  3. Written description of the proposed activity together with maps, drawings, or other appropriate means to describe the nature of the proposed activity;
  4. Name of the waterway at which the activity is proposed and a description of the location of the activity within or proximity to the waterway;
  5. A statement of the tentative determination to issue or deny a permit for the activity described in the application;
  6. Address and phone number of the premises at which interested persons may obtain further information, request a copy of the draft permit and inspect and copy forms and related documents.
- (e) Interested persons may submit written comments on the tentative determinations within either 15 days of public notice or such greater period as the Commissioner allows. All written comments received before the comment deadline shall be retained and considered in the final determination. Full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies and other experts on matters within their expertise.
- (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 no later than the end of the period allowed for public comment, and must indicate the interest of the party filing it, must concisely state the water quality issues being raised, and the reasons why a hearing is warranted. If there are water quality issues and significant public interest in having a hearing, the Commissioner shall hold one in the geographical area of the proposed activity. No less than 30 days in advance of the hearing, public notice of it shall be circulated at least as widely as was notice of the application. The Commissioner will distribute notice of the public hearing as set forth in subparagraph (c) 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.

(4) Circumstances, Conditions and Limitations of Permits:

- (a) A permit under the Act may authorize both the activity and the resulting use.
- (b) The Commissioner may add special conditions to a permit when such conditions are necessary to satisfy legal requirements and to otherwise satisfy the stated purpose of the Act. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and enforceable.
- (c) The Commissioner may suspend, modify or revoke a permit if he determines that the applicant has not complied with any of the conditions or limitations set forth in the permit, or has exceeded the scope of the work set forth in the application. Unauthorized modifications or alterations to a permitted structure or activity are unlawful and may invalidate the permit.
- (d) § 401 Water Quality Certification of any activity which requires a Department of the Army permit for the discharge of dredged or fill material under § 404 of the Clean Water Act will serve as a permit under this Chapter.
- (e) Any activity or structure which was commenced before July 1, 1986, does not need a permit under this Act.
- (f) The decision whether to issue a permit for an activity or structure will be based upon an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on navigability. All factors which may be relevant to the proposal must be considered.
- (g) A riparian landowner's general right of access to navigable waters is subject to the general public's right of navigation on the water surface. Proposals which create an undue hindrance to use of, or access to navigable waters, will be deterred as contrary to the public interest.
- (h) The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the proposed activity. A permit under the Act does not convey any property rights, either in real estate or material, or any exclusive privileges.
- (i) Applications to protect property from erosion will generally be permitted. However, if the protective structure results in an interference to navigation, or is otherwise contrary to the public interest, then an attempt to define and impose reasonable alternative methods to protect the property from erosion will be accomplished by the Commissioner.
- (j) The primary responsibility for determining zoning and land use matters rests with local government. It is the responsibility of the applicant to determine and comply with zoning and land use requirements.
- (k) The applicant shall have the burden of demonstrating that the proposed activity will comply with the requirements of the Act.
- (l) The Commissioner may deny a permit application if the proposed activity would result in an unreasonable hindrance to navigation.
- (m) An activity requiring a permit under these rules may also require a permit pursuant to the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101 et seq. The issuance of such a permit is based upon different criteria than those of this Act and these rules. Therefore, issuance of a permit under these rules has no effect on whether a permit under T.C.A. § 69-3-101 et seq. will be issued.
- (n) A permit shall continue in effect until it expires or is suspended or revoked.
- (o) A permit for a structure or other activity of a permanent nature will normally have no expiration date. However, where a temporary structure is authorized, the permit will be of limited duration with a definite expiration date.
- (p) A permit for construction work for a structure which requires a permit of indefinite duration will

specify a time limit for completing the activity. A permit may also specify the date by which the activity must be started normally within one year of from the date of issuance. The date will be established by the Commissioner and will provide a reasonable period based upon the scope and nature of the activity involved.

- (q) An extension of time of a permit for an activity or structure of a temporary nature may be granted by the Commissioner. A permit will expire if the permittee fails to request and receive an extension of time. A request for an extension of time will be processed in accordance with the regular procedures of paragraphs (2) and (3) of this rule, including public notice, except that such processing is not required where the Commissioner determines that there have been no significant changes in the attendant circumstances since the permit was issued.

(5) Reelfoot Lake

- (a) For the purpose of this rule, the natural water levels of the navigable stream Reelfoot Lake are delineated as follows:
  - 1. The ordinary low water mark is two hundred eighty-two and four-tenths feet (282.4') mean sea level.
  - 2. The full pool level is two hundred eighty-three and six-tenths feet (283.6') mean sea level.
  - 3. The ordinary high water mark is two hundred eight-five feet (285') mean sea level.
- (b) Structures which are located above normal full pool elevation (283.6' msl) but below ordinary high water (285' msl) are authorized by this rule.
- (c) Duck blinds authorized by the Tennessee Wildlife Resources Agency pursuant to T.C.A. §§ 70-1-206 and 70-4-107 are authorized by this rule.

- (6) Review of Permit Denials, Terms and Conditions: Any applicant who is denied a permit or who disagrees with the terms or conditions imposed in the permit is entitled to review of the Commissioner's decision. Any action by the Commissioner regarding a previously issued permit, such as modification or revocation of an existing permit, may also be appealed. Such appeals may be perfected by filing a request for a hearing with the Commissioner's action. Such appeals shall be conducted in accordance with the Tennessee Uniform Administrative Procedures Act T.C.A. § 4-5-301 et seq.

Authority: T.C.A. §§ 69-1-117 and 4-5-201 et seq.

I certify that the information included in this filing is an accurate and complete representation of the intent and scope of rulemaking proposed by the agency.

Date: 2/12/13

Signature: Sandra K. Dudley

Name of Officer: SANDRA K. DUDLEY

Title of Officer: DIRECTOR, WATER RESOURCES



My Commission Expires JULY 6, 2015

Subscribed and sworn to before me on: 2-12-13

Notary Public Signature: Beth B. Smith

My commission expires on: July 6, 2015

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Filed with the Department of State on: 2/13/13

Tre Hargett

Tre Hargett  
Secretary of State

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