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Division of Publications**

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Sequence Number: 01-06-17
Rule ID(s): 6394
File Date: 1/5/17
Effective Date: 4/5/17

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: Environment and Conservation
Division: Air Pollution Control
Contact Person: Lacey J. Hardin
Address: William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 15th Floor
Nashville, Tennessee 37243
Phone: (615) 532-0545
Email: Lacey.Hardin@tn.gov

Revision Type (check all that apply):

- Amendment
 New
 Repeal

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

Chapter Number	Chapter Title
1200-03-09	Construction and Operating Permits
Rule Number	Rule Title
1200-03-09-.01	Construction 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>)

Chapter 1200-03-09
Construction and Operating Permits

Amendments

Subparagraph (e) of paragraph (1) of Rule 1200-03-09-.01 Construction Permits is amended by deleting it in its entirety and substituting instead the following:

- (e) No construction permit shall be issued by the Technical Secretary if the approval to construct or modify an air contaminant source would result in a violation of the ambient air quality standards specified in Chapter 1200-03-03, would cause a violation of any other regulatory requirement under this Division, 1200-03, would result in a violation of applicable portions of the control strategy, or would interfere with attainment or maintenance of a national ambient air quality standard in a neighboring state. In the case where a source or modification was constructed without first obtaining a construction permit the appropriate enforcement action shall be pursued to ensure that ambient air quality standards and other regulatory requirements will be met. All emission limits and requirements of any applicable construction permit must be met prior to issuance of an operating permit for the source or modification.

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

Part 3 of subparagraph (j) of paragraph (4) of Rule 1200-03-09-.01 Construction Permits is amended by deleting it in its entirety and substituting instead the following:

- 3. At the time of construction permitting, a major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

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

Item (II) of subpart (iii) of part 2 of subparagraph (b) of paragraph (5) of Rule 1200-03-09-.01 Construction Permits is amended by deleting it in its entirety and substituting instead the following:

- (II) At the time of construction permitting, a new major stationary source shall apply the lowest achievable emission rate for each contaminant for which the area is designated nonattainment that it would have the potential to emit in an amount sufficient to make the source or modification a major stationary source or modification. This provision applies to each new emissions unit at which emissions would occur.

Authority: T.C.A. §§ 68-201-101 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:

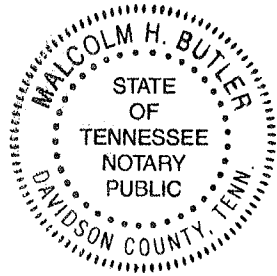
Board Member	Aye	No	Abstain	Absent	Signature (if required)
Dr. Ronne Adkins Commissioner's Designee, Dept. of Environment and Conservation	X				
Dr. John Benitez Licensed Physician with experience in health effects of air pollutants				X	
Karen Cisler Environmental Interests	X				
Dr. Wayne T. Davis Conservation Interests	X				
Stephen Gossett Working for Industry with technical experience	X				
Dr. Shawn A. Hawkins Working in field related to Agriculture or Conservation	X				
Richard Holland Working for Industry with technical experience	X				
Caitlin Roberts Jennings Small Generator of Air Pollution representing Automotive Interests				X	
Chris Moore Working in management in Private Manufacturing	X				
Amy Spann, PE Registered Professional Engineer				X	
Larry Waters County Mayor	X				
Jimmy West Commissioner's Designee, Dept. of Economic and Community Development	X				
Vacant Working in Municipal Government					
Vacant Involved with Institution of Higher Learning on air pollution evaluation and control					

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Air Pollution Control Board on 12/14/2016, 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: 09/10/15

Rulemaking Hearing(s) Conducted on: (add more dates). 11/02/15



Date: 12/14/2016

Signature: Quincy N. Styke III

Name of Officer: Quincy N. Styke III

Title of Officer: Acting Technical Secretary

Subscribed and sworn to before me on: 12/14/2016

Notary Public Signature: Malcolm H. Butler

My commission expires on: January 11, 2017

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
Herbert H. Slatery III
Attorney General and Reporter

1/4/2017 Date

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RECEIVED
2017 JAN -5 PM 2:02
SECRETARY OF STATE
PUBLICATIONS

Filed with the Department of State on: 1/5/17

Effective on: 4/5/17

Tre Hargett
Tre Hargett
Secretary of State

Rm09-01c10 RedLineCopy.doc

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment: The Tennessee Chamber of Commerce and Industry (TCC&I) was supportive of these rule amendments, as they are an outgrowth of a petition for rulemaking filed by TCC&I.

Response: The Board agrees that the rule amendments would allow the Tennessee State Implementation Plan (SIP) to be interpreted in a different manner for the purpose of making a failure to obtain a construction permit a single violation as opposed to the prior interpretation by the Sixth Circuit Court of Appeals in the 2007 National Parks Conservation Association v. TVA case of the failure as a “continuing series of discrete violations”.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

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

This rulemaking would generally not affect small businesses since it does not affect state enforcement, and small business are generally not targets for federal citizen action or enforcement by EPA.

- (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.

There are no additional requirements imposed by this rulemaking.

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

The effect would be inconsequential to both groups.

- (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.

There is none.

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

The state rule was interpreted by a federal court as broader than the board intended and the amendment adjusts the language to be consistent with rules in other states and EPA's regulation in states in which it runs the New Source Review (NSR) program.

- (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.

While it is unlikely that a small business would be targeted by a federal citizen action, if it was, it would be a disadvantage to the small businesses if they were not covered by this rulemaking, leaving them subject to potentially expensive litigation.

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://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The Department anticipates that this amended rule will not have a financial impact on local governments.

Additional Information Required by Joint Government Operations Committee

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

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

This rulemaking responds to a petition filed by the Tennessee Chamber of Commerce & Industry with the Tennessee Air Pollution Control Board seeking these amendments to the state rules. The petition related to the need for clarification of the state rules as to the nature of the obligations created by rules requiring sources of air contaminants to obtain a construction permit for a new or modified source and to require emissions limitations consistent to the use and operation of the Best Available Control Technology (BACT). The effect of this rulemaking is to say that a violation of these portions of the rule occur at a point in time when there is construction or modification at a source and that this rule does not impose an obligation of a continuing nature to apply for a permit and receive a BACT determination.

- (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 amendment is being promulgated under the authority of T.C.A. § 68-201-101 et seq., and is consistent with 40 CFR Part 51.

- (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;

Companies that are considered major sources for the purposes of construction permits under the Prevention of Significant Deterioration (PSD) program would be most affected by this rule. The rule would now allow these companies to assert a defense based on the general five-year federal Statute of Limitations on enforcement similar to what other companies in other states with similar air pollution programs can do. These companies are most likely to be the focus of actions under federal law for enforcement or citizen actions.

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

None are directly related although this rulemaking is heavily influenced by application of the rule being amended in a particular case. The United States Court of Appeals for the Sixth Circuit in *National Parks Conservation Association v. TVA*, has interpreted the rule being amended to cause a new violation to arise each day a source operates no matter how many years have passed since the original date of construction or modification, hence creating a "continuing series of discrete violations". The rule being corrected deprived Tennessee companies of the benefit of a defense based on the federal statute of limitations of five years from the construction or modification. The Statute of Limitations defense is supported by public policy, and without fixing this rule Tennessee companies are being placed at a competitive disadvantage in contrast to most states with similar separate construction and operating permit schemes as explained in several other federal court decisions. This rule still allows enforcement action by the State but would even the playing field for Tennessee companies having to defend stale actions in federal courts.

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

There will be no significant impact in state and local government revenues and expenditures resulting from the promulgation of these amendments.

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

Steven R. Stout

Office of General Counsel
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, Tennessee 37243

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

Jenny Howard
Deputy 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
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, Tennessee 37243
(615) 532-8685
Jenny.Howard@tn.gov

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

The Tennessee Air Pollution Control Board is not aware of any.

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Agency/Board/Commission: Environment and Conservation
Division: Air Pollution Control
Contact Person: Lacey J. Hardin
Address: William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 15th Floor
Nashville, Tennessee 37243
Phone: (615) 532-0545
Email: Lacey.Hardin@tn.gov

Revision Type (check all that apply):

- Amendment
- New
- Repeal

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

Chapter Number	Chapter Title
1200-03-09	Construction and Operating Permits
Rule Number	Rule Title
1200-03-09-.01	Construction 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>)

Chapter 1200-03-09
Construction and Operating Permits

Amendments

Subparagraph (e) of paragraph (1) of Rule 1200-03-09-.01 Construction Permits is amended by deleting it in its entirety and substituting instead the following:

- (e) No construction permit shall be issued by the Technical Secretary if the approval to construct or modify an air contaminant source would result in a violation of the ambient air quality standards specified in Chapter 1200-03-03, would cause a violation of any other regulatory requirement under this Division, 1200-03, would result in a violation of applicable portions of the control strategy, or would interfere with attainment or maintenance of a national ambient air quality standard in a neighboring state. In the case where a source or modification was constructed without first obtaining a construction permit, ~~a construction permit may be issued to the source or modification to establish as conditions of the permit, the necessary emission limits and requirements to assure that these regulatory requirements are met. The~~ the appropriate enforcement action shall be pursued to ~~insure~~ ensure that ambient air quality standards and other regulatory requirements will be met. All emission limits and requirements of the any applicable construction permit must be met prior to issuance of an operating permit for the source or modification.

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

Part 3 of subparagraph (j) of paragraph (4) of Rule 1200-03-09-.01 Construction Permits is amended by deleting it in its entirety and substituting instead the following:

3. A At the time of construction permitting, a major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

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

Item (II) of subpart (iii) of part 2 of subparagraph (b) of paragraph (5) of Rule 1200-03-09-.01 Construction Permits is amended by deleting it in its entirety and substituting instead the following:

- (II) A At the time of construction permitting, a new major stationary source shall apply the lowest achievable emission rate for each contaminant for which the area is designated nonattainment that it would have the potential to emit in an amount sufficient to make the source or modification a major stationary source or modification. This provision applies to each new emissions unit at which emissions would occur.

Authority: T.C.A. §§ 68-201-101 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. Ronne Adkins Commissioner's Designee, Dept. of Environment and Conservation	X				
Dr. John Benitez Licensed Physician with experience in health effects of air pollutants				X	
Karen Cisler Environmental Interests	X				
Dr. Wayne T. Davis Conservation Interests	X				
Stephen Gossett Working for Industry with technical experience	X				
Dr. Shawn A. Hawkins Working in field related to Agriculture or Conservation	X				
Richard Holland Working for Industry with technical experience	X				
Caitlin Roberts Jennings Small Generator of Air Pollution representing Automotive Interests				X	
Chris Moore Working in management in Private Manufacturing	X				
Amy Spann, PE Registered Professional Engineer				X	
Larry Waters County Mayor	X				
Jimmy West Commissioner's Designee, Dept. of Economic and Community Development	X				
Vacant Working in Municipal Government					
Vacant Involved with Institution of Higher Learning on air pollution evaluation and control					

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Air Pollution Control Board on 12/14/2016, 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: 09/10/15

Rulemaking Hearing(s) Conducted on: (add more dates). 11/02/15

Date: December 14, 2016

Signature: _____

Name of Officer: Quincy N. Styke III

Title of Officer: Acting Technical Secretary

Subscribed and sworn to before me on: December 14, 2016

Notary Public Signature: _____

My commission expires on: January 11, 2017

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

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- (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.

This rulemaking would generally not affect small businesses since it does not affect state enforcement, and small business are generally not targets for federal citizen action or enforcement by EPA.

- (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.

There are no additional requirements imposed by this rulemaking.

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

The effect would be inconsequential to both groups.

- (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.

There is none.

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

The state rule was interpreted by a federal court as broader than the board intended and the amendment adjusts the language to be consistent with rules in other states and EPA's regulation in states in which it runs the New Source Review (NSR) program.

- (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.

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- (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;

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

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

There will be no significant impact in state and local government revenues and expenditures resulting from the promulgation of these amendments.

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

Steven R. Stout

Office of General Counsel
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 Tennessee Air Pollution Control Board is not aware of any.