ADMINISTRATIVE REGISTER OF KENTUCKY

LEGISLATIVE RESEARCH COMMISSION
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Title		Chapter	Regulation
806	KAR	50:	155
Cabinet, Department, Board or Agency		Office, Division, or Major Function	Specific Regulation

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ADMINISTRATIVE REGULATION REVIEW SUBCOMMITTEE
TENTATIVE AGENDA - August 10, 1994, 10 a.m.
Room 149, State Capitol Annex

KENTUCKY HIGHER EDUCATION ASSISTANCE AUTHORITY

Kentucky Loan Program

11 KAR 3:005. Lender participation.

11 KAR 3:100. Administrative wage garnishment.

KHEAA Grant Program

11 KAR 5:001. Definitions pertaining to Chapter 5 of Title 11 of Kentucky administrative regulations.

11 KAR 5:034. CAP grand student eligibility.

11 KAR 5:130. Student application.

11 KAR 5:145. CAP grant award determination procedure.

11 KAR 5:160. Disbursement procedures.

Teacher Scholarship Loan Program

11 KAR 8:030. Teacher scholarships.

AGRICULTURAL EXPERIMENT STATION

Seed

12 KAR 1:071. Repeal of 12 KAR 1:015; 12 KAR 1:020; 12 KAR 1:030; 12 KAR 1:035; 12 KAR 1:040; 12 KAR 1:050 and 12 KAR 1:070. (Deferred from July)

12 KAR 1:111. Repeal of 12 KAR 1:110. (Deferred from July)

12 KAR 1:115 & E. Sampling, analyzing, testing, and tolerances. (Deferred from July)

12 KAR 1:120 & E. Noxious weed seed. (Deferred from July)

12 KAR 1:125 & E. Identification of seed not for sale. (Deferred from July)

12 KAR 1:130 & E. Labeling of seed mixtures. (Deferred from July)

12 KAR 1:135 & E. Tags available for purchase from the director. (Deferred from July)

12 KAR 1:140 & E. Permits, reports and fees for persons using own tags. (Deferred from July)

12 KAR 1:145 & E. Registration of agricultural seed dealers, noncertified custom seed conditioners, certified seed growers, and certified seed conditioners. (Deferred from July)

12 KAR 1:150 & E. Stop sale orders. (Deferred from July)

12 KAR 1:155 & E. Schedule of charges for samples submitted for testing. (Deferred from July)

12 KAR 1:160 & E. Seed not required to be labeled by variety name. (Deferred from July)

12 KAR 1:165 & E. Germination standards for vegetable seed. (Deferred from July)

12 KAR 1:170 & E. Germination standards for flower seed. (Deferred from July)

12 KAR 1:175 & E. Seed certification in Kentucky. (Deferred from July)

Tobacco

12 KAR 6:010 & E. Dealer registration. (Deferred from July)

12 KAR 6:015 & E. Permit to label tobacco seedlings or finished tobacco plants for distribution in Kentucky, reports of sales, and payment of inspection fees. (Deferred from July)

12 KAR 6:020 & E. Identification of tobacco seedlings or finished tobacco plants not for sale. (Deferred from July)

12 KAR 6:025 & E. Notice of violation and stop sale. (Deferred from July)

TREASURY

State Treasury

20 KAR 1:010. Access to public records of State Treasury.

REVENUE CABINET

Income Tax; General Administration

103 KAR 15:070. Electronic funds transfer.

Income Tax; Withholding

103 KAR 18:150. Employer's withholding reporting requirements. (Repeals 103 KAR 18:030; 103 KAR 18:040; 103 KAR 18:141)

GENERAL GOVERNMENT CABINET

Board of Speech-language Pathology and Audiology

201 KAR 17:010. Application for licensure.

201 KAR 17:025. Requirements for an interim license as a speech-language pathology assistant.

201 KAR 17:027. Supervision requirements for a speech-language pathology assistant.

201 KAR 17:030. License fees.

Board of Nursing

201 KAR 22:031. Therapist's licensing procedures.

201 KAR 22:106. Assistant's certification procedure.

201 KAR 22:135. Fees.

Board of Respiratory Care

201 KAR 29:070. Scope of practice.

Kentucky Real Estate Appraisers Board

201 KAR 30:020. Licensed nonfederal real property appraiser.
201 KAR 30:140. Transitional licensed real property appraiser.

TOURISM CABINET
Department of Fish and Wildlife Resources

Hunting and Fishing

301 KAR 3:022. License, tag and permit fees.
301 KAR 3:027. Hunting and fishing method exemptions for disabled persons.

ECONOMIC DEVELOPMENT CABINET
Department of Agriculture

Tobacco Sales

302 KAR 78:010. Tobacco sales to persons under the age of eighteen (18).

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water

Water Quality

401 KAR 5:001. Definitions of terms used in 401 KAR Chapter 5. (Public Hearing in June)
401 KAR 5:037. Groundwater protection plans. (Amended After Hearing) (Deferred from July)
401 KAR 5:050. General provisions of KPDES permitting program. (Public Hearing in June)
401 KAR 5:055. Scope and applicability of the KPDES program. (Public Hearing in June)
401 KAR 5:057. KPDES pretreatment requirements. (Public Hearing in June)
401 KAR 5:060. KPDES application requirements. (Public Hearing in June)
401 KAR 5:065. KPDES permit conditions. (Public Hearing in June)
401 KAR 5:070. Provisions of the KPDES permit. (Public Hearing in June)
401 KAR 5:075. Cabinet review procedures for KPDES permits. (Public Hearing in June)
401 KAR 5:080. Criteria and standards for the Kentucky pollutant discharge elimination system. (Public Hearing in June)

Division of Air Quality

General Administrative Procedures

401 KAR 50:035. Permits.

New Source Standards

401 KAR 59:101. New bulk gasoline plants.

New Source Performance Standards

401 KAR 60:100. Standards of performance for petroleum refineries. (Repeals 401 KAR 59:045)

401 KAR 60:110. Standards of performance for storage vessels for petroleum liquids for which construction, reconstruction, or modification commenced after June 11, 1973, and prior to May 19, 1978.

401 KAR 60:111. Standards of performance for storage vessels for petroleum liquids for which construction, reconstruction, or modification commenced after May 18, 1978 and prior to July 23, 1984.

401 KAR 60:150. Standards of performance for sewage treatment plants. (Repeals 401 KAR 59:070)
401 KAR 60:160. Standards of performance for primary copper smelters. (Repeals 401 KAR 59:110)
401 KAR 60:170. Standards of performance for primary zinc smelters. (Repeals 401 KAR 59:115)
401 KAR 60:180. Standards of performance for primary lead smelters. (Repeals 401 KAR 59:120)
401 KAR 60:190. Standards of performance for primary aluminum reduction plants. (Repeals 401 KAR 59:125)
401 KAR 60:250. Standards of performance for coal preparation plants. (Repeals 401 KAR 59:155)
401 KAR 60:260. Standards of performance for ferroalloy production facilities. (Repeals 401 KAR 59:160)
401 KAR 60:330. Standards of performance for stationary gas turbines. (Repeals 401 KAR 59:019)
401 KAR 60:340. Standards of performance for lime manufacturing plants. (Repeals 401 KAR 59:171)
401 KAR 60:370.Standards of performance for lead-acid battery manufacturing plants. (Repeals 401 KAR 59:270)
401 KAR 60:380. Standards of performance for metallic mineral processing plants. (Repeals 401 KAR 59:285)
401 KAR 60:390. Standards of performance for automobile and light-duty truck surface coating operations. (Repeals 401 KAR 59:181)
401 KAR 60:400. Standards of performance for phosphate rock plants. (Repeals 401 KAR 59:265)
401 KAR 60:420. Standards of performance for ammonium sulfate manufacture. (Repeals 401 KAR 59:255)
401 KAR 60:440. Standards of performance for pressure sensitive tape and label surface coating operations. (Repeals 401 KAR 59:300)
401 KAR 60:450. Standards of performance for industrial surface coating: large appliances. (Repeals 401 KAR 59:201)
401 KAR 60:460. Standards of performance for metal coil surface coating. (Repeals 401 KAR 59:221)
401 KAR 60:470. Standards of performance for asphalt processing and asphalt roofing manufacture. (Repeals 401 KAR 59:042)
401 KAR 60:480. Standards of performance for equipment leaks of VOC in the synthetic organic chemicals manufacturing industry. (Repeals 401 KAR 59:305)
401 KAR 60:490. Standards of performance for the beverage can surface coating industry. (Repeals 401 KAR 59:216)
401 KAR 60:500. Standards of performance for bulk gasoline terminals. (Repeals 401 KAR 59:099)
401 KAR 60:540. Standards of performance for the rubber tire manufacturing industry. (Repeals 401 KAR 59:236)

401 KAR 60:560. Standards of performance for volatile organic compound (VOC) emissions from the polymer manufacturing industry.

401 KAR 60:580. Standards of performance for flexible vinyl and urethane coating and printing. (Repeals 401 KAR 59:211)

401 KAR 60:590. Standards of performance for equipment leaks of VOC in petroleum refineries. (Repeals 401 KAR 59:049)

401 KAR 60:600. Standards of performance for synthetic fiber production facilities. (Repeals 401 KAR 59:280)

401 KAR 60:620. Standards of performance for petroleum dry cleaners. (Repeals 401 KAR 59:242)

401 KAR 60:630. Standards of performance for equipment leaks of VOC from onshore natural gas processing plants. (Repeals 401 KAR 59:295)

401 KAR 60:640. Standards of performance for onshore natural gas processing: SO_2 emissions. (Repeals 401 KAR 59:295)

401 KAR 60:680. Standards of performance for wool fiberglass insulation manufacturing plants. (Repeals 401 KAR 59:290)

401 KAR 60:700. Standards of performance for volatile organic compound (VOC) emissions from synthetic organic chemical manufacturing industry (SOCMI) reactor processes.

401 KAR 60:730. Standards of performance for calciners and dryers in mineral industries.

Existing Source Standards

401 KAR 61:056. Existing bulk gasoline plants.

General Standards of Performance

401 KAR 63:100. General provisions.

401 KAR 63:300. National emission standards for coke oven batteries.

401 KAR 63:320. National perchloroethylene air emission standards for dry cleaning facilities.

Department for Surface Mining Reclamation and Enforcement

General Provisions

405 KAR 7:080 & E. Small operator assistance. (Public Hearing Held in June)

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Office of the Secretary

501 KAR 6:020. Corrections policies and procedures.

501 KAR 6:040. Kentucky State Penitentiary.

501 KAR 6:050 & E. Luther Luckett Correctional Complex & E.

501 KAR 6:070. Kentucky Correctional Institution for Women.

501 KAR 6:080. Department of Corrections manuals.

501 KAR 6:090. Frankfort Career Development Center.

501 KAR 6:140. Bell County Forestry Camp.

501 KAR 6:150. Eastern Kentucky Correctional Complex.

EDUCATION, ARTS AND HUMANITIES CABINET

Department of Education

Office of District Support Services

School Administration and Finance

702 KAR 3:270. SEEK funding formula. (Public Hearing in June)

Bureau of Learning Results Services

Learning Results Services

703 KAR 4:060. Academic expectations. (Public Hearing Held in June)

Office of Learning Programs Development

Education Professional Standards Board

704 KAR 20:670. Kentucky teaching certificates.

LABOR CABINET

Occupational Safety and Health

803 KAR 2:180. Recordkeeping; statistics.

803 KAR 2:308. Adoption of 29 CFR Part 1910.132-.140.

803 KAR 2:309. Adoption of 29 CFR Part 1910.141-.149.

803 KAR 2:317. Adoption of 29 CFR Part 1910.261-.275.

803 KAR 2:318. Adoption of 29 CFR Part 1910.301-.399.

803 KAR 2:320. Adoption of 29 CFR Part 1910.1000-1910.1500.

803 KAR 2:403. Adoption of 29 CFR Part 1926.50-.59.

803 KAR 2:424. Adoption of 29 CFR Part 1926.1071-.1092.

803 KAR 2:500. Adoption of 29 CFR Part 1915, 1917, 1918 and 1919, maritime employment.

803 KAR 2:600. Adoption of 29 CFR Part 1928.

Workers' Compensation Board

803 KAR 25:035 & E. Computation of apportionment and attorney's fees.

PUBLIC PROTECTION AND REGULATION CABINET

Department of Insurance

General Provisions

806 KAR 1:011. Repeal of 806 KAR 1:010, 806 KAR 2:130, 806 KAR 3:180 and 806 KAR 14:040.

Liability Self-Insurance Groups

806 KAR 46:010. Financial statements for liability self-insurance groups.

Department of Housing, Buildings and Construction

Electrical Inspectors

815 KAR 35:015. Certification of electrical inspectors. (Repeals 815 KAR 35:010)

CABINET FOR HUMAN RESOURCES

Department for Health Services

Communicable Diseases

902 KAR 2:020. Reportable diseases.
902 KAR 2:111. Repeal of 902 KAR 2:110 and 902 KAR 2:120.

Department for Employment Services

Unemployment Insurance

903 KAR 5:270 & E. Maximum weekly benefit rates.

Department for Social Insurance

Public Assistance

904 KAR 2:017. Job opportunities and basic skills (JOBS) child care and supportive services.
904 KAR 2:040. Procedures for determining initial and continuing eligibility.

Department for Medicaid Services

Medicaid Services

907 KAR 1:009 & E. Physicians' services. (Repeals 907 KAR 1:402)
907 KAR 1:023 & E. Review and approval of oxygen and selected therapies in nursing facilities. (Public Hearing Held in June)
907 KAR 1:026 & E. Dental services. (Repeals 907 KAR 1:414)
907 KAR 1:030. Home health agency services. (Repeals 907 KAR 1:430)
907 KAR 1:626 & E. Reimbursement of dental services. (Repeals 907 KAR 1:625E)
907 KAR 1:631 & E. Reimbursement of vision care services. (Repeals 907 KAR 1:630E)

ADMINISTRATIVE REGULATION REVIEW PROCEDURE
(Also see KRS Chapter 13A)

Notice of Intent

Beginning July 15, 1994, administrative bodies shall file with the Regulations Compiler a Notice of Intent to promulgate an administrative regulation, including date, time and place of a public hearing on the subject matter to which the administrative regulation applies. This Notice of Intent, along with the public hearing information, shall be published in the Administrative Register. This Notice has to be filed and published in the Administrative Register, and the public hearing held or cancelled, prior to the filing of an administrative regulation.

After the scheduled hearing date, if held, the administrative body shall file with the Regulations Compiler a Statement of Consideration, setting forth a summary of the comments made at the public hearing, and the responses by the administrative body. This Statement shall not be published in the Administrative Register.

Filing and Publication

Administrative bodies shall file with the Regulations Compiler all proposed administrative regulations, public hearing information, tiering statement, regulatory impact analysis, fiscal note, and the federal mandate comparison. Those administrative regulations received by the deadline required in KRS 13A.050 shall be published in the Administrative Register.

Public Hearing

The administrative body shall schedule a public hearing on proposed administrative regulations to be held not less than twenty (20) nor more than thirty (30) days following publication. The time, date, and place of the hearing and the name and address of the agency contact person shall be included on the last page of the administrative regulation when filed with the Compiler's office.

Any person interested in attending the scheduled hearing must submit written notification of such to the administrative body at least five (5) days before the scheduled hearing. If no written notice is received at least five (5) days before the hearing, the administrative body may cancel the hearing.

If the hearing is cancelled, the administrative body shall notify the Compiler of the cancellation. If the hearing is held, the administrative body shall submit within fifteen (15) days following the hearing a statement of consideration summarizing the comments received at the hearing and the administrative body's responses to the comments.

No transcript of the hearing need to be taken unless a written request for a transcript is made, and the person requesting the transcript shall have the responsibility of paying for same. A recording may be made in lieu of a transcript.

Review Procedure

If a proposed administrative regulation is amended as a result of the public hearing, the amended version shall be published in the next Administrative Register; and the administrative regulation shall be reviewed by the Administrative Regulation Review Subcommittee at its next meeting following publication. If a proposed administrative regulation is not amended as a result of the hearing or if the hearing is cancelled, the administrative regulation shall be reviewed by the Administrative Regulation Review Subcommittee at its next meeting. After review by the Subcommittee, the administrative regulation shall be referred by the Legislative Research Commission to an appropriate jurisdictional committee for a second review. The administrative regulation shall be considered as adopted and in effect as of adjournment on the day the appropriate jurisdictional committee meets or thirty (30) days after being referred by LRC, whichever occurs first.

NOTICES OF INTENT TO PROMULGATE ADMINISTRATIVE REGULATIONS

DEPARTMENT OF FISH AND WILDLIFE RESOURCES

DATE: July 12, 1994
Tourism Cabinet
Department of Fish and Wildlife Resources

(1) Regulation Number and Title: **301 KAR 1:085** Mussel Shell Harvesting

(2) The Department of Fish and Wildlife Resources intends to amend the administrative regulation cited above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 11 a.m. in the Commission Room, Arnold L. Mitchell Building, at the Game Farm, five miles west of Frankfort on U.S. 60.

(4) (a) The public hearing will be held if:

1. It is requested, in writing, by at least five persons, or an administrative body, or an association having at least five members; and,

2. A minimum of five persons, or the administrative body or association agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, the public hearing will be cancelled.

(5) (a) Persons wishing to request a public hearing should mail their written request to the Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, KY 40601.

(b) In a request for a public hearing, a person shall state:

1. "I agree to attend the public hearing;" or

2. "I will not attend the public hearing."

(6) (a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter, may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request from the Department at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of this administrative regulation is KRS 150.520.

(b) The administrative regulation that the Department intends to promulgate will amend 301 KAR 1:085 as follows: Extend the mussel sanctuary on Green River from the Highway 31W bridge in Hart county upstream to the Green River Lake Dam in Taylor county.

(c) The necessity and function of the proposed administrative regulation is to regulate the manner of taking mussels because of their value and susceptibility to over-harvest.

(d) The benefits expected from the administrative regulation are extending the protection of endangered species from damage by mussel harvesters.

(e) This administrative regulation will be implemented by sending notices to licensed musselers, publication in statewide newspapers and enforcement by conservation officers.

15 July 1994
Tourism Cabinet
Department of Fish and Wildlife Resources

(1) Regulation Number and Title: **301 KAR 2:140** Seasons for Wild Turkey.

(2) The Department of Fish and Wildlife Resources intends to amend the administrative regulation cited above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30 at 9 a.m. in the Commission Room, Arnold L. Mitchell building, at the Game Farm, five miles west of Frankfort on U.S. 60.

(4) The public hearing will be held as scheduled if:

(a) It is requested, in writing, by at least five persons, or an administrative body, or an association having at least five members; and,

(b) A minimum of five persons, or the administrative body or association agree, in writing, to be present at the public hearing.

(c) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5) (a) Persons wishing to request a public hearing should mail their written request to The Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, KY 40601.

(b) In a request for a public hearing, a person shall state:

1. "I agree to attend the public hearing"; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request from the Department at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of this administrative regulation is KRS 150.390, 150.170, 150.175.

(b) The administrative regulation that the department intends to promulgate will amend 301 KAR 2:140 as follows:

1. Move the closing date of the fall archery turkey season from Oct. 31 to Nov. 30, with no turkey hunting during modern gun deer season.

2. Open Fayette, Kenton and Woodford counties, and portions of Jessamine, Johnson, and Webster counties, to turkey hunting.

3. Open additional portions of Adair, Barren, Boyle, Clinton, Estill, Floyd, Garrard, Lawrence, Lincoln, Knox, Logan, Madison, Martin, Metcalfe, Morgan, Ohio, Owen, Rockcastle and Whitley counties to turkey hunting.

4. Close Casey County to turkey hunting.

5. Open all counties in the state to turkey hunting beginning with the 1996 season.

6. Reduce from 18 to 16 that age that a turkey hunter must be accompanied by an adult.

7. Adjust season dates for turkey hunting on Higginson-Henry Wildlife Management Area (WMA), Reelfoot Lake National Wildlife Refuge, Land Between The Lakes, Grayson Lake WMA, and Robinson Forest WMA.

(c) The necessity and function of the proposed administrative regulation is to permit and regulate the taking of wild turkeys. This amendment is necessary to adjust the areas open and closed to turkey hunting and to make other changes in turkey hunting requirements as listed above.

(d) The benefits expected from the administrative regulation are continued protection and management of Kentucky's wild turkey population; improved future turkey populations through harvest management; and increased wild turkey hunting opportunities by opening formerly closed areas.

(e) This administrative regulation will be implemented by informing turkey hunters of these regulatory changes through print and electronic media and department publications, and by enforcing this administrative regulation through the department's Division of Law Enforcement.

July 15, 1994
Tourism Cabinet
Department of Fish and Wildlife Resources

(1) Regulation Number and Title: **301 KAR 3:030** Year-round season for some birds and animals.

(2) The Department of Fish and Wildlife Resources intends to amend the administrative regulation cited above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30 at 11 a.m. in the Commission Room, Arnold L. Mitchell building, at the Game Farm, five miles west of Frankfort on U.S. 60.

(4) (a) The public hearing will be held if:

1. It is requested, in writing, by at least five persons, or an administrative body, or an association having at least five members; and,

2. A minimum of five persons, or the administrative body or association agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5) (a) Persons wishing to request a public hearing should mail their written request to The Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, KY 40601.

(b) In a request for a public hearing, a person shall state:

1. "I agree to attend the public hearing"; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request from the Department at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of this administrative regulation is KRS 150.370.

(b) The administrative regulation that the department intends to promulgate will amend 301 KAR 3:030 as follows: It will eliminate the closed season on protected and unprotected wildlife from November 1 through the close of the modern gun deer season.

(c) The necessity and function of the proposed administrative regulation is to eliminate an unnecessary requirement. Small game seasons now open November 1, making this closed season superfluous.

(d) The benefits expected from the administrative regulation are simplified and fewer regulatory requirements.

(e) This administrative regulation will be implemented by informing the public of this change through print and electronic media, brochures and other department informational activities.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Division of Air Quality

July 15, 1994
Natural Resources and Environmental Protection Cabinet
Department for Environmental Protection
Division for Air Quality

(1) The subject matter of these new administrative regulations, which would establish a new chapter in Title 401 of the Kentucky Administrative Regulations, is the creation of a state program equivalent to the federal Acid Rain program mandated by 42 USC 7651-7651o (Title IV of the Clean Air Act).

(2) The Division for Air Quality intends to promulgate nine administrative regulations governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the nine proposed administrative regulations has been scheduled for August 30, 1994, at 10 a.m. (ET), in the Conference Room of the Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601.

(4)(a) The public hearing will be held if it is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and a minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If 5 persons, or an administrative body or association, request this public hearing, and agree in writing to be present at this public hearing, it will be held as scheduled.

(c) If a request for a public hearing is not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5) Persons wishing to request a public hearing should mail their written request to the following address: Division for Air Quality, Attention John E. Hornback, 803 Schenkel Lane, Frankfort, Kentucky 40601, and phone number (502) 564-3382.

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Division for Air Quality at the address listed above.

(7) Information relating to the proposed administrative regulations.

(a) The statutory authority for the promulgation of the nine administrative regulations relating to the Acid Rain program includes KRS 224.10-100, and KRS 224.20-120.

(b) The nine administrative regulations that the Division for Air Quality intends to promulgate will not amend any existing administrative regulation. They will establish the requirements for state enforcement of Phase II of the Acid Rain program mandated by Congress and administered by the United States Environmental Protection Agency (EPA). This mandate requires sulfur dioxide and nitrogen oxides reductions by fossil-fuel fired electric utilities and requires sources to obtain and comply with permits issued by the Cabinet.

(c) The Necessity and Function of the proposed administrative regulations is as follows:

Existing administrative regulations do not provide for state enforcement of the federal Acid Rain program. These nine administrative regulations provide state authority for the Acid Rain program.

The federal program requires two-phased reductions in sulfur dioxide and nitrogen oxides from fossil-fuel fired electric utilities identified in Title IV of the Clean Air Act Amendments of 1990 and, for Phase II, the federal regulations implementing Title IV of the Act. Phase II affects approximately 67 units located in Kentucky. Federal statute further requires that sources obtain permits to construct and operate.

Title V of the Clean Air Act (42 USC 7661-7661f) requires that the state enforce Phase II of the Acid Rain program. These regulations are necessary for the Division for Air Quality to meet that requirement. If these regulations are not adopted, Kentucky's authority to issue operating permits to air pollution sources will be denied by the U.S. Environmental Protection Agency (EPA). All air pollution sources required to obtain permits then would have to obtain permits from EPA.

(d) The benefit expected from the nine administrative regulations is: Affected sources and affected units in Phase II of the Acid Rain program will be able to work with the state rather than the federal government to obtain necessary permits.

(e) The administrative regulations will be implemented as follows: The nine proposed administrative regulations will require affected sources and affected units to apply for an Acid Rain permit by January 1, 1996, which, when approved, will allow each affected source or affected unit to construct and operate units in accordance with EPA requirements related to controlling emissions of sulfur

dioxide and nitrogen oxides.

As proposed, the administrative regulations will duplicate the federal model rule. The Cabinet is also considering incorporation by reference of 40 CFR Chapter 72. The model rule contains more specific language than the federal regulation and, thus, in some cases may have a more restricted interpretation.

Under either alternative, sources must obtain permits to operate and establish a plan of compliance leading to reduced emissions of sulfur dioxide and nitrogen oxides. Either alternative would allow for emissions trading.

July 15, 1994
Natural Resources and Environmental Protection Cabinet
Department for Environmental Protection
Division for Air Quality

(1) The subject matter of this administrative regulation, which would adopt the federal provisions for compliance extensions for sources of hazardous air pollutants which comply with the voluntary provisions of Maximum Achievable Control Technology (MACT) standards, is as follows:

Compliance extensions for early reductions of hazardous air pollutants.

(2) The Division for Air Quality intends to promulgate one administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994, at 10 a.m. (ET), in the Conference Room of the Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601.

(4)(a) The public hearing will be held if it is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and a minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If 5 persons, or an administrative body or association, request this public hearing, and agree in writing to be present at this public hearing, it will be held as scheduled.

(c) If a request for a public hearing is not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5) Persons wishing to request a public hearing should mail their written request to the following address: Division for Air Quality, Attention John E. Hornback, 803 Schenkel Lane, Frankfort, Kentucky 40601, and phone number (502) 564-3382.

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Division for Air Quality at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of the administrative regulation relating to the federal early reduction regulation is KRS 224.20-110(2) and KRS 224.10-100.

(b) The administrative regulation that the Division for Air Quality intends to promulgate will not amend any existing administrative regulation.

(c) The Necessity and Function of the proposed administrative regulation is as follows: The Natural Resources and Environmental Protection Cabinet is mandated by KRS 224.20-110(2) to promulgate an early emissions reduction regulation that exactly mirrors the federal Clean Air Act standard. The proposed regulation contains the same provisions as the federal regulation, 40 CFR 63.70 to 63.81 and 40 CFR Part 63, Appendix A (40 CFR 63, Subpart D).

(d) The benefit expected from this administrative regulation is: The adoption of the federal regulation, coupled with the approval of Kentucky's Title V program approval, will allow the Cabinet to administer the early reductions program.

July 15, 1994
Natural Resources and Environmental Protection Cabinet
Department for Environmental Protection
Division for Air Quality

(1) The subject matter of these administrative regulations, which would adopt three new and nine amended federal National Emissions Standards for Hazardous Air Pollutants (NESHAPs) by reference, is as follows:

40 CFR 61.30 to 61.34 (Subpart C) national emission standard for beryllium.

40 CFR 61.50 to 61.56 (Subpart E) National emission standard for mercury.

40 CFR 61.40 to 61.44 (Subpart D) National emission standard for beryllium rocket motor firing.

40 CFR 61.60 to 61.71 (Subpart F) National emission standard for vinyl chloride.

40 CFR 61.130 to 61.139 (Subpart L) National emission standard for benzene emissions from coke by-product recovery plants. (new)

40 CFR 61.160 to 61.165 (Subpart N) National emission standard for inorganic arsenic emissions from glass manufacturing plants.

40 CFR 61.170 to 61.177 (Subpart O) National emission standard for inorganic arsenic emissions from primary copper smelters.

40 CFR 61.180 to 61.186 (Subpart P) National emission standard for inorganic arsenic emissions from arsenic trioxide and metallic arsenic production facilities.

40 CFR 61.240 to 61.247 (Subpart V) National emission standard for equipment leaks (fugitive emission sources).

40 CFR 61.270 to 61.277 (Subpart Y) National emission standard for benzene emissions from benzene storage vessels. (new)

40 CFR 61.300 to 61.306 (Subpart BB) National emission standard for benzene emissions from benzene transfer operations. (new)

(2) The Division for Air Quality intends to promulgate twelve administrative regulations governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the twelve proposed administrative regulations has been scheduled for August 30, 1994, at 10 a.m. (ET), in the Conference Room of the Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601.

(4)(a) The public hearing will be held if it is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and a minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If 5 persons, or an administrative body or association, request this public hearing, and agree in writing to be present at this public hearing, it will be held as scheduled.

(c) If a request for a public hearing is not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5) Persons wishing to request a public hearing should mail their written request to the following address: Division for Air Quality, Attention John E. Hornback, 803 Schenkel Lane, Frankfort, Kentucky 40601, and phone number (502) 564-3382.

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Division for Air Quality at the address listed above.

(7) Information relating to the proposed administrative regulations.

(a) The statutory authority for the promulgation of the twelve administrative regulations relating to the federal NESHAP regulations includes KRS 224.10-100, KRS 224.20-100, KRS 224.20-110, and

KRS 224.20-120.

(b) Nine of the administrative regulations that the Division for Air Quality intends to promulgate will amend nine existing administrative regulations and three of the administrative regulations will not amend any existing administrative regulations.

(c) The Necessity and Function of the proposed administrative regulations is as follows: Section 112(b) of the Clean Air Act (42 USC 7412(b)), mandates the U.S. EPA to promulgate standards for emissions of hazardous air pollutants. The federal NESHAP regulations establish standards, procedures, and requirements for the listed source categories.

42 USC 7412(g) allows the U.S. EPA to delegate authority for implementing and enforcing NESHAP regulations to states. The proposed regulations contain the same provisions as the federal regulations. The Division for Air Quality is proposing to adopt these standards so that the Commonwealth will have the delegated authority to enforce the provisions of the federal NESHAP regulations.

(d) The benefit expected from the twelve administrative regulations is: Sources that are subject to the federal NESHAP regulations will be able to work with the state rather than the federal government to obtain necessary permits.

PETROLEUM STORAGE TANK ENVIRONMENTAL ASSURANCE FUND COMMISSION

415 KAR 1:050: Definitions

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: KRS 224.60-120 and KRS 224.60-130 require the Petroleum Storage Tank Environmental Assurance Fund Commission to adopt regulations to establish the policy guidelines and procedures to administer the Petroleum Storage Tank Environmental Assurance Fund. This regulation defines essential terms used in connection with the regulations of the Commission in this chapter. 1992 Kentucky Acts Chapter 450 amended the statutory provisions for the Fund. This regulation repeals the prior regulations of the Commission.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:050. This regulation contains the definitions related to the administrative regulations adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

415 KAR 1:060: Financial Responsibility Account

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: The 1992 Kentucky General Assembly amended KRS 224.60-130 to direct the Commission to establish a financial responsibility account within the fund which may be used by petroleum storage tank owners and operators to demonstrate financial responsibility as required by state and federal administrative regulations for the payment of the costs of corrective action and third-party liability. This regulation establishes the eligibility requirements for the financial responsibility account, and establishes the procedure for eligible storage tank owners and operators to receive a certification of eligibility for this account.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:060. This administrative regulation contains the regulations related to the Financial Responsibility Account adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

415 KAR 1:070: Petroleum Storage Tank Account.

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: The 1992 Kentucky General Assembly amended KRS 224.60-130 to direct the Commission to establish a petroleum storage tank account within the fund which may be used to pay the costs of corrective action due to a release of contamination from a petroleum storage tank. This regulation establishes the eligibility requirements for the petroleum storage tank account.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:070. This administrative regulation contains the regulations related to the Petroleum Storage Tank Account adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission,

911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

415 KAR 1:080: Claims Procedures

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: KRS 224.60-130 requires the Commission to establish the procedures necessary to administer the fund. This regulation establishes the procedures to be followed by a petroleum storage tank owner or operator who is certified as eligible to participate in the financial responsibility account or is eligible to participate in the petroleum storage tank account to make a claim to the Commission for reimbursement or payment of the costs of corrective action.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:080. This administrative regulation contains the regulations related to Claim procedures adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

415 KAR 1:090: Ranking System

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: The amendments to KRS 224.60-130 enacted by the 1992 Kentucky General Assembly require the Commission to establish a ranking system to be used for the distribution of amounts from the petroleum storage tank account for the purpose of corrective action. In promulgating the administrative regulations the Commission shall consider the financial ability of the petroleum storage tank owner or operator to perform corrective action and the extent of damage caused by release into the environment from a petroleum storage tank. This administrative regulation establishes the criteria for ranking sites according to the extent of damage to the environment and the financial ability of the petroleum storage tank owner or operator to perform corrective action.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:090. This administrative regulation contains the regulations related to the Ranking procedures adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

415 KAR 1:100: Third Party Claims

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: The 1992 Kentucky General Assembly amended KRS 224.60-130 to direct the Commission to establish a Financial Responsibility Account within the Fund which may be used by petroleum storage tank owners and operators to receive reimbursement or payment for third party claims. This administrative regulation establishes the procedure for eligible petroleum storage tank owners or operators to receive reimbursement or payment for third party claims.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:100. This administrative regulation contains the regulations related to Third Party Claims adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a

minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

415 KAR 1:120: Hearings

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140, 40 CFR Part 280

STATUTORY AUTHORITY: KRS 224.60-120, 224.60-130

NECESSITY AND FUNCTION: KRS 224.60-130(2)(c) requires the Commission to hear complaints brought regarding the payment of claims from the fund. This administrative regulation establishes hearing procedures to be followed in the hearing of those complaints.

The Petroleum Storage Tank Environmental Assurance Fund Commission (PSTEAFC) intends to Amend its administrative regulation 415 KAR 1:100. This administrative regulation contains the regulations related to Third Party Claims adopted by the Petroleum Storage Tank Environmental Assurance Fund Commission. The PSTEAFC will need to amend this administrative regulation to reflect changes to administrative regulation that shall be amended as a result of statutory changes that directly impact the administrative regulations adopted by the PSTEAFC.

Public Hearing: A public hearing on this administrative regulation will be held on August 31, 1994, at 1 p.m. in the offices of the Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky. Individuals interested in being heard at this hearing at this hearing shall notify this committee in writing by August 11, 1994, of their intent to attend. If the Commission does not receive notification of intent to attend the hearing by a minimum of five (5) persons or an association having at least five (5) members that intend to attend by the notification date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation on or before the date of the hearing. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person: Stephen W. Atwood, Petroleum Storage Tank Environmental Assurance Fund Commission, 911 Leawood Drive, Frankfort, Kentucky 40601, (502) 564-5981.

TRANSPORTATION CABINET

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) **600 KAR 4:010** Relating to Certification of the Disadvantage, Minority, and Women Business Enterprises

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 12 Noon local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the certification of disadvantaged, minority, and women business enterprises is KRS 174.080 and 49 CFR Part 23.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 600 KAR 4:010, certification of disadvantaged, minority, and women business enterprises.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

Title 49 of the Code of Federal Regulations Part 23 requires that most recipients of funds from the United States Department of Transportation (USDOT) implement a program to support the fullest possible participation of firms or business enterprises owned and controlled by minorities, women, and socially and economically disadvantaged individuals in the United States Department of Transportation programs. The Kentucky Transportation Cabinet as a recipient of USDOT funds is required by the federal regulation to have a program of certification of disadvantaged, minority, and women business enterprises. This administrative regulation establishes the procedures and criteria for the Transportation Cabinet's certification program in accordance with the requirements of 49 CFR Part 23. It also sets forth the requirement that certified and prequalified disadvantaged business enterprise firms, attend an orientation program and management development course to increase the probability of the firm remaining certified.

(d) The benefits expected from the administrative regulation are renewed compliance with the federal mandate. At its last amendment of this administrative regulation, the Transportation Cabinet inadvertently promulgated a part of this administrative regulation to be not in compliance with the federal mandate. The Federal Highway Administration has notified the Kentucky Transportation Cabinet that changes must be made immediately to this administrative regulation in order to retain eligibility for federal highway funding.

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) **600 KAR 4:020** Relating to the Disadvantaged, Minority, and Business Enterprise Program

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 12 Noon local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to disadvantaged, minority, and women business enterprise program is KRS 174.080 and 49 CFR Part 23.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 600 KAR 4:020, the disadvantaged, minority, and women business enterprise program.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

Title 49 of the Code of Federal Regulations Part 23 requires that most recipients of funds from the United States Department of Transportation (USDOT) implement a program supporting the fullest possible participation of firms owned and controlled by minorities, women, and socially and economically disadvantaged individuals in USDOT programs. The Kentucky Transportation Cabinet as a recipient of USDOT funds is required by the federal regulation to have a program that requires the participation of disadvantaged, minority, and women business enterprises in contracts financed in hole or in part by federal funds. This administrative regulation established the procedures to be followed by and requirements of contractors and subcontracts dealing with the Transportation Cabinet.

(d) The benefits expected from the administrative regulation are renewed compliance with the federal mandate. At its last amendment of this administrative regulation the Transportation Cabinet inadvertently promulgated a part of this administrative regulation not in compliance with the federal mandate. The Federal Highway Administration has notified the Kentucky Transportation Cabinet that changes must be made immediately to this administrative regulation in order to retain eligibility for federal highway funding.

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) **600 KAR 5:010** relating to the provision of funding for the transportation of private school students.

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 3 P.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the provision of $2 million for each of the next two years for the transportation of private school students is House Bill 2, the Budget Bill passed by the 1994 Special Legislative Session.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will not amend an existing administrative regulation.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

HB 2 passed by the 1994 Special Session of the General Assembly requires the Transportation Cabinet to administer a program dividing up $2 million each year of the current biennium for the transportation of students to private schools. This proposed administrative regulation will set forth the criteria for dividing the funds as well as the application process.

(d) The benefits expected are authorized by HB 2. The specific benefit from this administrative regulation will be the uniformity and fairness it will provide statewide in dealing with the request the many anticipated applications.

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) **601 KAR 1:005** Motor Carrier Safety Regulations

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 11 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to Motor Carrier Safety is KRS 138.665, KRS 281.600, KRS 281.726, KRS 281.730, KRS 281.750, and Title 49, Code of Federal Regulations.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 601 KAR 1:005 Safety Regulations.

(c) The Necessity and Function of the proposed administrative regulation is as follows:
This administrative regulation is necessary to set forth the safety requirements that KRS 281.600 allows the Transportation Cabinet to establish. The administrative regulation sets out the safety procedures to be followed by all motor carriers operating commercial vehicles in the Commonwealth of Kentucky. The safety requirements are based upon those promulgated nationwide by the Federal Highway Administration. This proposed amendment to the administrative regulation is needed to adopt the latest federal changes to the federal regulations.

(d) The benefits expected from the administrative regulation are increased highway safety. Specifically, the proposed amendment will establish new cargo tie-down securement requirements to replace the standards recently found by the courts to be inappropriate. This will also enhance national uniformity for the safety in the motor carrier industry.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) **601 KAR 1:020** Relating to Industrial Haul Permits

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 9 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to Industrial Haul Permits is KRS 189.271

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 601 KAR 1:020 Industrial Haul Permits.

(c) The Necessity and Function of the proposed administrative regulation is as follows:
KRS 189.271 empowers the Transportation Cabinet to adopt administrative regulations for the issuance of a special permit to the owner, operator, or lessee of a motor vehicle for the purpose of hauling any material when the vehicle's gross weight or dimensions exceeds the limits set forth in KRS Chapter 189. This administrative regulation change is needed to expand the program from purely industrial materials to any product.

(d) The benefits expected from the administrative regulation are increased access for commodity transportation in rural areas of the Commonwealth.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) **601 KAR 1:025** Transportation of Hazardous Materials

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 11 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to transporting hazardous materials by air or highway is KRS 174.410(2), 174.410(2), 174.430(1) and 49 CFR Part 130 and Parts 171 through 180.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 601 KAR 1:025 transporting hazardous materials by air or highway; permit.

(c) The Necessity and Function of the proposed administrative regulation is as follows:
KRS 174.410(2) provides the Secretary of Transportation Cabinet in consultation with the Secretary of the Natural Resources and Environmental Protection Cabinet and the Secretary of the Cabinet for Human Resources shall adopt by reference or in its entirety the federal hazardous materials transportation regulation 49 CFR as amended to effectively carry out the intent of KRS 174.400 though 174.435 relating to the transportation of hazardous material by air or highway. This amended administrative regulation incorporates the latest changes to the federal regulations as set forth by the United States Department of Transportation. House Bill 448 passed by the 1994 General Assembly repeals the permit for the transporters of hazardous material operating intrastate commerce in Kentucky and the proposed amended administrative regulation will delete all references to the permit and the application for the permit.

(d) The benefits expected from the administrative regulation are increased highway safety and national uniformity for safety in the transportation of hazardous materials.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) Branding of Motor Vehicle Titles (HB 225 passed by the 1994 General Assembly) **601 KAR 9:200**

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 10 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the Branding of Motor Vehicle Titles is KRS Chapter 186 A (HB 225 passed by the 1994 General Assembly)

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will not amend an existing administrative regulation.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

HB 225 passed by the 1994 General Assembly requires the Transportation Cabinet to enter a brand upon a motor vehicle title if the vehicle has been rebuilt from a salvage vehicle or water damaged. This administrative regulation sets forth the procedures to be followed in applying for a title on a salvaged vehicle as well as the documentation which must be submitted in order to replace a salvage title with an ordinary title on a vehicle which has been recovered after being stolen and which has little to no damage.

(d) The benefits expected are authorized by HB 225 and that is providing advance notice to persons that the vehicle they are considering purchasing has been previously severely damaged. The specific benefit from this administrative regulation will be the uniformity it will allow statewide in dealing with the request for roadworthy titles on vehicles which have been rebuilt.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) **601 KAR 13:090** relating to the Medical Review Board

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 2 P.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the Medical Review Board is KRS 186.570 and Senate Bill 205 passed by the 1994 General Assembly.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will replace 601 KAR 13:011 Medical Review Board.

(c) The Necessity and Function of the proposed amended administrative regulation is as follows:

The Medical Review Board has existed through administrative regulation since June, 1964. The 1994 General Assembly passed two bills, SB 205 and HB 417, mandating the establishment of the Medical Review Board and authorizing the Transportation Cabinet to promulgate an administrative regulation to implement the Medical Review Board. Statutory authority was necessary because the Administrative Regulation Review Subcommittee determined in late 1993 that the Transportation Cabinet does not have the specific authority necessary to promulgate an administrative regulation relating to the Medical Review Board and, therefore, 601 KAR 13:010 expired on April 15, 1994.

Because of a slight conflict between SB 205 and HB 417, the Transportation Cabinet is including in this administrative regulation clarification of the differences between the two bills.

(d) The benefits expected from administrative regulation are: Clear authority for the actions of the Medical Review Board. The Cabinet anticipates that more of its rulings relating to motor vehicle operators who are unsafe because of a physical or mental impairment will be upheld by the courts, resulting in safer highways.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) Medical Standards for Driver Licensing, **601 KAR 13:100**

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 2 P.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to Medical Standards for Driver Licensing KRS 186.570.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will not amend an existing administrative regulation.

(c) The Necessity and Function of the proposed administrative regulation is as follows: The Transportation Cabinet is charged with the responsibility of not issuing driving privilege to individuals who have a physical or mental impairment which adversely affects their ability to drive. However, in order to not act in an arbitrary or capricious manner the Transportation Cabinet needs some standards to assist it in establishing when an individual should or should not be allowed to operate a motor vehicle.

(d) The benefits expected from administrative regulation are: Improved highway safety.

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) Tourist Oriented Directional Signs, **603 KAR 4:040**

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 1 P.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to Tourist Oriented Directional Signs is 189.337.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will not amend an existing administrative regulation.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

KRS 189.337 requires the Department of Highways to establish standards for the placement of signs within highway right of way of a public road. The Transportation Cabinet has promulgated 603 KAR 5:050 which deals with all traffic control devices by incorporating the "Manual on Uniform Traffic Control Devices" by reference. The "Manual on Uniform Traffic Control Devices" allows for the erection of tourist oriented directional signs (TODS) to provide directional information for tourist activities offering goods and surfaces that are of significant interest to the travelling public within certain perimeters but requires each jurisdiction to establish policies for those areas not covered in the "Manual". This administrative regulation will set forth the criteria to be followed in the erection and maintenance of TODS.

(d) The benefits expected from the administrative regulation are increased highway signage for facilities which cater to the travelling public. This will allow both the travelling public to more easily find the facilities they wish and the business entities to have increased signage to their facility.

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) **603 KAR 5:075** Relating to Permits for Transporting Overweight or Overdimensional Vehicles

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 8 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to permits for moving overdimension or overweight vehicles is KRS 189.270.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 603 KAR 5:075, permits for moving overdimensional or overweight vehicles.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

KRS 189.270 authorizes the Department of Highways to issue permits for the movement of vehicles exceeding legal dimensions or weight. This administrative regulation establishes the permit application procedure within the Transportation Cabinet and establishes movement requires necessary in the interest of highway safety. The

amendment to this administrative regulation proposed by this notice of intent will allow utility companies to transport utility poles in excess of 45 feet during non-daylight hours for the purpose of restoring electric service during times of emergencies.

(d) The benefits expected from the administrative regulation are the faster restoration of utility services during emergency outages. In addition, the utility companies will be able to legally operate during emergencies to transport the material needed to restore utility service.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) **603 KAR 5:110** relating to overdimensional manufactured homes and boats.

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 8 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the issuance of permits for overdimensional manufactured homes and boats is KRS 189.270.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend administrative regulation 603 KAR 5:110.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

KRS 189.270 authorizes the Department of Highways to issue permits for the movement of manufactured homes and boats exceeding legal dimensions but which do not exceed sixteen (16) feet in width. This administrative regulation establishes for manufactured homes and boats the permit application procedures within the Transportation Cabinet and establishes movement requirements necessary in the interest of highway safety and convenience.

(d) The benefits expected are: Increased highway safety and the inclusion of boats in the same administrative regulation as the movement of manufactured homes since their requirements are identical.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) **603 KAR 5:112** Relating to Annual Permits for Moving Utility Equipment, Poles, or Pipes.

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 11 A.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to annual permits for moving utility equipment, poles, or pipes is KRS 189.270 and KRS 281.600.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend 603 KAR 5:112, annual permits for moving utility equipment, poles, or pipes.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

KRS 189.270 authorizes the Department of Highways to issue annual permits for the movement of utility equipment, poles or pipes exceeding legal dimensions. This administrative regulation establishes the permit application procedure within the Transportation Cabinet and establishes movement requires necessary in the interest of highway safety. The amendment to this administrative regulation proposed by this notice of intent will allow utility companies to transport utility poles in excess of 45 feet during non-daylight hours for the purpose of restoring electric service during times of emergencies.

(d) The benefits expected from the administrative regulation are the faster restoration of utility services during emergency outages. In addition, the utility companies will be able to legally operate during emergencies to transport the material needed to restore utility service.

Date: July 15, 1994
Administrative Body: Transportation Cabinet

(1) **603 KAR 9:010** relating to the closure of public highway/railway crossings.

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 4 P.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the installation of gates at highway/railway crossings is KRS 177.120.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will amend existing administrative regulation 603 KAR 9:010.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

KRS 177.120 requires the Transportation Cabinet to promulgate administrative regulations that contain standards governing the closure of public railway/highway grade crossings. This administrative regulation sets forth procedures the Transportation Cabinet shall follow regarding the production of a list of railroad crossings which shall be considered for closure, the evaluation of the candidate list with respect to possible closure, and the ultimate decision to recommend closure. KRS 177.120 considers that public safety will be enhanced by the closure of redundant and inherently dangerous crossings.

(d) The benefits expected are: Public safety enhancement.

Date: July 15, 1994

Administrative Body: Transportation Cabinet

(1) **603 KAR 9:020** relating to the installation of gates at highway/railway crossings.

(2) The Kentucky Transportation Cabinet intends to promulgate an administrative regulation governing the subject matter listed above.

(3) A public hearing to receive oral and written comments on the proposed administrative regulation has been scheduled for August 30, 1994 at 4 P.M. local prevailing time, at 501 High Street, 4th Floor Hearing Room, Frankfort, KY 40622.

(4)(a) The public hearing will be held if:

1. It is requested, in writing, by at least 5 persons, or an administrative body, or an association having at least 5 members; and

2. A minimum of 5 persons, or the administrative body or association, agree, in writing, to be present at the public hearing.

(b) If a request for a public hearing, and agreement to attend the public hearing, are not received from the required number of people at least 20 days prior to August 30, 1994, the public hearing will be cancelled.

(5)(a) Persons wishing to request a public hearing should mail their written request to the following address: Sandra G. Pullen, 501 High Street, 10th Floor, State Office Bldg., Frankfort, KY 40622.

(b) On a request for public hearing, a person shall state:

1. "I agree to attend the public hearing."; or

2. "I will not attend the public hearing."

(6)(a) KRS Chapter 13A provides that persons who desire to be informed of the intent of an administrative body to promulgate an administrative regulation governing a specific subject matter may file a request to be informed by the administrative body.

(b) Persons who wish to file this request may obtain a request form from the Transportation Cabinet at the address listed above.

(7) Information relating to the proposed administrative regulation.

(a) The statutory authority for the promulgation of an administrative regulation relating to the installation of gates at highway/railway crossings is KRS 177.120.

(b) The administrative regulation that the Transportation Cabinet intends to promulgate will not amend an existing administrative regulation.

(c) The Necessity and Function of the proposed administrative regulation is as follows:

KRS 177.120 allows the Transportation Cabinet to promulgate administrative regulations that contain standards governing the selection of locations for the installation of gates at a public railway/highway grade crossing if the accidents leading to the location being selected as a site for the installation of gates was not caused because of the inherent unsafeness of the crossing. This administrative regulation sets forth procedures the Transportation Cabinet shall follow regarding the production of a list of railroad crossings which shall be considered for gates.

(d) The benefits expected are: Public safety enhancement and the amendment to the existing procedures which will allow the crossings which most need gates for safety-related purposes to be the ones to have the limited rail safety funds used on them.

EMERGENCY ADMINISTRATIVE REGULATIONS NOW IN EFFECT

(NOTE: Emergency administrative regulations filed before July 15, 1994, expire 120 days from publication or upon replacement, repeal, or withdrawal)
(Emergency administrative regulations filed on or after July 15, 1994, expire 170 days from publication or upon replacement, repeal, or withdrawal)

STATEMENT OF EMERGENCY
32 KAR 1:100E

KRS 121.140(4) requires the Registry of Election Finance to "adopt official forms and perform other duties necessary to implement the provisions of this chapter and KRS Chapter 121A." With the reduction in contribution limits and increased disclosure requirements, as well as the requirement that slates of candidates report with much greater frequency, the amount of data which slates will file with the registry will be much greater than has been true of past campaigns. It is the registry's belief that the best way for the agency to implement the Public Financing Campaign Act of 1992 is through the use of the Election Information Management System, a software program tailored to assist slates in complying with the specific provisions of Kentucky law. The government side of the program will allow the registry to analyze massive quantities of data within the time frame required by statute. Because slates may begin to file to run in the 1995 race on July 15, 1994, it is necessary to promulgate this administrative regulation to adopt this program as the filing form for the 1995 gubernatorial campaign. This emergency regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 14, 1994.

BRERETON C. JONES, Governor
JOSEPH H. TERRY, Chair

DEPARTMENT OF STATE
Registry of Election Finance

32 KAR 1:100E. Slate software.

RELATES TO: KRS 121.180
STATUTORY AUTHORITY: KRS 121.140(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS 121.140(4) requires the Registry of Election Finance to "adopt official forms and perform other duties necessary to implement the provisions of this chapter and KRS Chapter 121A." With the reduction in contribution limits and increased disclosure requirements, as well as the requirement that slates of candidates report with much greater frequency, the amount of data which slates will file with the registry will be much greater than has been true of past campaigns. It is the registry's belief that the best way for the agency to implement the Public Financing Campaign Act of 1992 is through the use of the Election Information Management System, a software program tailored to assist slates in complying with the specific provisions of Kentucky law. The government side of the program will allow the registry to analyze massive quantities of data within the time frame required by statute. Because slates may begin to file to run in the 1995 race on July 15, 1994, it is necessary to promulgate this administrative regulation to adopt this program as the filing form for the 1995 gubernatorial campaign.

Section 1. (1) As authorized by KRS 121.140(4), the Registry of Election Finance hereby prescribes KREF 94-006/G, the Election Information Management Systems software (Copyright 1993-4, Election Technology Company) as the report form to be utilized by all slates of candidates for Governor and Lieutenant Governor. The software shall be made available at no charge to each slate of candidates which files with the Secretary of State and registers a slate campaign committee with the registry.

(2) All slates shall file campaign finance reports by filing on diskette, accompanied by one (1) paper copy.

Section 2. Material Incorporated by Reference. Form KREF 94-006/G, Election Information Management Systems (Copyright 1993-94, Election Technology Company) and accompanying documentation is hereby incorporated by reference and is on file with the Administrative Regulations Compiler or may be obtained from the Registry of Election Finance, 140 Walnut Street, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m., local time.

JOSEPH H. TERRY, Chair
APPROVED BY AGENCY: July 8, 1994
FILED WITH LRC: July 14, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:061E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.801 et seq. as set forth in House Bill 469. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:061E. Repeal of 40 KAR 2:060, Business opportunities.

RELATES TO: KRS 367.801-.819
STATUTORY AUTHORITY: KRS 15.180, 367.150(4), 367.803
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: 40 KAR 2:060 is no longer required because of amendments to KRS 367.803.

Section 1. 40 KAR 2:060, Business opportunities is hereby repealed.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:070E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 367 as set forth in House Bill 710. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:070E. Procedure for registration of telephone solicitation merchants.

RELATES TO: KRS Chapter 367 (SB 168, §§7, 8, 10)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (SB 168, §11), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To regulate the sales of goods and services to consumers in the Commonwealth of Kentucky by use of telephone solicitations.

Section 1. Definitions. "Material change" in reported information required by KRS Chapter 367 (SB 168, §7) means any additions or deletions of factual matter which would have a significant consequence in the evaluation of the application if it were contained in the original filing, such as but not limited to:

(1) Any association with any officer, director, trustee, general or limited partner, sole proprietor, owner, or person having management responsibility in the applicant's business activities whose past occurrences would have been required to have been reported in an original application pursuant to KRS Chapter 367 (SB 168, §7);

(2) Filing of any bankruptcy petition by applicant;

(3) Any filing by any governmental agency against the applicant which, upon resolution, would have been required to be reported pursuant to KRS Chapter 367 (SB 168, §7);

(4) Any change in sales presentations, scripts, sales literature, or similar documentation, which significantly changes the predictions of value of goods or service offered, or the likelihood of profit in any investment opportunity offered, which would have been required to have been originally reported pursuant to KRS 367 (SB 168, §7).

Section 2. Registration Required. (1) No merchant may solicit sales by telephone in the Commonwealth of Kentucky without complying with all registration requirements of KRS Chapter 367 (SB 168, §§7, 8, 10). All applications for registration shall be in writing on a form as provided herein, verified and signed by the applicant under the penalty of perjury, and accompanied by the required registration fee to be deposited in the trust agency account maintained by the Attorney General's Office to be used to defray the cost of telemarketing registration.

(2) Applicants shall utilize form OAG effective July 15, 1994, hereby adopted and incorporated by reference.

(3) An application may be withdrawn prior to approval by submitting a written request that the application be withdrawn.

(4) An application is withdrawn or denied any fees received shall be retained by the Attorney General's Office to be deposited in a trust agency account maintained by the Attorney General's Office to be used to defray the cost of telemarketing registration.

Section 3. A surety bond shall be maintained in the amount of $50,000 issued by a surety company admitted to do business in the Commonwealth of Kentucky. The bond shall be in favor of the Attorney General for the benefit of any person suffering injury or loss by reason of any violation of KRS Chapter 367 (SB 168). In addition, a surety bond shall be required in addition in the amount sufficient to cover the amount of the value of any sales premium which is held out or advertised in telephone sales solicitations.

Section 4. Any applicant or any telephone solicitation registration shall be deemed to have consented to the application of KRS Chapters 367 and 526 by the use of any electronic equipment in conducting telephone solicitations sales within the Commonwealth of Kentucky.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 15, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:080E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.650 et seq. as set forth in House Bill 474. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:080E. Prehearing procedure for rejection, revocation, suspension of registration or refusal to renew certification of professional solicitors or fundraising consultants.

RELATES TO: KRS Chapter 367 (HB 474, §5)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (HB 474, §5), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS 367.650 requires in pertinent part the Office of the Attorney General, Division of Consumer Protection to promulgate administrative regulations pertaining to the operation of charitable solicitors and fundraiser with the Commonwealth. This administrative regulation sets forth initial procedures for a due process hearing for the rejection, revocation, suspension, of registration or refusal to renew a registration of professional solicitors or fundraising consultants.

Section 1. Notice of Hearing. (1) Prior to rejecting, revoking, suspending registration, or refusing to renew the solicitor's or consultant's registration, the Attorney General shall send by registered or certified mail return receipt requested written notice stating

the action to be taken, the grounds for the action, and the date the hearing will be held as well as the name, official title and mailing address of the hearing officer.

(2) The notice shall be delivered to the solicitor or consultant at his most recent address, as listed in the registration statement.

(3) Within seven (7) calendar days after receiving a notice that filing requirements as set forth in KRS Chapter 356 are not satisfied, the professional solicitor or fundraiser may request a hearing. In the event no hearing is requested, the Attorney General may proceed with a hearing.

(4) The hearing shall be held within fourteen (14) calendar days of the Attorney General's receipt of the request for a hearing.

Section 2. Complaints and Answers. (1) Upon a request for a hearing from a professional solicitor or fundraising consultant, or upon his own initiative, a complaint shall be prepared by the Attorney General.

(2) A complaint shall contain a concise statement of the facts, transaction or occurrence upon which it is based.

(3) A complaint shall be notarized.

(4) Exhibits or other documents, shall be attached to the complaint.

(5) A copy of the complaint and attachments shall be served on the professional solicitor or fundraising consultant or their designee by the Attorney General:

(a) At the last known address of the solicitor or consultant;

(b) By certified mail, return receipt requested.

(6)(a) The solicitor or consultant shall file with the hearing officer an answer to the complaint.

(b) The answer shall be notarized.

(c) The answer shall be filed with the hearing officer within twenty (20) days after service of the complaint.

(d) A copy of the answer shall be served on the Attorney General by the solicitor or consultant by certified mail, return receipt requested to the address shown on the complaint.

Section 3. Counsel. If a party has retained counsel:

(1) The attorney shall file an entry of appearance with the hearing officer;

(2) Notices, correspondence, and orders relating to the hearing shall be transmitted to the attorney; and

(3) Motions, requests, or filings on behalf of a party or appraiser shall be made by the attorney.

Section 4. Motions, requests, filings, and other material filed with the hearing officer shall:

(1) Be served on the other party by certified mail, return receipt requested; and

(2) Contain a signed statement that service on the other party has been made.

Section 5. Witnesses. A party shall file a list of his witnesses:

(1) With the hearing officer;

(2) At least ten (10) days prior to the hearing.

Section 6. Subpoenas. (1) A party shall file a written request to the presiding officer at least fourteen (14) days prior to a hearing if the party wishes to:

(a) Subpoena a witness; or

(b) Require the production of a document.

(2) The request shall contain the:

(a) Name and address of residence and place of employment, including county, of the witness;

(b) Name of document or item, with a description sufficient to identify the document or item.

Section 7. Continuance. (1) A hearing may be continued by the hearing officer:

(a) To permit any prehearing procedures; or

(b) For other good cause.

(2) If it is necessary to continue a hearing, the hearing officer shall:

(a) Reschedule the hearing; and

(b) Notify the parties.

(3)(a) Except as provided by subsection (4) of this section, a motion for continuance shall be filed with the hearing officer at least seven (7) working days before the hearing.

(4) A motion for continuance may be filed upon the occurrence of an emergency.

(5) The hearing officer shall notify a party of his decision in writing.

Section 8. Prehearing Conference. (1) The hearing officer may schedule a prehearing conference:

(a) On his own motion; or

(b) Upon motion of a party.

(2) The hearing officer shall schedule a prehearing conference if the hearing officer determines that it will:

(a)1. Establish stipulations;

2. Clarify issues;

3. Identify witnesses;

4. Resolve issues relating to:

a. Evidence;

b. Subpoenas;

c. Discovery; or

d. Protective orders; and

(b) Otherwise promote the orderly and prompt conduct of the hearing; or

(c) Promote settlement of the issues.

(3) If the prehearing officer schedules a prehearing conference, the prehearing officer shall notify the parties in writing:

(a) Of the date, time and place of the prehearing conference; and

(b) That they are required to attend the prehearing conference.

(4)(a) The hearing officer shall issue a prehearing order that incorporates matters determined at the prehearing conference.

(b) A copy of the prehearing order shall be mailed to the parties.

Section 9. Discovery. (1) A request to obtain discovery shall be filed with the hearing officer.

(2) The request shall:

(a) Specify the type of discovery requested;

(b) Where applicable, describe in sufficient detail:

1. Names and addresses of persons or items;

2. Documents, other items, or places; and

(c) State the reason discovery is requested.

(3) The hearing officer may deny, limit, or require discovery.

(4) Discovery may be obtained by:

(a) Written or oral depositions;

(b) Interrogatories;

(c) Production or inspection of documents or things;

(d) Permission to photograph, or enter upon land or other property; or

(e) Physical or mental examinations.

Section 10. Settlement Agreement. (1) The parties may agree to a settlement of the issues that gave rise to a complaint.

(2) A settlement agreement:

(a) Shall be subject to approval by the hearing officer; and

(b) If approved by the hearing officer, shall constitute:

1. A waiver of a party's right to an administrative hearing; and

2. The final order of the hearing officer.

Section 11. Motions. A motion shall be:

(1) In writing;

(2) Signed; and
(3) Filed with hearing officer.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:090E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.650 et seq. as set forth in House Bill 474. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:090E. Hearings for rejection, revocation, suspension of registration or refusal to renew registration of professional solicitor or fundraising consultant.

RELATES TO: KRS Chapter 367 (HB 474, §5)
STATUTORY AUTHORITY: KRS 15.180, 367.6 (HB 474, §5(2)), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS 367.6 requires in pertinent part the Division of Consumer Protection to promulgate administrative regulations pertaining to the operation of charitable solicitors and fundraisers within the Commonwealth. This administrative regulation sets forth hearing and conference procedures for the permanent regulatory program including the rejection, revocation, suspension and refusal to renew registration certificates of professional solicitors or fundraising consultants.

Section 1. Purpose and Construction. When the Attorney General through the Division of Consumer Protection has determined and given notice that the registration of a professional solicitor or fundraising consultant shall be revoked, suspended, or refused to be renewed in accordance with KRS Chapter 367, any professional solicitor or fundraising consultant so affected is entitled to due process. Accordingly, this administrative regulation shall be liberally constructed so as to aid in that process.

Section 2. A party may:
(1) Represent himself; or
(2) Be represented by:
(a) An authorized representative; or
(b) Counsel.

Section 3. Hearing Officer. A hearing officer shall be appointed and serve pursuant to KRS Chapter 13B (HB 334, §§ 3 and 4).

Section 4. Evidence. (1) Formal rules of evidence shall not apply.
(2) The hearing officer shall exclude evidence that is:
(a) Irrelevant;
(b) Immaterial;
(c) Unduly repetitious; or
(d) Excludable on:
1. Constitutional or statutory grounds; or
2. The basis of evidentiary privilege recognized in the courts of the Commonwealth.
(3) Testimony or other evidence shall be admitted if it is:
(a) Based on facts; and
(b) Commonly relied upon by reasonably prudent persons.
(4)(a) Evidence shall not be excluded solely because it is hearsay.
(b) Hearsay evidence, including affidavits, may be admitted for the purpose of supplementing relevant evidence.
(5) The hearing officer may admit party or witness testimony taken by deposition if:
(a) A party or witness is unable to attend through no fault of his own; and
(b) The opposing party has had a full opportunity to cross-examine the party or witness.
(6) Evidence may be received in written form if it will:
(a) Expedite the hearing; and
(b) Not substantially prejudice the interest of a party.
(7)(a) A copy or an excerpt of documentary evidence may be received.
(b) Upon request, a party shall be permitted to compare the copy or excerpt with the original.
(8) Official notice shall be taken of:
(a) A fact that would be judicially noticed in the courts of the Commonwealth;
(b) The record of other proceedings before the Division of Consumer Protection;
(c) Technical or scientific matters within the specialized knowledge of the Division of Consumer Protection;
(d) Codes or standards that have been adopted by:
1. An agency of the United States, the Commonwealth, or another state; or
2. A nationally recognized organization or association, and incorporated by reference as provided by KRS Chapter 13A.

Section 5. Ex parte Communications. (1) Except as provided in this section, a hearing officer, a party, or a person with a direct or indirect interest in the outcome of a pending hearing, shall not communicate, directly or indirectly, with regard to an issue of a pending hearing with a:
(a) Party;
(b) Person who has a direct or indirect interest in the outcome of the hearing; or
(c) Person who presided at a previous stage of the hearing.
(2) Communications prohibited by the provisions of this section may be made if:
(a) Written notice is given to other parties; and
(b) Other parties are permitted to participate in the communication.
(3) A hearing officer may communicate with staff assistants, or other Division of Consumer Protection personnel, if they:
(a) Have not received ex parte communications that are prohibited to the hearing officer; and
(b) Do not furnish, augment, diminish, or modify the evidence in the record.
(4) If prior to serving as the hearing officer of a hearing, the hearing officer has received an ex parte communication that person is prohibited from receiving as a hearing officer, he shall:
(a) Place on the record of the pending hearing:
1. The written communications received;
2. The written responses to them;
3. A memorandum stating oral communications and responses;

and

4. The identity of the person from whom a communication was received; and

(b) Notify and transmit copies of the items specified in subparagraph 1 of this paragraph to the parties to the hearing.

(5) Within ten (10) days of receipt of the hearing officer's notice and transmittal, a party may:

(a) Rebut the prohibited communications specified in this section; or

(b) File a motion with the Division of Consumer Protection to:

1. Disqualify the hearing officer; and

2. Seal the portions of the record pertaining to the prohibited communications.

(6) The Division of Consumer Protection shall:

(a) Report any willful violation of this section to the Attorney General or his designee for disciplinary proceedings; and

(b) Take disciplinary action authorized by statute or administrative regulation of the Division of Consumer Protection.

Section 6. Separation of Functions. (1) A person shall not serve as a hearing officer of a hearing, or assist or advise a hearing officer in a hearing, if that person has served as an investigator, prosecutor, or advocate with regard to the subject matter of the hearing.

(2) The provisions of subsection (1) of this section shall apply to a person who is subject to the authority, direction, or discretion of persons specified in subsection (1) of this section.

(3) A person shall not serve as the hearing officer of the hearing if that person has participated in:

(a) A determination of probable cause; or

(b) In another equivalent preliminary determination related to the complaint or Division of Consumer Protection action that gave rise to a hearing.

Section 7. Procedure at Hearing. A hearing shall proceed as follows:

(1) Opening statements by the:

(a) Counsel for Division of Consumer Protection or its counsel;

(b) Complainant; and

(c) Respondent.

(2) Complainant's presentation of:

(a) Testimony of complainant or witnesses; and

(b) Evidence;

(3) Division of Consumer Protection presentation of:

(a) Witnesses; and

(b) Evidence;

(4) Respondent's presentation of:

(a) Witnesses; and

(b) Evidence;

(5) Closing arguments.

(6) The hearing officer may require parties to submit legal memoranda in lieu of opening statements or closing arguments.

Section 8. Posthearing Procedure. (1) Upon completion of the hearing, within seven (7) business days after the hearing, the hearing officer shall prepare and submit to the parties;

(a) Findings of fact and conclusions of law;

(b) A recommended order; and

(2) A copy of the findings of fact, conclusions of law and recommended order, or decision if the Division of Consumer Protection has conducted the hearing, shall be mailed to all parties of record;

(3)(a) A party may file exceptions to the hearing officer's findings of fact, conclusions of law and recommended order within seven (7) days of their submission to the Division of Consumer Protection.

(b) If the hearing was conducted by the Division of Consumer Protection, a party shall file exceptions with the Division of Consumer Protection.

(4) Any party to the hearing who is aggrieved by the order may seek judicial review by filing notice of appeal in the Franklin Circuit Court within thirty (30) days after the order has been mailed or delivered to him/her. An appeal shall be handled as set forth in KRS Chapter 367(5).

Section 9. Default. Default proceeding shall be handled as set forth in Sections 7(6) and 11 of KRS Chapter 13B which are hereby incorporated by reference.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:100E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.650 et seq. as set forth in House Bill 474. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:100E. Notice of requested disclosure of percentage of gross revenue going to charitable organization.

RELATES TO: KRS 367.667(3) (HB 474, §9)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (HB 474, §9(5)), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS Chapter 367 (HB 474, §9(5)) requires in pertinent part, upon request, the giving of the amount or percentage of funds which will be received by the charitable organization. This administrative regulation sets forth the procedure for that disclosure.

Section 1. Disclosure of information in response to a request by a person being solicited regarding the amount or percentage of funds going to the charitable organization or for a charitable or civic purpose shall be done in the following manner:

(1) Timing:

(a) The requested information shall be given immediately upon request.

(b) No further effort to solicit shall be made until the information is supplied.

(2) Form:

(a) The information disclosed shall be in clear and concise manner using words and phrases of common meaning.

(b) If the solicitation is oral, the information shall be given orally with a written statement of the same information available at no cost if the person being solicited wishes to obtain a copy.

(c) If the solicitation is written, the disclosure information shall be in written form.

(d) Any written disclosure of the amount or percentage of funds going to the charitable organization or for a charitable or civic purpose shall clearly contain the information required by KRS Chapter 367 (HB 474, §9(1), (2)).

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:110E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.650 et seq. as set forth in House Bill 474. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:110E. Notice of intent to solicit forms.

RELATES TO: KRS 367.657
STATUTORY AUTHORITY: KRS 15.180, 367.150(4), 367.657(2)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement of an administrative form for those charitable organizations identified in KRS 367.657(2).

Section 1. (1) The "Notice of Intent to Solicit Form A-1" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Notice of Intent to Solicit Form A-1" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Center Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m. Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:120E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.801 et seq. as set forth in House Bill 469. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:120E. Disclosure document forms.

RELATES TO: KRS Chapter 367 (HB 469, §6), 367.801, 367.805(4), 367.990(13)
STATUTORY AUTHORITY: KRS 15.180, 367.150(4), 367.805(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement of an administrative form for the information set forth in KRS 367.805(4) (HB 469, §2).

Section 1. (1) The "Disclosure Document Form A-1" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Disclosure Document Form A-1" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Center Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m. Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:130E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.801 et seq. as set forth in House Bill 469. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:130E. Hearings for rejection, revocation, suspension or refusal to renew registration for business opportunities.

RELATES TO: KRS 367.801, 367.805, 367.990(13), HB 469, §6
STATUTORY AUTHORITY: KRS 15.180, 367.150(4), 367.805(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS 367.805(4) requires in pertinent part the Division of Consumer Protection to promulgate rules and regulations pertaining to the operation of business opportunities within the Commonwealth. This administrative regulation sets forth hearing and conference procedures for the permanent regulatory program including the rejection, revocation, suspension and refusal to renew registration certificates of business opportunities.

Section 1. Purpose and Construction. When the Attorney General through the Division of Consumer Protection has determined and given notice that the registration of a business opportunity shall be rejected, revoked, suspended, or refused to be renewed in accordance with KRS 367.801, any business opportunity so affected is entitled to due process. Accordingly, this administrative regulation is to be liberally constructed so as to aid in that process.

Section 2. A party may:
(1) Represent himself; or
(2) Be represented by:
(a) An authorized representative; or
(b) Counsel.

Section 3. Hearing Officer. A hearing officer shall be appointed and serve pursuant to KRS Chapter 13B (HB 334, §§3 and 4).

Section 4. Evidence. (1) Formal rules of evidence shall not apply.
(2) The hearing officer shall exclude evidence that is:
(a) Irrelevant;
(b) Immaterial;
(c) Unduly repetitious; or
(d) Excludable on:
1. Constitutional or statutory grounds; or
2. The basis of evidentiary privilege recognized in the courts of the Commonwealth.
(3) Testimony or other evidence shall be admitted if it is:
(a) Based on facts; and
(b) Commonly relied upon by reasonably prudent persons.
(4)(a) Evidence shall not be excluded solely because it is hearsay.
(b) Hearsay evidence, including affidavits, may be admitted for the purpose of supplementing relevant evidence.
(5) The hearing officer may admit party or witness testimony taken by deposition if:
(a) A party or witness is unable to attend through no fault of his own; and
(b) The opposing party has had a full opportunity to cross-examine the party or witness.
(6) Evidence may be received in written form if it will:
(a) Expedite the hearing; and
(b) Not substantially prejudice the interest of a party.
(7)(a) A copy or an excerpt of documentary evidence may be received.
(b) Upon request, a party shall be permitted to compare the copy or excerpt with the original.
(8) Official notice shall be taken of:
(a) A fact that would be judicially noticed in the courts of the Commonwealth;
(b) The record of other proceedings before the Division of Consumer Protection;
(c) Technical or scientific matters within the specialized knowledge of the Division of Consumer Protection;
(d) Codes or standards that have been adopted by:
1. An agency of the United States, the Commonwealth, or another state; or
2. A nationally recognized organization or association, and incorporated by reference as provided by KRS Chapter 13A.

Section 5. Ex parte Communications. (1) Except as provided in this section, a hearing officer, a party, or a person with a direct or indirect interest in the outcome of a pending hearing, shall not communicate, directly or indirectly, with regard to an issue of a pending hearing with a:
(a) Party;
(b) Person who has a direct or indirect interest in the outcome of the hearing; or
(c) Person who presided at a previous stage of the hearing.
(2) Communications prohibited by the provisions of this section may be made if:
(a) Written notice is given to other parties; and
(b) Other parties are permitted to participate in the communication.
(3) A hearing officer may communicate with staff assistants, or other Division of Consumer Protection personnel, if they:
(a) Have not received ex parte communications that are prohibited to the hearing officer; and
(b) Do not furnish, augment, diminish, or modify the evidence in the record.
(4) If prior to serving as the hearing officer of a hearing, the hearing officer has received an ex parte communication that he/she is prohibited from receiving as a hearing officer, he/she shall:
(a) Place on the record of the pending hearing:
1. The written communications received;
2. The written responses to them;
3. A memorandum stating oral communications and responses; and
4. The identity of the person from whom a communication was received; and
(b) Notify and transmit copies of the items specified in subparagraph 1 of this paragraph to the parties to the hearing.
(5) Within ten (10) days of receipt of the hearing officer's notice and transmittal, a party may:
(a) Rebut the prohibited communications specified in this section; or
(b) File a motion with the Division of Consumer Protection to:
1. Disqualify the hearing officer; and
2. Seal the portions of the record pertaining to the prohibited communications.
(6) The Division of Consumer Protection shall:
(a) Report any willful violation of this section to the Attorney General or his designee for disciplinary proceedings; and
(b) Take disciplinary action authorized by statute or administrative regulation of the Division of Consumer Protection.

Section 6. Separation of Functions. (1) A person shall not serve as a hearing officer of a hearing, or assist or advise a hearing officer in a hearing, if he/she has served as an investigator, prosecutor, or advocate with regard to the subject matter of the hearing.
(2) The provisions of subsection (1) of this section shall apply to a person who is subject to the authority, direction, or discretion of persons specified in subsection (1) of this section.
(3) A person shall not serve as the hearing officer of the hearing if he/she has participated in:
(a) A determination of probable cause; or
(b) In another equivalent preliminary determination related to the complaint or Division of Consumer Protection action that gave rise to a hearing.

Section 7. Procedure at Hearing. A hearing shall proceed as follows:
(1) Opening statements by the:
(a) Counsel for Division of Consumer Protection or its counsel;
(b) Complainant; and
(c) Respondent.
(2) Complainant's presentation of:
(a) Testimony of complainant or witnesses; and
(b) Evidence.
(3) Division of Consumer Protection presentation of:
(a) Witnesses; and
(b) Evidence.
(4) Respondent's presentation of:
(a) Witnesses; and
(b) Evidence.

(5) Closing arguments.

(6) The hearing officer may require parties to submit legal memoranda in lieu of opening statements or closing arguments.

Section 8. Posthearing Procedure. (1) Upon completion of the hearing, within seven (7) business days after the hearing, the hearing officer shall prepare and submit to the parties;

(a) Findings of fact and conclusions of law;

(b) A recommended order; and

(2) A copy of the findings of fact, conclusions of law and recommended order, or decision if the Division of Consumer Protection has conducted the hearing, shall be mailed to all parties of record;

(3)(a) A party may file exceptions to the hearing officer's findings of fact, conclusions of law and recommended order within seven (7) days of their submission to the Division of Consumer Protection.

(b) If the hearing was conducted by the Division of Consumer Protection, a party shall file exceptions with the Division of Consumer Protection.

(4) Any party to the hearing who is aggrieved by the order may seek judicial review by filing notice of appeal in the Franklin Circuit Court within thirty (30) days after the order has been mailed or delivered to him/her. An appeal shall be handled as set forth in KRS Chapter 367(5).

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:140E

The attached administrative regulations are promulgated pursuant to amendments to KRS 367.801 et seq. as set forth in House Bill 469. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 13, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:140E. Prehearing procedure for rejection, revocation, suspension or refusal to renew registration for business opportunities.

RELATES TO: KRS 367.801, 367.805(4), 367.990
STATUTORY AUTHORITY: KRS 15.180, 367.150(4), 367.805(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS Chapter 367.805(4) requires in pertinent part the Office of the Attorney General, Division of Consumer Protection to promulgate rules and regulations pertaining to the operation of business opportunities within the Commonwealth. This administrative regulation sets forth initial procedures for a due process hearing for the rejection, revocation, suspension, or refusal to renew a registration.

Section 1. Notice of Hearing. (1) Prior to rejecting, revoking, suspending, or refusing to renew the business opportunity's registration, the Attorney General shall send by registered or certified mail written notice stating the action to be taken, the grounds for the action, and the date the hearing will be held.

(2) The notice shall be delivered to the business opportunity at his/her most recent address, as listed in the registration statement.

(3) Within seven (7) calendar days after receiving a notice that filing requirements as set forth in KRS 367.805 are not satisfied, the professional solicitor or fundraiser may request a hearing.

(4) The hearing shall be held within fourteen (14) calendar days of the Attorney General's receipt of the request for a hearing.

Section 2. Complaints and Answers. (1) A complaint shall contain a concise statement of the facts, transaction or occurrence upon which it is based.

(2) A complaint shall be notarized.

(3) Exhibits or other documents, shall be attached to the complaint.

(4) A copy of the complaint and attachments shall be served on the licensee or certificant by the hearing officer:

(a) At the last known address of the licensee or certificant;

(b) By certified mail, return receipt requested.

(5)(a) The licensee or certificant shall file with the hearing officer an answer to the complaint on "Board of Appraisers Answer Form".

(b) The answer shall be notarized.

(c) The answer shall be filed with the hearing officer within twenty (20) days after service of the complaint.

(d) A copy of the answer shall be served on complainant by the licensee or certificant by certified mail, return receipt requested to the address shown on the complaint.

Section 3. Motions, requests, filings, and other material filed with the hearing officer shall:

(1) Be served on the other party by certified mail, return receipt requested; and

(2) Contain a signed statement that service on the other party has been made.

Section 4. Witnesses. A party shall file a list of his witnesses:

(1) With the hearing officer;

(2) At least ten (10) days prior to the hearing.

Section 5. Subpoenas. (1) A party shall file a written request to the presiding officer at least twenty (20) days prior to a hearing if he/she wishes to:

(a) Subpoena a witness; or

(b) Require the production of a document.

(2) The request shall contain the:

(a) Name and address of residence and place of employment, including county, of the witness;

(b) Name of document or item, with a description sufficient to identify the document or item.

Section 6. Continuance. (1) A hearing may be continued by the presiding officer:

(a) To permit any prehearing procedures; or

(b) For other good cause.

(2) If it is necessary to continue a hearing, the presiding officer shall:

(a) Reschedule the hearing; and

(b) Notify the parties.

(3)(a) Except as provided by subsection (4) of this section, a motion for continuance shall be filed with the presiding officer at least seven (7) working days before the hearing.

(4) A motion for continuance may be filed upon the occurrence of an emergency.

(5) The hearing officer shall notify a party of his decision in writing.

Section 7. Prehearing Conference. (1) The hearing officer may schedule a prehearing conference:
(a) On his own motion; or
(b) Upon motion of a party.
(2) The hearing officer shall schedule a prehearing conference if he/she determines that it will:
(a)1. Establish stipulations;
2. Clarify issues;
3. Identify witnesses;
4. Resolve issues relating to:
a. Evidence;
b. Subpoenas;
c. Discovery; or
d. Protective orders; and
(b) Otherwise promote the orderly and prompt conduct of the hearing; or
(c) Promote settlement of the issues.
(3) If the prehearing officer schedules a prehearing conference, he/she shall notify the parties in writing:
(a) Of the date, time and place of the prehearing conference; and
(b) That they are required to attend the prehearing conference.
(4)(a) The hearing officer shall issue a prehearing order that incorporates matters determined at the prehearing conference.
(b) A copy of the prehearing order shall be mailed to the parties.

Section 8. Discovery. (1) A request to obtain discovery shall be filed with the hearing officer.
(2) The request shall:
(a) Specify the type of discovery requested;
(b) Where applicable, describe in sufficient detail:
1. Names and addresses of persons or items;
2. Documents, other items, or places; and
(c) State the reason discovery is requested.
(3) The hearing officer may deny, limit, or require discovery.
(4) Discovery may be obtained by:
(a) Written or oral depositions;
(b) Interrogatories;
(c) Production or inspection of documents or things;
(d) Permission to photograph, or enter upon land or other property; or
(e) Physical or mental examinations.

Section 9. Settlement Agreement. (1) The parties may agree to a settlement of the issues that gave rise to a complaint.
(2) A settlement agreement:
(a) Shall be subject to approval by the hearing officer; and
(b) If approved by the hearing officer, shall constitute:
1. A waiver of a party's right to an administrative hearing; and
2. The final order of the hearing officer.

Section 10. Motions. A motion shall be:
(1) In writing;
(2) Signed; and
(3) Filed with hearing officer.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 13, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:150E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 367 (SB 137) as set forth in Senate Bill 137. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 29, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:150E. Cremation authorization forms.

RELATES TO: KRS Chapter 367 (SB 137)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (SB 137), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for a cremation authorization form identified in KRS 367 (SB 137).

Section 1. (1) The "Cremation Authorization Form CR-1" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Cremation Authorization Form CR-1" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 24, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:160E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 367 (SB 137) as set forth in Senate Bill 137. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 29, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:160E. Crematory annual report form.

RELATES TO: KRS 367 (SB 137)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (SB 137), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for a crematory annual report form identified in KRS Chapter 367 (SB 137).

Section 1. (1) The "Crematory Annual Report Form CR-2" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Crematory Annual Report Form CR-2" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 24, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:170E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 367 (SB 137) as set forth in Senate Bill 137. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 29, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:170E. Preneed cremation authorization forms.

RELATES TO: KRS 367 (SB 137)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (SB 137), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for a cremation authorization form identified in KRS Chapter 367 (SB 137).

Section 1. (1) The "Preneed Cremation Authorization Form CR-3" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Preneed Cremation Authorization Form CR-3" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 24, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:180E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 367 (SB 137) as set forth in Senate Bill 137. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 29, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:180E. Statement of training for crematory operators forms.

RELATES TO: KRS 367 (SB 137)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (SB 137), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for a statement of training for crematory operators identified in KRS Chapter 367 (SB 137).

Section 1. (1) The "Statement of Supervision For Registered Crematory Retort Operators Form CR-4" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Statement of Supervision For Registered Crematory Retort Operators Form CR-4" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 24, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:190E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 367 (SB 137) as set forth in Senate Bill 137. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on June 29, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

COMMONWEALTH OF KENTUCKY
Department of Law

40 KAR 2:190E. Crematory authority license application forms.

RELATES TO: KRS 367 (SB 137)
STATUTORY AUTHORITY: KRS 15.180, Chapter 367 (SB 137), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for a crematory authority license application form identified in KRS Chapter 367 (SB 137).

Section 1. (1) The "Crematory Authority License Application Form CR-5" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Crematory Authority License Application Form CR-5" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: June 24, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:200E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 365 (HB 787) as set forth in House Bill 787. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 8, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

DEPARTMENT OF LAW

40 KAR 2:200E. Application for removal sale permit form.

RELATES TO: KRS 365.420
STATUTORY AUTHORITY: KRS 15.180, 365.420(7), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for an application form to conduct a removal sale with itemization of the inventory of goods identified in KRS 365.420(7).

Section 1. (1) The "Application for Permit to Conduct a Removal Sale Form GOB-1" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Application For Permit To Conduct A Removal Sale Form GOB-1" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: July 8, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:210E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 365 (HB 787) as set forth in House Bill 787. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 8, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

DEPARTMENT OF LAW

40 KAR 2:210E. Application for conducting more than two (2) going-out-of-business sales in four (4) years form.

RELATES TO: KRS Chapter 365 (HB 787, §4)
STATUTORY AUTHORITY: KRS 15.180, Chapter 365 (HB 787, §4), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: To fulfill the requirement for an application form to conduct more than two (2) going-out-of-business sales in a four (4) year period identified in KRS Chapter 365 (HB 787, §4)).

Section 1. (1) The "Application for Conducting More Than Two (2) Going-out-of-business Sales in Four (4) Years Form GOB-2" (July 1994 edition) is incorporated by reference.
(2) Copies of the "Application For Conducting More Than Two (2) Going-out-of-business Sales In Four (4) Years Form GOB-2" may be inspected, copied, or obtained at the Office of the Attorney General, Consumer Protection Division, 1024 Capital Drive, Frankfort, Kentucky 40602, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: July 8, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:220E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 365 (HB 787) as set forth in House Bill 787. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 8, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

DEPARTMENT OF LAW

40 KAR 2:220E. Application procedure for obtaining going-out-of-business sale permits in excess of two (2) sales in a four (4) year period.

RELATES TO KRS Chapter 365 (HB 787, §4)
STATUTORY AUTHORITY: KRS 15.180, Chapter 365 (HB 787, §4), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS Chapter 365 (HB 787, §4) requires in pertinent part the Office of the Attorney General to promulgate administrative regulations pertaining to applications by any party for more than two (2) going-out-of-business sale permits during a four (4) year period. This administrative regulation sets forth the procedures for applying for a subsequent permit, the investigation to be initiated and conducted by the Attorney General, and charges to the applicant, pursuant to KRS Chapter 365 (HB 787, §4).

Section 1. Application Procedure for Excess Permits. When any individual, partnership, corporation or other firm seeks a permit to conduct more than two (2) going-out-of-business sales within a four (4) year period, such party shall obtain, complete, and submit to the Office of the Attorney General, Division of Consumer Protection, an application form to obtain such permit.

Section 2. Investigation to Determine Legitimate Business Purpose. (1) Upon receipt of such application, the Office of the Attorney General, Division of Consumer Protection, shall initiate and conduct an investigation to determine if there is a legitimate business reason to conduct more than two (2) going-out-of-business sales within a four (4) year period. The Division of Consumer Protection shall investigate the circumstances of all previous going-out-of-business sales conducted by the applicant within the previous four (4) years and consider all relevant information in reaching its decision. The Attorney General may request additional information and relevant business records from the applicant in determining the legitimacy of the business reason for the application.

(2) The Attorney General shall determine if there is a legitimate business reason for the applicant's request for any excess permits and deny or grant the permit within thirty (30) days of receiving the application.

Section 3. The Applicant May be Charged the Costs of the Investigation. The Attorney General may charge the applicant for the costs of the investigation. The actual costs shall be assessed the applicant by the Attorney General, however the minimum charge shall be twenty-five (25) dollars, and the maximum charge $250.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: July 8, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:230E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 365 (HB 787) as set forth in House Bill 787. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 8, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

DEPARTMENT OF LAW

40 KAR 2:230E. Prehearing procedure for rejection of application for more than two (2) going-out-of-business sales during a four (4) year period.

RELATES TO: KRS Chapter 365 (HB 787, §4)
STATUTORY AUTHORITY: KRS 15.180, Chapter 365 (HB 787, §4), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS Chapter 365 (HB 787, §4) requires in pertinent part the Office of the Attorney General, Division of Consumer Protection, to promulgate administrative regulations pertaining to applications by any party for more than two (2) going-out-of-business sale permits during a four (4) year period. This administrative regulation sets forth initial procedures for a due process hearing for the appeal by the applicant of a denial of an application for a permit to conduct more than two (2) going-out-of-business sales in a four (4) year period pursuant to KRS Chapter 365 (HB 787, §4).

Section 1. Notice of Denial and Request for a Hearing. (1) Upon denial of the applicant's request for a permit to conduct a subsequent sale in excess of two (2) going-out-of-business sales in a four (4) year period, the Attorney General shall send by registered or certified mail written notice stating that the application has been denied. The grounds for the denial shall be set forth in the notice.

(2) Within seven (7) calendar days after receiving the notice of denial of the application for a subsequent permit after having conducted two (2) going-out-of-business sales within a four (4) year period, the applicant may request a hearing. The request shall be made to the Attorney General, Division of Consumer Protection.

(3) The hearing shall be held within thirty (30) calendar days of the Attorney General's receipt of the request for a hearing.

Section 2. Motions, requests, filings, and other material filed with the hearing officer shall:

(1) Be served on the other party by certified mail, return receipt requested; and

(2) Contain a signed statement that service on the other party has been made.

Section 3. Witnesses. A party shall file a list of his witnesses:

(1) With the hearing officer;

(2) At least ten (10) days prior to the hearing.

Section 4. Subpoenas. (1) A party shall file a written request to the hearing officer at least twenty (20) days prior to a hearing if he/she wishes to:

(a) Subpoena a witness; or

(b) Require the production of a document.

(2) The request shall contain the:

(a) Name and address of residence and place of employment, including county, of the witness;

(b) Name the document or item, with a description sufficient to identify the document or item.

Section 5. Continuance. (1) A hearing may be continued by the

hearing officer:
(a) To permit any prehearing procedures; or
(b) For other good cause.
(2) If it is necessary to continue a hearing, the hearing officer shall:
(a) Reschedule the hearing; and
(b) Notify the parties.
(3) Except as provided by subsection (4) of this section, a motion for continuance shall be filed with the hearing officer at least seven (7) working days before the hearing.
(4) A motion for continuance may be filed upon the occurrence of an emergency.
(5) The hearing officer shall notify a party of his decision in writing.

Section 6. Prehearing Conference. (1) The hearing officer may schedule a prehearing conference:
(a) On his own motion; or
(b) Upon motion of a party.
(2) The hearing officer shall schedule a prehearing conference if he/she determines that it will:
(a)1. Establish stipulations;
2. Clarify issues;
3. Identify witnesses;
4. Resolve issues relating to:
a. Evidence;
b. Subpoenas;
c. Discovery; or
d. Protective orders; and
(b) Otherwise promote the orderly and prompt conduct of the hearing; or
(c) Promote settlement of the issues.
(3) If the hearing officer schedules a prehearing conference, he/she shall notify the parties in writing:
(a) Of the date, time and place of the prehearing conference; and
(b) That they are required to attend the prehearing conference.
(4)(a) The hearing officer shall issue a prehearing order that incorporates matters determined at the prehearing conference.
(b) A copy of the prehearing order shall be mailed to the parties.

Section 7. Discovery. (1) A request to obtain discovery shall be filed with the hearing officer.
(2) The request shall:
(a) Specify the type of discovery requested;
(b) Where applicable, describe in sufficient detail:
1. Names and addresses of persons or items;
2. Documents, other items, or places; and
(c) State the reason discovery is requested.
(3) Discovery may be obtained by:
(a) Written or oral depositions;
(b) Interrogatories;
(c) Production or inspection of documents or things;
(d) Permission to photograph, or enter upon land or other property; or
(e) Physical or mental examinations.

Section 8. Settlement Agreement. (1) The parties may agree to a settlement of the issues that gave rise to the denial of the application.
(2) A settlement agreement:
(a) Shall be subject to approval by the hearing officer; and
(b) If approved by the hearing officer, shall constitute:
1. A waiver of a party's right to an administrative hearing; and
2. The final order of the hearing officer.

Section 9. Motions. A motion shall be:
(1) In writing;
(2) Signed; and
(3) Filed with the hearing officer.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: July 8, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
40 KAR 2:240E

The attached administrative regulations are promulgated pursuant to amendments to KRS Chapter 365 (HB 787) as set forth in House Bill 787. This new legislation was enacted during the 1994 Legislative Session and will become effective July 15, 1994. The attached administrative regulations are mandated by and are an integral part of the new legislation. It is necessary to have the regulations enacted simultaneously with the statutes. It was not possible to enact ordinary administrative regulations in the time period following the 1994 Legislative Session. Therefore, the emergency regulations are necessary. This emergency administrative regulation shall be replaced by an ordinary regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 8, 1994.

BRERETON C. JONES, Governor
CHRIS GORMAN, Attorney General

DEPARTMENT OF LAW

40 KAR 2:240E. Hearings for denial of application for more than two (2) going-out-of-business sales during a four (4) year period.

RELATES TO: KRS Chapter 365 (HB 787, §4)
STATUTORY AUTHORITY: KRS 15.180, Chapter 365 (HB 787, §4), 367.150(4)
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS Chapter 365 (HB 787, §4) requires in pertinent part the Attorney General, Division of Consumer Protection to promulgate rules and administrative regulations pertaining to applications by any party for a permit to conduct a going-out-of-business sale subsequent to two (2) previous going-out-of-business sales within a four (4) year period. This administrative regulation sets forth hearing and conference procedures for the appeal by the applicant of a denial of a subsequent permit by the Attorney General, pursuant to KRS Chapter 365 (HB 787, §4).

Section 1. Purpose and Construction. When the Attorney General through the Division of Consumer Protection has determined and given notice that a request for approval of a permit to conduct a going-out-of-business sale subsequent to two (2) previous going-out-of-business sales in a four (4) year period has been denied in accordance with KRS Chapter 365 (HB 787, §4), any applicant so affected is entitled to due process. Accordingly, this regulation is to be liberally constructed so as to aid in that process.

Section 2. A party may:
(1) Represent himself; or
(2) Be represented by:
(a) An authorized representative; or
(b) Counsel.

Section 3. Hearing Officer. A hearing officer shall be appointed and serve pursuant to KRS Chapter 13B (HB 334, §§3 and 4).

Section 4. Evidence. (1) Formal rules of evidence shall not apply.
(2) The hearing officer shall exclude evidence that is:

(a) Irrelevant;
(b) Immaterial;
(c) Unduly repetitious; or
(d) Excludable on:
1. Constitutional or statutory grounds; or
2. The basis of evidentiary privilege recognized in the courts of the Commonwealth.
(3) Testimony or other evidence shall be admitted if it is:
(a) Based on facts; and
(b) Commonly relied upon by reasonably prudent persons.
(4) Hearsay evidence.
(a) Evidence shall not be excluded solely because it is hearsay.
(b) Hearsay evidence, including affidavits, may be admitted for the purpose of supplementing relevant evidence.
(5) The hearing officer may admit party or witness testimony taken by deposition if:
(a) A party or witness is unable to attend through no fault of his own; and
(b) The opposing party has had a full opportunity to cross-examine the party or witness.
(6) Evidence may be received in written form if it will:
(a) Expedite the hearing; and
(b) Not substantially prejudice the interest of a party.
(7) Copies and excerpts.
(a) A copy or an excerpt of documentary evidence may be received.
(b) Upon request, a party shall be permitted to compare the copy or excerpt with the original.
(8) Official notice shall be taken of:
(a) A fact that would be judicially noticed in the courts of the Commonwealth;
(b) The record of other proceedings before the Division of Consumer Protection;
(c) Technical or scientific matters within the specialized knowledge of the Division of Consumer Protection;
(d) Codes or standards that have been adopted by:
1. An agency of the United States, the Commonwealth, or another state; or
2. A nationally recognized organization or association, and incorporated by reference as provided by KRS Chapter 13A.

Section 5. Ex parte Communications. (1) Except as provided in this section, a hearing officer, a party, or a person with a direct or indirect interest in the outcome of a pending hearing, shall not communicate, directly or indirectly, with regard to an issue of a pending hearing with a:
(a) Party;
(b) Person who has a direct or indirect interest in the outcome of the hearing; or
(c) Person who presided at a previous stage of the hearing.
(2) Communications prohibited by the provisions of this section may be made if:
(a) Written notice is given to other parties; and
(b) Other parties are permitted to participate in the communication.
(3) A hearing officer may communicate with staff assistants, or other Division of Consumer Protection personnel, if they:
(a) Have not received ex parte communications that are prohibited to the hearing officer; and
(b) Do not furnish, augment, diminish, or modify the evidence in the record.
(4) If prior to serving as the hearing officer of a hearing, the hearing officer has received an ex parte communication that he/she is prohibited from receiving as a hearing officer, he/she shall:
(a) Place on the record of the pending hearing:
1. The written communications received;
2. The written responses to them;
3. A memorandum stating oral communications and responses; and
4. The identity of the person from whom a communication was received; and
(b) Notify and transmit copies of the items specified in subparagraph 1 of this paragraph to the parties to the hearing.
(5) Within ten (10) days of receipt of the hearing officer's notice and transmittal, a party may:
(a) Rebut the prohibited communications specified in this section; or
(b) File a motion with the Division of Consumer Protection to:
1. Disqualify the hearing officer; and
2. Seal the portions of the record pertaining to the prohibited communications.
(6) The Division of Consumer Protection shall:
(a) Report any willful violation of this section to the Attorney General or his designee for disciplinary proceedings; and
(b) Take disciplinary action authorized by statute or administrative regulation of the Division of Consumer Protection.

Section 6. Separation of Functions. (1) A person shall not serve as a hearing officer of a hearing, or assist or advise a hearing officer in a hearing, if he/she has served as an investigator, prosecutor, or advocate with regard to the subject matter of the hearing.
(2) The provisions of subsection (1) of this section shall apply to a person who is subject to the authority, direction, or discretion of persons specified in subsection (1) of this section.
(3) A person shall not serve as the hearing officer of the hearing if he/she has participated in:
(a) A determination of the legitimacy of the business purpose of the proposed subsequent sale; or
(b) In another equivalent preliminary determination related to the application or Division of Consumer Protection action that gave rise to a hearing.

Section 7. Procedure at Hearing. A hearing shall proceed as follows:
(1) Opening statements by the:
(a) Counsel for applicant; and
(b) Counsel for Division of Consumer Protection.
(2) Applicant's presentation of:
(a) Testimony of applicant or witnesses; and
(b) Evidence;
(3) Division of Consumer Protection's presentation of:
(a) Witnesses; and
(b) Evidence.
(4) Closing arguments.
(5) The hearing officer may require parties to submit legal memoranda in lieu of opening statements or closing arguments.

Section 8. Posthearing Procedure. (1) Upon completion of the hearing, within seven (7) business days after the hearing, the hearing officer shall prepare and submit to the parties;
(a) Findings of fact and conclusions of law;
(b) A recommended order; and
(2) A copy of the findings of fact, conclusions of law and recommended order, or decision if the Division of Consumer Protection has conducted the hearing, shall be mailed to all parties of record;
(3) Filing exceptions.
(a) A party may file exceptions to the hearing officer's findings of fact, conclusions of law and recommended order within seven (7) days of their submission to the Division of Consumer Protection.
(b) If the hearing was conducted by the Division of Consumer Protection, a party shall file exceptions with the Division of Consumer Protection.
(4) Any party to the hearing who is aggrieved by the order may

seek judicial review by filing notice of appeal in the Franklin Circuit Court within thirty (30) days after the order has been mailed or delivered to him/her.

BRENT L. CALDWELL, Deputy Attorney General
APPROVED BY AGENCY: July 8, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
101 KAR 2:100E

The 1994 General Assembly passed and the Governor signed HB 522 which amends KRS 18A.195 to permit appointing authorities to grant compensatory leave at the rate of time and one half for hours worked by employees classified as nonexempt for purposes of the federal Fair Labor Standards Act. This regulation is being amended to comply with and implement the provisions of the Fair Labor Standards Act and KRS 18A.195 to allow compensatory leave to be granted to nonexempt employees at the rate of time and one half for hours worked in excess of forty hours per week upon request by the employee. The amendment is being promulgated as an emergency measure to comply with the provisions of state and federal law at the earliest possible date. An ordinary amendment to this regulation was filed with the Legislative Research Commission on July 14, 1994.

BRERETON C. JONES, Governor
LOWELL W. CLARK, Commissioner

DEPARTMENT OF PERSONNEL

101 KAR 2:100E. Leave regulations.

RELATES TO: KRS 18A.030, 18A.110, 18A.195 [1976], 61.394, 344.030, PL 103-3
STATUTORY AUTHORITY: KRS 18A.030, 18A.110, 18A.155, 344.030, PL 103-3
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS 18A.110 requires the Commissioner of Personnel to promulgate comprehensive administrative regulations, consistent with KRS Chapter 18A, which govern annual leave, sick leave, special leaves of absence, and for other conditions of leave. [The Family and Medical Leave Act of 1993 (PL 103-3) as implemented by 29 CFR Part 825 requires the granting of family leave.] This regulation is necessary to comply with these statutory requirements.

Section 1. Annual Leave. (1) Each full-time employee in the state service, except seasonal, temporary, per diem, and emergency employees, and each part-time employee who works at least 100 hours a month shall accumulate annual leave with pay at the following rate:

Months of Service	Annual Leave Days
0-59 months	1 leave day per month; 12 per year
60-119 months	1 1/4 leave days per month; 15 per year
120-179 months	1 1/2 leave days per month; 18 per year
180 months and over	1 3/4 leave days per month; 21 per year

A full-time employee must have worked more than half of the workdays in a month to qualify for annual leave. Each employee shall be credited with additional leave upon the first day of the month following the month in which the leave is earned. In computing months of total service for the purpose of earning annual leave, only those months for which an employee earned annual leave shall be counted or in the case of a part-time employee, only those months in which the employee worked at least 100 hours shall be counted. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing years of total service. Former employees who have been rehired and who have been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from a violation of KRS 18A.140, 18A.145, or 18A.990. In those cases where an employee is changed from full time to part time, those months for which the employee earned annual leave as a full-time employee shall be counted in computing months of total service. Employees serving on a part-time basis who work less than 100 hours a month shall not be entitled to annual leave.

(2) Annual leave may be accumulated and carried forward from one (1) calendar year to the next not to exceed the following maximum amounts:

Months of Service	Maximum Amount
0-59 months	Thirty (30) workdays
60-119 months	Thirty-seven (37) workdays
120-179 months	Forty-five (45) workdays
180-239 months	Fifty-two (52) workdays
240 months and over	Sixty (60) workdays

However, leave in excess of the above maximum amounts shall be converted to sick leave at the end of the calendar year, or upon retirement. Months of service for the purpose of determining the maximum amount of annual leave which may be accumulated and the amount to be converted to sick leave shall be computed as provided in subsection (1) of this section. Annual leave shall not be granted in excess of that earned prior to the starting date of leave.

(3) Absence due to sickness, injury, or disability in excess of that hereinafter authorized for such purposes may, at the request of the employee and within the discretion of the appointing authority, be charged against annual leave.

(4) Accumulated annual leave shall be granted by the appointing authority in accordance with operating requirements and, insofar as practicable, with the request of employees. An employee who makes a timely request for annual leave shall be granted annual leave by the appointing authority, during the calendar year, up to at least the amount of time he earned that year.

(5) Employees are charged with annual leave for absence only on days upon which they would otherwise work and receive pay.

(6) Annual leave shall accrue only when an employee is working or on authorized leave with pay. Annual leave shall not accrue when an employee is on educational leave with pay.

(7) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his accumulated annual leave in the receiving agency.

(8) Before an employee may be placed on leave of absence without pay in excess of thirty (30) working days, he must have used or have been paid for any accumulated annual leave unless he has requested to retain up to ten (10) days of accumulated annual leave.

(9) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave during the previous month subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he

works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(10) Employees shall be paid in a lump sum for accumulated annual leave, not to exceed the maximum amounts as set forth in paragraph (2) of this section, when separated by proper resignation or retirement. In the case of layoff, the employee shall be paid in a lump sum for all accumulated leave. An employee in the unclassified service who reverts to the classified service or an employee who resigns one day and is employed the next day shall retain his accumulated leave in the receiving agency. The effective date of the separation shall be the last workday.

(11) An employee who has been dismissed for cause or who has failed to give proper notice of resignation may, at the discretion of the appointing authority, be paid in a lump sum for accumulated annual leave not to exceed the maximum amounts set forth in Section 2(2) of this regulation.

(12) Upon the death of an employee, his estate shall be entitled to receive pay for the unused portion of the employee's accumulated annual leave.

(13) Absence for a fraction or part of a day that is charged to annual leave shall be charged in hours or increments of one-quarter (1/4) hours.

Section 2. Sick Leave. (1) Each employee in the state service, except emergency, per diem and part-time employees who work less than 100 hours a month, shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. An employee must have worked more than half of the workdays in a month to qualify for sick leave with pay. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned. Employees serving on a part-time basis who work at least 100 hours a month shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned.

(2) Full-time employees completing 120 months of total service with the state shall be credited with ten (10) additional days of sick leave upon the first day of the month following the completion of 120 months of service. In computing months of total service for the purpose of crediting ten (10) additional days of sick leave, only those months for which an employee earned sick leave shall be used. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing months of total service. Part-time employees who work at least 100 hours a month completing 120 months of total service with the state shall be credited with ten (10) additional sick leave days upon the first day of the month following the completion of 120 months of service. In computing months of total service for part-time employees who work at least 100 hours a month for the purpose of crediting ten (10) additional sick leave days, only those months in which the employee worked at least 100 hours shall be used. In those cases where an employee is changed from full time to part time, those months for which the employee earned sick leave as a full-time employee shall be counted in computing years of total service. The total service must be verified before the leave is credited to the employee's record. Former employees who have been rehired and who had been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from the violation of KRS 18A.140, 18A.145, or 18A.990.

(3) Unused sick leave may be accumulated with no maximum on accumulation.

(4) Sick leave shall accrue only when an employee is working or on authorized leave with pay. Sick leave shall not accrue when an employee is on educational leave with pay.

(5) An appointing authority shall grant or require the use of accrued sick leave with pay when an employee:

(a) Receives medical, dental or optical examination or treatment;

(b) Is disabled by sickness, injury or pregnancy. The appointing authority may require a doctor's statement attesting to the inability to perform his/her duties;

(c) Is required to care for a sick or injured member of his immediate family for a reasonable period of time. The appointing authority may require a doctor's statement supporting the need for care by the employee;

(d) Would jeopardize the health of others at his duty post, because of exposure to a contagious disease;

(e) Has lost by death a parent, child, brother or sister, or the spouse of any of them, or any persons related by blood or affinity with a similarly close association. Leave under this paragraph is limited to three (3) days or a reasonable extension at the discretion of the appointing authority.

(6) At the termination of sick leave with pay not exceeding six (6) months, the appointing authority shall return the employee to his former position. At the termination of sick leave with pay exceeding six (6) months, the appointing authority shall return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit.

(7) An appointing authority shall grant sick leave without pay for so long as an employee is disabled by sickness, or illness, or pregnancy, and the total continuous leave does not exceed one (1) year. The appointing authority may require periodic doctor's statements during the year attesting to the continued inability to perform the essential functions of his duties with or without reasonable accommodation. When the employee has given notice of his ability to resume his duties, the appointing authority shall return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit. The employee shall inform the employer that reasonable accommodation is necessary and shall provide upon request supporting documentation from a certified professional. An employee who is unable to return to work at the end of one (1) year of sick leave without pay, after being requested to return to work at least ten (10) days prior to the expiration of such sick leave, shall be dismissed by the appointing authority only if the appointing authority has been unable to place the employee in a vacant, budgeted position, with the same agency, for which the employee qualifies. The employee shall be given priority consideration for such vacant position, if he is capable of performing its essential functions with or without reasonable accommodation. An employee granted sick leave without pay may, upon request, retain up to ten (10) days of accumulated sick leave.

(8) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave during the previous month subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee in within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee

is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(9) Absence for a fraction or part of a day that is chargeable to sick leave shall be charged in hours or increments of one-quarter (1/4) hours.

(10) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his accumulated sick leave in the receiving agency.

(11) Employees shall be credited for accumulated sick leave when separated by proper resignation, layoff, retirement, or when granted leave without pay. Former employees who are reinstated or reemployed shall have unused sick leave balances revived upon appointment and placed to their credit.

(12) In cases of absence due to illness or injury for which Workers' Compensation benefits are received, accumulated sick leave may be used in order to maintain regular full salary. If paid sick leave is used, Workers' Compensation pay benefits shall be assigned back to the state for whatever period of time an employee received paid sick leave. The employee's sick leave shall be immediately reinstated to the extent that Workers Compensation Benefits were assigned.

(13) Application for sick leave. An employee shall file a written application for sick leave with or without pay within a reasonable time. Except in cases of emergency illness, an employee shall request advance approval for sick leave for medical, dental or optical examination, and for sick leave without pay. In all cases of illness, an employee is obligated to notify his immediate supervisor or other designated person. Failure to do so in a reasonable period of time may be cause for denial of sick leave for the period of absence.

(14) Supporting evidence.

(a) An appointing authority may require an employee to supply supporting evidence in order to receive sick leave. A supervisor's or employee's certificate may be accepted, but a medical certificate may be required, signed by a licensed practitioner and certifying to the incapacity, examination, or treatment. An appointing authority shall grant sick leave when the application is supported by acceptable evidence.

(b) An appointing authority may place on sick leave an employee whose health might be jeopardized by job duties, whose health might jeopardize others, or whose health prevents performance of duties and responsibilities, and who, on request, fails to produce a satisfactory medical certificate.

Section 3. Family Leave. (1) Effective August 5, 1993, every employee in state service who has completed twelve (12) months of service and has worked or been on paid leave at least 1,250 hours during the preceding twelve (12) months shall qualify for twelve (12) weeks of family leave without pay. On the first day of January of each year thereafter every employee in state service who has completed twelve (12) months of service and has worked at least 1,250 hours during the preceding calendar year shall qualify for twelve (12) weeks of family leave without pay. Unused family leave shall not be carried over from year to year.

(2)(a) A week of family leave is the amount of time an employee normally works each week.

(b) If an employee's schedule varies from week to week, a weekly average of the hours worked over the twelve (12) weeks prior to the beginning of the family leave shall be used for calculating the employee's normal work week.

(c) If there has been a permanent or long-term change in the employee's schedule (for reasons other than family leave), the hours worked under the new schedule shall be used for calculating the employee's normal work week.

(3) An appointing authority shall grant family leave, upon the receipt of a completed application from an employee. The appointing authority shall require the employee to utilize accumulated sick, annual and compensatory leave prior to granting unpaid family leave, provided that the employee may request to reserve ten (10) days of paid sick leave. The amount of available family leave shall be reduced by the amount of paid leave used. A completed application means the request form and the medical certification required by subsection (4) of this section. The employee shall make the application as far in advance of the start of the leave as reasonable. Family leave shall be granted:

(a) For the birth of a child of the employee, adoption by the employee of a child, or placement with the employee of a foster child under an agreement with an agency of the Commonwealth or other state government. An appointing authority may require a couple in the employ of an agency to limit the total amount of family leave to twelve (12) weeks where leave is sought in connection with the birth, adoption or placement of a child;

(b) Within one (1) year of the birth of a child of the employee, adoption by the employee or placement with the employee of a foster child, for the care of such newborn, adopted, or foster child;

(c) To an employee to care for the employee's spouse, parent, child (including biological, adopted, step, or foster), or other family member of similarly close blood or legal relationship (who has resided with the employee for not less than thirty (30) days prior to application), if the spouse, child, parent or family member has a serious health condition. A child includes one who is over eighteen (18) years of age and who is incapable of self-care because of a mental or physical disability. A serious health condition is a condition which requires inpatient care or continuing treatment by a health provider which renders the employee incapable of performing the duties of the employee's position. Where inpatient care is not involved, the expected absence from work, or from school, or incapacity in performing other daily activities of a family member shall be for a period of more than three (3) days.

(d) An appointing authority shall grant family leave because of a serious health condition, of the employee, that makes the employee temporarily unable to perform the essential functions of his position.

(4)(a) The appointing authority shall require an employee granted family leave for a serious health condition to supply a certification, on a form prescribed by the commissioner, from a health care provider that includes a statement that the employee is needed to care for a family member, or, that the employee's presence would be beneficial to the family member. An employee requesting intermittent leave or leave on a reduced leave schedule due to serious health condition of the employee or family member shall be required to supply a certification from a licensed health care provider that such leave is medically necessary and the expected duration and schedule of such leave. A "health care provider" includes: doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, chiropractor, nurse practitioner, and nurse midwife, or certified Christian Science practitioner.

(b) If an employee submits a complete certification signed by the health care provider, the appointing authority shall not request additional information from the employee's health care provider. If the appointing authority has reason to doubt the validity of a medical certification the appointing authority may require the employee to obtain a second opinion at the agency's expense. The appointing authority shall designate the health care provider to furnish the second opinion. The designated health care provider shall not be employed on a regular basis by the agency.

(c) If the opinions of the employee's health provider and the designated health care provider differ, the appointing authority may request the employee to obtain certification from a third health care provider who is approved by the employee. This third opinion shall be

final and binding. If the appointing authority does not act in good faith to attempt to reach an agreement on the third health care provider, the appointing authority shall be bound by the original certification. If the employee does not act in good faith to attempt to reach an agreement on the third health care provider, the employee shall be bound by the opinion of the second health care provider. An appointing authority may require recertification of the need for family leave every thirty (30) working days.

(5) If an employee requests intermittent leave or a reduced work schedule to care for a seriously ill family member or for the employee's own serious health condition, and the need for leave is reasonably based on planned medical treatment, the appointing authority may temporarily reassign the employee to an available alternative position with equivalent pay and benefits if the employee is qualified for the position and it better accommodates recurring periods of leave than the employee's regular job.

(6) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave or shall have been on family leave during the previous month subject to the following conditions:

(a) Any combination of work days and paid leave and family leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month;

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively;

(c) When an employee is unable to work, and elects to use family leave as the sole qualification for the state contributions for life insurance and health benefits, he shall utilize his family leave days consecutively.

(d) An employee who has exhausted paid leave and family leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the work days in a month. If the employee is unable to work for more than half of the work days in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contribution and the employee contributions for such benefits.

(e) An employee who uses family leave as the sole qualification for the state contribution for life insurance and health benefits who fails to return to work for thirty (30) calendar days after the family leave is exhausted, shall reimburse the Commonwealth for state contributions paid on behalf of the employee. The employee shall not be required to reimburse the Commonwealth if the reason the employee does not return is due to:

1. The continuation, recurrence or onset of a serious health condition which would entitle the employee to family leave under this regulation.

2. Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are where a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; or the employee is laid off while on leave. Examples of other circumstances which are not beyond the employee's control are where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care; or a parent's decision not to return to work to stay with a newborn child.

(f) An employee, on family leave, shall continue to be responsible for the employee's share of contributions for life insurance and health benefits. The contributions shall be due at the same time the contributions would be made if by payroll deduction. An employee shall be granted a thirty (30) calendar day grace period to make any employee contributions for life insurance and health benefits. If the employee does not make the contribution within the thirty (30) day grace period, the employee's life insurance and health benefits shall cease on the date the grace period ends. If the life insurance and health benefits cease as a result of nonpayment of premiums by the employee after the grace period, upon the employee's return to work for thirty (30) calendar days, the life insurance and health benefits shall be restored to the same level of coverages as were provided when the leave commenced, effective with the employee's return to work.

(7) At the conclusion of the family leave, an employee shall be restored to the same job that the employee held before going on leave. The employee shall be returned to the same shift or equivalent schedule. If special qualifications are required for a position and said qualifications have lapsed during the employee's leave, the employee may be reassigned to different duties and given a reasonable opportunity to fulfill the requirements after returning to work.

Section 4. Court Leave. An employee shall be entitled to leave of absence from duties during his scheduled working hours, without loss of time or pay for that amount of time necessary to comply with subpoenas by any court, or administrative agency or body of the federal or state government or any political subdivision thereof, to serve as a juror or a witness except in cases where the employee himself or a member of his family is a party to the court or administrative proceeding. This leave shall include necessary travel time. If relieved from duty as a juror or witness during his normal working hours, the employee shall return to work.

Section 5. Compensatory Leave and Overtime. (1) It shall be the responsibility of the appointing authorities to administer the overtime and compensatory leave provisions of the Fair Labor Standards Act (FLSA). An employee who is authorized to work in excess of the prescribed hours of duty shall be granted compensatory leave or paid overtime [~~on an hour for hour basis~~,] subject to the provisions of the Fair Labor Standards Act, the Kentucky Revised Statutes and this administrative regulation [~~and Kentucky Labor Laws~~]. Compensatory leave may be accumulated or taken off in one-quarter (1/4) hour increments. The maximum amount of compensatory leave that may be carried forward from one (1) pay period to another [~~accumulated~~] shall be 200 hours.

(2) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his compensatory leave in the receiving agency.

(3) Upon separation from state service, employees will be paid for all unused compensatory leave at the greater of their regular hourly rate of pay or at the average regular rate of pay for the final three (3) years of employment.

(4) An employee who has accrued compensatory leave shall be permitted by the appointing authority or his designee to take such time off if the use of such time does not unduly disrupt the operations of the agency. [~~when practicable. To maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave.~~]

(5) An appointing authority or his designee may direct an employee to take accumulated compensatory time off from work to maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave. Notice must be in writing specifying the number of hours to be taken and the pay period in which the hours must be used.

(6) [(~~5~~)] An employee deemed to be "nonexempt" in relation to the FLSA shall be compensated for all hours worked in excess of forty (40) per week in accordance with the following provisions: [~~shall be paid one and one half (1 1/2) times his regular hourly rate of pay for all hours worked in excess of forty (40) per week.~~]

(a) An employee who has not accumulated the maximum amount of compensatory leave has the option to accumulate compensatory leave on an hour and one-half (1 1/2) basis for each hour worked in excess of forty (40) per week in lieu of paid overtime.

(b) The election to receive compensatory leave in lieu of paid overtime must be in writing and such election will remain in force for

a minimum of six (6) months. The election can only be changed by submitting a new form. The effective date of any change will be the first day of the next workweek following receipt of the election.

(c) An employee who does not elect compensatory leave in lieu of paid overtime shall be paid one and one-half (1 1/2) times his regular hourly rate of pay for all hours worked in excess of forty (40) per week.

(7) An employee deemed to be "exempt" in relation to the FLSA shall accumulate compensatory time on an hour-for-hour basis for all hours worked in excess of his normal work schedule.

(8) [~~(6)~~] An employee except one who is in policy making position, may, after accumulating 151 hours of compensatory leave, request that he be paid for fifty (50) hours at his regular rate of pay. If the appointing authority or his designee approves the payment, then an employee's leave balance shall be reduced accordingly.

(9) [~~(7)~~] All employees, except those who are in policy making positions, shall be paid for fifty (50) hours at their regular hourly rate of pay upon accumulating at the end of the pay period 200 hours or more of compensatory leave. The employee's leave balance shall be reduced accordingly.

(10) [~~(8)~~] All employees whose prescribed hours of duty are normally less than forty (40) per week and who have not exceeded the maximum amount of compensatory time shall receive compensatory leave on an hour-for-hour basis until the total hours worked in that week reaches forty (40).

(11) [~~(9)~~] Compensatory leave used during the same workweek it is earned does not constitute "hours worked" for computing paid overtime or time and one-half (1 1/2) compensatory time.

(12) This administrative regulation shall become effective on August 1, 1994.

Section 6. Military Leave. Any employee who is an active member of the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Public Health Service Reserve, or the Kentucky National Guard shall be relieved from his civil duties upon request therefor, to serve under orders on training duty without loss of his regular compensation for a period not to exceed ten (10) working days in any one (1) federal fiscal [~~calendar~~] year, and any such absence shall not be charged to leave. Absence in excess of this amount will be charged as annual leave, compensatory leave or leave without pay. The appointing authority may require a copy of the orders requiring the attendance of an employee before granting military leave. An appointing authority shall grant an employee entering military duty a leave of absence without pay for a period of such duty not to exceed six (6) years. All accumulated annual and compensatory leave may be paid in a lump sum, at the request of the employee, upon receiving this leave.

Section 7. Voting Leave. All employees who are eligible and registered to vote shall be allowed, upon prior request, four (4) hours, for the purpose of voting. Such absence shall not be charged against leave. Employees who are not scheduled to work during voting hours shall not receive voting leave and shall not be entitled to compensatory leave in lieu of time off to vote. Employees who are permitted to work in lieu of voting leave shall be granted compensatory leave on an hour-for-hour basis.

Section 8. Special Leave of Absence. (1) In addition to leaves as above provided, an appointing authority may grant leave without pay for a period or periods not to exceed thirty (30) working days in any calendar year.

(2) An appointing authority, with approval of the commissioner, may grant leave of absence when requested by an employee for a period not to exceed twenty-four (24) months, with or without pay for assignment to and attendance at college, university, vocational or business school for the purpose of training in subjects related to the work of the employee and which will benefit the state service.

(3) An appointing authority, with approval of the commissioner, may grant an employee a leave of absence without pay for a period not to exceed one (1) year for purposes other than specified in this regulation that are deemed in the best interest of the state.

(4) An appointing authority, with approval of the commissioner, may place an employee on leave without pay for a period not to exceed thirty (30) working days pending an investigation into allegations of employee misconduct. The employee shall be notified in writing by the appointing authority that he is being placed on leave without pay and of the reasons therefor. If such investigation reveals no misconduct on behalf of the employee, he shall be made whole for the period of such leave and all records relating to the investigation will be purged from agency and Department of Personnel files. The appointing authority shall notify the employee in writing of the completion of the investigation and the action taken, including those cases where the employee voluntarily resigns in the interim.

(5) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave during the previous month subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

Section 9. Absence Without Leave. An employee who is absent from duty without approval shall report the reason therefor to his supervisor immediately. Unauthorized and/or unreported absence shall be considered absence without leave and deduction of pay may be made for each period of such absence. Such absence may constitute grounds for disciplinary action.

LOWELL W. CLARK, Commissioner
BRERETON C. JONES, Governor
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
101 KAR 3:010E

The 1994 General Assembly passed and the Governor signed HB 522 which amends KRS 18A.195 to permit appointing authorities to grant compensatory leave at the rate of time and one-half for hours worked by employees classified as nonexempt for purposes of the federal Fair Labor Standards Act. This regulation is being amended to comply with and implement the provisions of the Fair Labor Standards Act and KRS 18A.195 to allow compensatory leave to be granted to nonexempt employees at the rate of time and one-half for hours worked in excess of forty hours per week upon request by the

employee. The amendment is being promulgated as an emergency measure to comply with the provisions of state and federal law at the earliest possible date. An ordinary amendment to this regulation was filed with the Legislative Research Commission on July 14, 1994.

BRERETON C. JONES, Governor
LOWELL W. CLARK, Commissioner

DEPARTMENT OF PERSONNEL

101 KAR 3:010E. Leave regulations for unclassified service.

RELATES TO: KRS 18A.155, 61.394, PL 103-3
STATUTORY AUTHORITY: KRS 18A.155, 18A.195, PL 103-3 [~~197~~]
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: KRS 18A.155 requires the Commissioner of Personnel to submit to the Governor proposed administrative regulations for the unclassified service persons in positions enumerated in KRS 18A.115(1)(g), (h), (i), (j), (k), (p), (u) and (v). KRS 18A.155 further provides that these regulations shall be approved by the Governor. In practice, the leave regulations (101 KAR 2:100) which apply to merit system employees in the following specific areas have also been applied to the aforementioned categories of employees in the unclassified service.

Section 1. Annual leave. (1) Each full-time employee in the state service, except seasonal, temporary, per diem, and emergency employees, or each part-time employee who works at least 100 hours a month shall accumulate annual leave with pay at the following rate:

Months of Service	Annual Leave Days
0-59 months	1 leave day per month; 12 per year
60-119 months	1 1/4 leave days per month; 15 per year
120-179 months	1 1/2 leave days per month; 18 per year
180 months and over	1 3/4 leave days per month; 21 per year

A full-time employee must have worked more than half of the workdays in a month to qualify for annual leave. Each employee shall be credited with additional leave upon the first day of the month following the month in which the leave is earned. In computing months of total service for the purpose of earning annual leave, only those months for which an employee earned annual leave shall be counted or in the case of a part-time employee, only those months in which the employee worked at least 100 hours shall be counted. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing years of total service. Former employees who have been rehired and who have been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from a violation of KRS 18A.140, 18A.145, or 18A.990. In those cases where an employee is changed from full time to part time, those months for which the employee earned annual leave as a full-time employee shall be counted in computing months of total service. Employees serving on a part-time basis who work less than 100 hours a month shall not be entitled to annual leave.

(2) Annual leave may be accumulated and carried forward from one (1) calendar year to the next not to exceed the following maximum amounts:

Months of Service	Maximum Amount
0-59 months	Thirty (30) workdays
60-119 months	Thirty-seven (37) workdays
120-179 months	Forty-five (45) workdays
180-239 months	Fifty-two (52) workdays
240 months and over	Sixty (60) workdays

However, leave in excess of the above maximum amounts shall be converted to sick leave at the end of the calendar year, or upon retirement. Months of service for the purpose of determining the maximum amount of annual leave which may be accumulated and the amount to be converted to sick leave shall be computed as provided in subsection (1) of this section. Annual leave shall not be granted in excess of that earned prior to the starting date of leave.

(3) Absence due to sickness, injury, or disability in excess of that authorized for such purposes may, at the request of the employee and within the discretion of the appointing authority, be charged against annual leave.

(4) Accumulated annual leave shall be granted by the appointing authority in accordance with operating requirements and, insofar as practicable, with the request of employees. An employee who makes a timely request for annual leave shall be granted annual leave by the appointing authority, during the calendar year, up to at least the amount of time he earned that year.

(5) Employees are charged with annual leave for absence only on days upon which they would otherwise work and receive pay.

(6) Annual leave shall accrue only when an employee is working or on authorized leave with pay. Annual leave shall not accrue when an employee is on educational leave with pay.

(7) An employee who is transferred or otherwise changed from the jurisdiction of one (1) agency to another shall retain his accumulated annual leave in the receiving agency.

(8) Before an employee may be placed on leave of absence without pay in excess of thirty (30) working days, he must have used or have been paid for any accumulated annual leave unless he has requested to retain up to ten (10) days of accumulated annual leave.

(9) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave for more than half of the workdays in a month, subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(10) Employees shall be paid in a lump sum for accumulated annual leave, not to exceed the maximum amounts as set forth in Section 1(2) of this regulation, when separated by proper resignation or retirement. In the case of layoff, the employee shall be paid in a lump sum for all accumulated annual leave. An employee in the unclassified service who reverts to the classified service or an employee who resigns one day and is employed the next day shall retain his accumulated leave in the receiving agency. The effective date of the separation shall be the last workday.

(11) An employee who has been dismissed for cause or who has failed to give proper notice of resignation may, at the discretion of the appointing authority, be paid in a lump sum for accumulated annual

leave not to exceed the maximum amounts set forth in Section 1(2) of this regulation.

(12) Upon the death of an employee, his estate shall be entitled to receive pay for the unused portion of the employee's accumulated annual leave.

(13) Absence for a fraction or part of a day that is charged to annual leave shall be charged in hours or increments of one-quarter (1/4) hours.

Section 2. Sick Leave. (1) Each employee in the state service, except an emergency, per diem and part-time employees who work less than 100 hours a month, shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. An employee must have worked more than half of the workdays in a month to qualify for sick leave with pay. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned. Employees serving on a part-time basis who work at least 100 hours a month shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned.

(2) Full-time employees completing 120 months of total service with the state shall be credited with ten (10) additional days of sick leave upon the first day of the month following the completion of 120 months of service. In computing months of total service for the purpose of crediting ten (10) additional days of sick leave, only those months for which an employee earned sick leave shall be used. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing months of total service. Part-time employees who work at least 100 hours a month completing 120 months of total service with the state shall be credited with ten (10) additional sick leave days upon the first day of the month following the completion of 120 months of service. In computing months of total service for part-time employees who work at least 100 hours a month for the purpose of crediting ten (10) additional sick leave days, only those months in which the employee worked at least 100 hours shall be used. In those cases where an employee is changed from full time to part time, those months for which the employee earned sick leave as a full-time employee shall be counted in computing years of total service. The total service must be verified before the leave is credited to the employee's record. Former employees who have been rehired and who had been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from the violation of KRS 18A.140, 18A.145, or 18A.990.

(3) Unused sick leave may be accumulated with no maximum on accumulation.

(4) Sick leave shall accrue only when an employee is working or on authorized leave with pay. Sick leave shall not accrue when an employee is on educational leave with pay.

(5) An appointing authority shall grant accrued sick leave with pay when the employee:

(a) Receives medical, dental or optical examination or treatment;

(b) Is disabled by sickness, injury or pregnancy. The appointing authority may require a doctor's statement attesting to the inability to perform his/her duties;

(c) Is required to care for a sick or injured member of his immediate family for a reasonable period of time. The appointing authority may require a doctor's statement supporting the need for care;

(d) Would jeopardize the health of others at his duty post, because of exposure to a contagious disease;

(e) Has lost by death a parent, child, brother or sister, or the spouse of any of them, or any persons related by blood or affinity with a similarly close association. Leave under this paragraph is limited to three (3) days or a reasonable extension at the discretion of the appointing authority.

(6) At the termination of sick leave with pay not exceeding six (6) months, the appointing authority may return the employee to his former position. At the termination of sick leave with pay exceeding six (6) months, the appointing authority may return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit.

(7) An appointing authority shall grant sick leave without pay for so long as an employee is disabled by sickness, or illness, or pregnancy, and the total continuous leave does not exceed one (1) year. The appointing authority may require periodic doctor's statements during the year attesting to the continued inability to perform his/her duties. When the employee has given notice of his ability to resume his duties, the appointing authority may return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit. An employee who is unable to return to work at the end of one (1) year of sick leave without pay, after being requested to return to work at least ten (10) days prior to the expiration of such sick leave, shall be dismissed by the appointing authority. An employee granted sick leave without pay may, upon request, retain up to ten (10) days of accumulated sick leave.

(8) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave for more than half of the workdays in a month, subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(9) Absence for a fraction or part of a day that is chargeable to sick leave shall be charged in hours or increments of one-quarter (1/4) hours.

(10) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his accumulated sick leave in the receiving agency.

(11) Employees shall be credited for accumulated sick leave when separated by proper resignation, layoff, retirement, or when granted leave without pay in excess of thirty (30) working days. Former employees who are reinstated or reemployed shall have unused sick leave balances revived upon appointment and placed to their credit.

(12) In cases of absence due to illness or injury for which Workers' Compensation benefits are received, accumulated sick leave may be used in order to maintain regular full salary. If paid sick leave is used, Workers' Compensation pay benefits shall be assigned back to the state for whatever period of time an employee received paid sick leave. The employee's sick leave shall be immediately reinstated to the extent that Workers' Compensation Benefits were assigned.

(13) Application for sick leave. An employee shall file a written application for sick leave with or without pay within a reasonable time.

Except in cases of emergency illness, an employee shall request advance approval for sick leave for medical, dental or optical examination, and for sick leave without pay. In all cases of illness, an employee is obligated to notify his immediate supervisor or other designated person. Failure to do so in a reasonable period of time may be cause for denial of sick leave for the period of absence.

(14) Supporting evidence.

(a) An appointing authority may require an employee to supply supporting evidence in order to receive sick leave. A supervisor's or employee's certificate may be accepted, but a medical certificate may be required, signed by a licensed practitioner and certifying to the incapacity, examination, or treatment. An appointing authority shall grant sick leave when the application is supported by acceptable evidence.

(b) An appointing authority may place on sick leave an employee whose health might be jeopardized by job duties, whose health might jeopardize others, or whose health prevents performance of duties and responsibilities, and who, on request, fails to produce a satisfactory medical certificate.

Section 3. Family Leave. It shall be the responsibility of the appointing authority to administer family leave in compliance with the Federal Family and Medical Leave Act of 1993 and regulations promulgated thereunder found in 29 CFR Part 825. Each employee in a nonexempt, nonpolicy making position shall be entitled to family leave as set out in 101 KAR 2:100, Section 3.

Section 4. Court Leave. An employee shall be entitled to leave of absence from duties during his scheduled working hours, without loss of time or pay for that amount of time necessary to comply with subpoenas by any court, or administrative agency or body of the federal or state government or any political subdivision thereof, to serve as a juror or a witness except in cases where the employee himself or a member of his family is a party to the court or administrative proceeding. This leave shall include necessary travel time. If relieved from duty as a juror or witness during his normal working hours, the employee shall return to work.

Section 5. Compensatory Leave and Overtime. (1) It shall be the responsibility of the appointing authorities to administer the overtime and compensatory leave provisions of this section and the Fair Labor Standards Act (FLSA). An employee who is authorized to work in excess of the prescribed hours of duty shall be granted compensatory leave or paid overtime [~~on an hour for hour basis,~~] subject to the provisions of the Fair Labor Standards Act, the Kentucky Revised Statutes and this administrative regulation. [~~and Kentucky Labor Laws.~~] Compensatory leave may be accumulated or taken off in one-quarter (1/4) hour increments. The maximum amount of compensatory leave that may be carried forward from one (1) pay period to another [~~accumulated~~] shall be 200 hours.

(2) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his compensatory leave in the receiving agency.

(3) Upon separation from state service, employees will be paid for all unused compensatory leave at the greater of their regular hourly rate of pay or at the average regular rate of pay for the final three (3) years employment.

(4) An employee who has accrued compensatory leave shall be permitted by the appointing authority or his designee to take such time off if the use of such time does not unduly disrupt the operations of the agency. [~~To maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave,~~]

(5) An appointing authority or his designee may direct an employee to take accumulated compensatory time off from work to maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave. Notice must be in writing specifying the number of hours to be taken and the pay period in which the hours must be used.

(6) [~~(5)~~] An employee deemed to be "nonexempt" in relation to the FLSA shall be compensated for all hours worked in excess of forty (40) per week in accordance with the following provisions: [~~shall be paid at one and one half (1 1/2) times his regular hourly rate of pay for all hours worked in excess of forty (40) per week.~~]

(a) An employee who has not accumulated the maximum amount of compensatory leave has the option to accumulate compensatory leave on an hour and one-half (1 1/2) basis for each hour worked in excess of forty (40) per week in lieu of paid overtime.

(b) The election to receive compensatory leave in lieu of paid overtime must be in writing and such election will remain in force for a minimum of six (6) months. The election can only be changed by submitting a new form. The effective date of any change will be the first day of the next workweek following receipt of the election.

(c) An employee who does not elect compensatory leave in lieu of paid overtime shall be paid one and one-half (1 1/2) time his regular hourly rate of pay for all hours worked in excess of forty (40) per week.

(7) An employee deemed to be "exempt" in relation to the FLSA shall accumulate compensatory time on an hour-for-hour basis for all hours worked in excess of his normal work schedule.

(8) [~~(6)~~] An employee except one who is in policy making position, may, after accumulating 151 hours of compensatory leave, request that he be paid for fifty (50) hours at his regular rate of pay. If the appointing authority or his designee approves the payment, then an employee's leave balance shall be reduced accordingly.

(9) [~~(7)~~](a) All employees, except those who are in policy making positions, shall be paid for fifty (50) hours at their regular hourly rate of pay. upon accumulating at the end of the pay period 200 hours or more of compensatory leave. The employee's leave balance shall be reduced accordingly.

(b) An employee in a policy making position shall be paid for all accrued compensatory leave, not to exceed 200 hours, only upon termination from the unclassified service. An employee who reverts to a position in the classified service or an employee who resigns one day and is employed the next day shall retain his accrued compensatory leave in the receiving agency.

(10) [~~(8)~~] All employees whose prescribed hours of duty are normally less than forty (40) per week and who have not exceeded the maximum amount of compensatory time shall receive compensatory leave on an hour-for-hour basis until the total hours worked in that week reaches forty (40).

(11) [~~(9)~~] Compensatory leave used during the same workweek it is earned does not constitute "hours worked" for computing paid overtime or time and one-half (1 1/2) compensatory time.

(12) This administrative regulation shall become effective on August 1, 1994.

Section 6. Military Leave. Any employee who is an active member of the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Public Health Service Reserve, or the Kentucky National Guard shall be relieved from his civil duties upon request therefor, to serve under orders on training duty without loss of his regular compensation for a period not to exceed ten (10) working days in any one (1) federal fiscal [~~calendar~~] year, and any such absence shall not be charged to leave. Absence in excess of this amount will be charged as annual leave, compensatory leave or leave without pay. The appointing authority may require a copy of the orders requiring the attendance of an employee before granting military leave. An appointing authority shall grant an employee entering military duty a leave of absence without pay for a period of such duty not to exceed six (6) years. All accumulated annual and compensatory leave may be paid in a lump sum, at the request of the employee, upon

receiving this leave.

Section 7. Voting Leave. All employees who are eligible and registered to vote shall be allowed, upon prior request, four (4) hours, for the purpose of voting. Such absence shall not be charged against leave. Employees who are not scheduled to work during voting hours shall not receive voting leave and shall not be entitled to compensatory leave in lieu of time off to vote. Employees who are permitted to work in lieu of voting leave shall be granted compensatory leave on an hour-for-hour basis.

Section 8. Special Leave of Absence. (1) In addition to leaves as above provided, an appointing authority may grant leave without pay for a period or periods not to exceed thirty (30) working days in any calendar year.

(2) An appointing authority, with approval of the commissioner, may grant leave of absence when requested by an employee for a period not to exceed twenty-four (24) months, with or without pay for assignment to and attendance at college, university, vocational or business school for the purpose of training in subjects related to the work of the employee and which will benefit the state service, or for other purposes that are deemed to be in the best interests of the state service.

(3) An appointing authority, with approval of the commissioner, may grant an employee a leave of absence without pay for a period not to exceed one (1) year for purposes other than specified in this regulation that are deemed in the best interest of the state.

(4) An appointing authority, with approval of the commissioner, may place an employee on leave without pay for a period not to exceed thirty (30) working days pending an investigation into allegations of employee misconduct. The employee shall be notified in writing by the appointing authority that he is being placed on leave without pay and of the reasons therefor. If such investigation reveals no misconduct on behalf of the employee, he shall be made whole for the period of such leave and all records relating to the investigation will be purged from agency and Department of Personnel files. The appointing authority shall notify the employee in writing of the completion of the investigation and the action taken.

(5) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave for more than half of the workdays in a month, subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

Section 9. Absence Without Leave. An employee who is absent from duty without approval shall report the reason therefor to his supervisor immediately. Unauthorized and/or unreported absence shall be considered absence without leave and deduction of pay may be made for each period of such absence. Such absence may constitute grounds for disciplinary action.

BRERETON C. JONES, Governor
LOWELL W. CLARK, Commissioner
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
200 KAR 20:010E

Pursuant to KRS 13A.190, the Governor of the Commonwealth of Kentucky does hereby declare that proposed administrative regulation 200 KAR 20:010E, should be enacted on an emergency basis in order to implement the provisions of the 1994 Ky. Acts ch. 512, sec. 93, which provide that effective July 15, 1994, the citizens of this Commonwealth of Kentucky, meeting certain qualifications, shall be provided with an opportunity to purchase the health insurance coverage provided to state employees under KRS 18A.225 and 18A.2281, until such time as the Kentucky Health Purchasing Alliance created by this legislation becomes operational. The above-cited legislation requires the Secretaries of the Finance and Administration Cabinet and the Cabinet for Human Resources to provide a system to enroll individuals desiring to purchase insurance, and further requires the Secretary of the Finance and Administration Cabinet to promulgate an administrative regulation governing the payment of premiums for health insurance coverage. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 14, 1994.

BRERETON C. JONES, Governor
W. PATRICK MULLOY II, Secretary

FINANCE AND ADMINISTRATION CABINET

200 KAR 20:010E. Health insurance coverage for nonstate employees.

RELATES TO: 1994 Ky. Acts ch. 512, §93
STATUTORY AUTHORITY: 1994 Ky. Acts ch. 512, §93
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: The provisions of the 1994 Ky. Acts ch. 512, §93, require the Secretary of the Finance and Administration Cabinet and the Secretary of the Cabinet for Human Resources to provide a system to enroll any citizen who elects to purchase health insurance coverage pursuant to provisions of the Act. This legislation also requires that the Finance and Administration Cabinet promulgate an administrative regulation which establishes the manner in which the premiums for health insurance coverage shall be paid.

Section 1. Enrollment for Health Insurance Coverage. (1) The provisions of the 1994 Ky. Acts ch. 512, §93, provide that any citizen of the United States, who has been a Kentucky resident for the previous one (1) year period, may elect to purchase health insurance coverage as provided to state employees pursuant to KRS 18A.225 and 18A.2281. In order to purchase this health insurance coverage, an individual shall obtain a "Request for Application for Health Insurance Coverage Form" from a county field office of the Cabinet for Human Resources located in the county of the citizen's residence, or at other locations designated by the Cabinet for Human Resources, and deliver it directly to the Kentucky Department of Personnel.

(2) Upon receipt of the "Request for Application of Health Insurance Coverage Form," the Department of Personnel shall mail to the applicant a "Commonwealth of Ky. Application." This application shall be filled out completely by the individual desiring to purchase health insurance coverage, and delivered to the Kentucky

Department of Personnel, along with the applicant's annual or first quarterly premium for the health insurance coverage as established by the Kentucky Department of Personnel. The applicant's premium shall be paid in the manner established in Section 2 of this administrative regulation.

Section 2. Payment of Premiums. (1) An applicant for health insurance coverage provided for under the provisions of the 1994 Ky. Acts ch. 512, shall pay, in advance on an annual or quarterly basis, the premium charged for this coverage as established by the Kentucky Department of Personnel.

(2)(a) If an applicant elects to pay the premium for health insurance coverage on a quarterly basis, then the applicant's advance quarterly premium shall be paid in its entirety at the time of filing of the Department of Personnel's "Commonwealth of Ky. Application."

(b) The applicant's quarterly premium may be paid in monthly installments, with the first two (2) monthly installments of the quarterly premium to be paid when the applicant's "Commonwealth of Ky. Application" is filed with the Kentucky Department of Personnel. Depending on whether the applicant has elected to purchase the health insurance coverage provided by KRS 18A.2281 or 18A.225, the applicant's last monthly installment of the quarterly premium shall be postmarked or received either by the Department of Personnel or the commercial health insurance carrier by the tenth day of the month preceding the month the health insurance coverage is to take effect.

(c) Subsequent quarterly payments shall be paid in monthly installments and postmarked or received either by the Department of Personnel or the commercial health insurance carrier by the tenth day of each month starting with the first month the health insurance is effective.

(d) The last monthly installment for any quarter shall be postmarked or received either by the Department of Personnel for insurance purchased under KRS 18A.2281 or the commercial health insurance carrier, for insurance purchased under KRS 18A.2281 by the tenth day of the month preceding the first month of any quarter of health insurance coverage.

(3) The applicant's payment of premiums for health insurance provided by KRS 18A.2281, shall be made by cashier's or certified check, or by money order made payable to the Kentucky State Treasurer and delivered to the Kentucky Department of Personnel, who shall deposit these funds into the Kentucky Kare Insurance Trust Fund authorized by KRS 18A.2281.

(4) The applicant's initial payment of insurance premium or installments for commercial health insurance provided for under KRS 18A.225, shall be made by cashier's or certified check, or by money order made payable to the commercial health insurance company chosen by the applicant and delivered to the Kentucky Department of Personnel, who shall forward said payment to the health insurance company with a copy of the "Commonwealth of Ky. Application." Subsequent quarterly payments or premium installments shall be paid directly from the applicant to the commercial health insurance company.

(5) If an applicant fails to comply with the provisions of this section, then the applicant's coverage shall not go into effect, or if already in effect, the applicant's insurance coverage shall be cancelled, at which time the installments previously paid by the applicant shall be reimbursed to the applicant within thirty (30) working days.

(6)(a) Except as provided in paragraph (b) of this subsection, the initial health insurance coverage provided by the 1994 Ky. Acts ch. 512, §93, shall not be effective until the first day of the second calendar month following the Kentucky Department of Personnel's receipt of the applicant's payment of the entire annual or quarterly premium.

(b) If the applicant elects to pay the quarterly premium on an installment basis, then the applicant's health insurance coverage shall be effective the first day of the second calendar month following the Department of Personnel's or the commercial health insurance carrier's receipt of payment of the first two (2) months installment of the quarterly premium, provided the final installment of the quarterly premium is received within the time established under Section 2(2)(d) of this administrative regulation.

Section 3. (1) Material Incorporated by Reference. The following material is incorporated by reference:

(a) Kentucky Department of Personnel "Request for Application for Health Insurance" (1994);

(b) Kentucky Department of Personnel "Commonwealth of Ky. Application" (1994).

(2) This material may be inspected, obtained, or copied at the Kentucky Department of Personnel, 200 Fair Oaks Lane, Suite 511, Frankfort, Kentucky 40601, 8 a.m. to 4:30 p.m., E.D.T., Monday through Friday.

W. PATRICK MULLOY, II, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 15, 1994 at 8 a.m.

STATEMENT OF EMERGENCY
301 KAR 4:200E

The department has entered into a cooperative agreement with the University of Kentucky and Cyprus AMAX Mineral Corporation to open lands owned by these two entities to public use. It is necessary to promulgate this emergency regulation (a) immediately to control public activities on these lands; (b) to allow the department immediately to appoint agents to sell use permits to the public; and (c) to open previously closed areas to hunting seasons which will begin before an ordinary administrative regulation can be adopted. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation was filed with the Regulations Compiler on July 1, 1994.

BRERETON C. JONES, Governor
C. TOM BENNETT, Commissioner

TOURISM CABINET
Department of Fish and Wildlife Resources

301 KAR 4:200E. Cyprus AMAX and Robinson Forest Wildlife Management Areas use requirements and restrictions.

RELATES TO: KRS 150.170, 150.175, 150.250, 150.620, 150.990

STATUTORY AUTHORITY: KRS 13A.350, 150.015, 150.021, 150.170, 150.175, 150.240, 150.700

EFFECTIVE: July 14, 1994

NECESSITY AND FUNCTION: To provide for the protection, conservation, use and management of the lands, waters, and wildlife associated with the Cyprus AMAX Wildlife Management Area and Robinson Forest Wildlife Management Area by detailing requirements and restrictions for permit agents and users of these areas.

Section 1. Definitions. (1) "The area" means the Cyprus AMAX Wildlife Management Area and the Robinson Forest Wildlife Management Area, those lands in Breathitt, Knott and Perry counties owned by the Cyprus AMAX Mineral Company or the University of Kentucky and managed by the department pursuant to agreements between the department, Cyprus AMAX Mineral Company and the University of Kentucky.

(2) "Group" means any family, organization or gathering using the area for a specific event.

(3) "Private inholding" means lands completely surrounded by the

area but not owned by the University of Kentucky or the Cyprus-AMAX Mineral Company.

(4) "Security deposit" means a bond, irrevocable letter of credit from a financial institution, or benefits on a certificate of deposit irrevocably assigned to the department.

Section 2. User Permits. Persons sixteen (16) years of age or older on the area for any purpose shall have in their possession a nontransferable user permit except:

(1) Employees, agents or persons under contract to Cyprus AMAX Mineral Company, the University of Kentucky or the department performing their official duties; or

(2) Persons on the area as a necessary part of their jobs or to protect public safety or well-being; or

(3) Persons on the area for educational purposes and accompanied by officials of the University of Kentucky; or

(4) Persons conducting research on the area with the written approval of the department, Cyprus AMAX Mineral Company or the University of Kentucky; or

(5) Persons hiking on the Boardinghouse Interpretive Trail from the mouth of Boardinghouse Branch to the Robinson Forest Fire Tower.

Section 3. Private Inholdings and Closed Watersheds. (1) Private inholdings shall be open to hunting or fishing only when the area is open to hunting or fishing.

(2) Persons shall not hunt, fish, train dogs or conduct field trials on lands owned by the University of Kentucky in the Clemons Fork, Coles Fork and Lewis Fork watersheds or in the Buckhorn Creek watershed below Hurricane Branch and above Lewis Fork.

Section 4. Event Permits. (1) In lieu of individual user permits, a person representing a group using the area may have in possession an event permit.

(2) The event permit shall apply to all members of the group.

(3) An event permit shall specify:

(a) Its period of validity, not to exceed four (4) days;

(b) The activity in which the group will engage;

(c) The name of the group;

(d) The approximate number of persons in the group; and

(e) The name and address of the person representing the group.

(4) The department shall not issue event permits for activities in which game or fish are taken.

Section 5. Permit Applications. (1) Persons shall apply for individual or event permits on forms provided by the department.

(2) Persons shall not knowingly provide false information on permit applications.

(3) Fees.

(a) Individual permits: ten (10) dollars annually;

(b) Event permits: twenty-five (25) dollars per event.

(4) Persons applying by mail shall include a certified check or money order for the correct amount.

(5) Applicants shall provide all information required on the application form. The department shall return incomplete applications to the applicant.

(6) Permits issued before February 29, 1996, shall be valid through that date. After February 29, 1996, permits shall be valid from March 1 through the end of February of each year.

(7) The department may:

(a) Limit the number of event permits issued; or

(b) Assign specific locations for events; or

(c) Deny applications for events which would interfere with management objectives for the area or unduly interfere with other uses or users; or

(d) Revoke individual or event permits for violations of the terms of the application or this administrative regulation.

(8) The department shall keep all applications, waivers of liability and copies of permits for a minimum of two (2) years after the permits expire.

Section 6. Permit Replacement or Refund. (1) Persons who lose their permits may make a written request to the department for a duplicate and include a four (4) dollar replacement fee. The department shall issue a duplicate upon verification that a permit was purchased.

(2) The department shall issue refunds only to persons who have purchased multiple individual permits valid for the same period of time.

(3) The department shall issue refunds only to representatives of groups who have purchased multiple event permits for the same event.

(4) Persons wishing a refund for multiple permits shall make a written request to the department and enclose the permit for which a refund is sought.

(5) The department shall issue refunds if it can verify that multiple permits were issued.

Section 7. Prohibited Activities. Except for persons exempted from permit requirements by Section 2(1), (2), (3), and (4) of this administrative regulation, persons on the area shall not:

(1) Swim for recreational purposes;

(2) Camp except in designated camping areas;

(3) Have a fire, except in designated camping areas;

(4) Operate motorized vehicles off existing roads or beyond where signs indicate vehicles are not allowed;

(5) Operate vehicles not licensed or legal for use on public streets;

(6) Block roads or gates;

(7) Discharge firearms, except while hunting;

(8) Construct structures or stands except portable deer stands, which hunters shall remove daily;

(9) Use boats;

(10) Hunt or fish in areas designated by signs as closed to hunting or fishing;

(11) Enter areas designated by signs as no trespassing areas;

(12) Act contrary to instructions from officials of the department, the University of Kentucky or the Cyprus AMAX Mineral Company.

Section 8. Fishing Restrictions. (1) Persons fishing on all impounded bodies of water on the area shall:

(a) Fish only from July 1 through December 31; and

(b) Fish only during daylight hours.

(2) Persons fishing on Starfire Lake shall abide by the following limits:

Species	Creel Limit	Size Limit
Largemouth bass	1	20"
Sunfish	10	none
Channel catfish	4	15"

Section 9. Permit Agent Qualifications, Issuing Fees, Issuance Requirements, and Reporting Requirements. (1) Event permits are available only from the department.

(2) The department may designate as permit agents to sell individual permits:

(a) The county clerks of Breathitt, Knott, Perry, Floyd, Lee or Letcher counties; or

(b) Businesses in Breathitt, Knott, Perry, Floyd, Lee or Letcher counties customarily open at least fifty-six (56) hours per week, year round.

(3) Businesses wishing to become permit agents shall:

(a) Complete an issuing agent application form and agreement; and

(b) Pay in advance for permits consigned; or

(c) Furnish a security deposit equal in value to the permits consigned.

(4) Permit agents.

(a) Shall retain an issuing fee of forty (40) cents from each permit sold.

(b) Shall not charge additional fees for issuing permits.

(c) Shall issue permits sequentially.

(d) Shall not knowingly record false information on the permit.

(e) Shall, on or before the tenth day of the month following the month of sale:

1. Report to the department the number of permits issued;

2. Remit monies collected, less the issuing fee; and

3. Send the department completed and signed permit applications.

(f) Shall, on or before March 25:

1. Report to the department the number of permits issued for the preceding year and the amount of money remitted; and

2. Return all unissued permits.

(g) Shall pay the department for unissued permits not returned.

(h) Shall file reports on forms supplied by the department.

(5) If the permit agent does not remit monies due, the department shall make collection through the agent's security deposit.

(6) If an error is made in issuing that cannot be clearly and legibly corrected, permit agents shall void the permit, issue a new one and return the voided permit in its entirety with the next monthly report.

Section 10. Revoking Permit Agent Designations. (1) The department may revoke permit agent designations if:

(a) The permit agent is delinquent in submitting reports and monies four (4) times in a twelve (12) month period; or

(b) The permit agent fails to respond to a reminder notice and does not report and remit by the 25th of the month the report is due; or

(c) The permit agent's check will not clear the bank and the permit agent does not make restitution by a certified check, cashier's check or money order within five (5) working days of notification.

(d) The permit agent does not remit fees owed as a result of an audit.

(2) A permit agent whose designation is revoked shall not be eligible for reinstatement for a period of twelve (12) months.

(3) If a designation is revoked the department shall:

(a) Collect all unissued permits and unreported sales; and

(b) Collect all monies due through the permit agent's security deposit.

Section 11. Audits. The department may audit the consignment, records and reports pertaining to the sale of permits without prior notice during the permit agent's regular business hours.

Section 12. Material Incorporated by Reference. (1) The following forms are incorporated by reference:

(a) Application for Appointment as Issuing Agent, Cyprus-AMAX and Robinson Forest User Permit.

(b) Issuing Agent Agreement for Cyprus AMAX and Robinson Forest User Permits.

(c) Agreement For Access to Designated Cyprus AMAX - Robinson Forest Lands: Individual Permit.

(d) Agreement for Access to Designated Cyprus AMAX - Robinson Forest Lands: Event Permit.

(2) This material may be obtained from, or examined or copied at, the offices of the Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, Kentucky, between the hours of 8 a.m. and 4:30 p.m. eastern time.

C. TOM BENNETT, Commissioner
CRIT LUALLEN, Secretary

DAVID H. GODBY, Chairman
APPROVED BY AGENCY: June 10, 1994
FILED WITH LRC: July 14, 1994 at 11 a.m.

STATEMENT OF EMERGENCY
502 KAR 45:015E

In order to begin recruitment for a new cadet class in July, 1994 it is necessary to advertise the qualifications for applicants. House Bill 864 changed the educational requirements and accordingly requires changes in candidate selection regulations along with clarifications in related areas. No offer of employment will be made until after July 15, 1994, but compliance with the new law will be required for applicants in the coming class. This regulation established guidelines and also explains portions of existing regulations for applicants. This regulation will be replaced by an ordinary regulation to be filed with the Regulations Compiler on July 11, 1994.

BRERETON C. JONES, Governor
JERRY W. LOVITT, Commissioner

DEPARTMENT OF STATE POLICE

502 KAR 45:015E. Qualifications.

RELATES TO: 1994 Ky. Acts ch. 16 [~~KRS 16.040~~]
STATUTORY AUTHORITY: KRS 16.040, 16.080
EFFECTIVE: July 11, 1994
NECESSITY AND FUNCTION: KRS 16.040 sets forth the basic qualifications for appointment as an officer. KRS 16.080 vests in the commissioner the authority to adopt administrative regulations for enlistment. This administrative regulation establishes the procedure to be used to determine whether applicants possess the basic qualifications.

Section 1. Applicants shall submit a birth certificate to establish that they meet the age qualification of KRS 16.040(2)(a).

Section 2. Applicants shall submit to a background investigation which may include a polygraph examination to establish the good moral character qualification of KRS 16.040(2)(b).

Section 3. Applicants who are offered conditional employment as cadet troopers shall submit to a medical examination to establish the good health qualification of KRS 16.040(2)(b).

Section 4. Applicants who are citizens of another country at the time of application shall submit naturalization certificates prior to employment to establish the citizenship qualification of KRS 16.040(2)(c).

Section 5. Applicants who are citizens of another state at the time of application shall submit Kentucky motor vehicle operator's licenses prior to employment to establish the residency qualification of KRS 16.040(2)(c).

Section 6. Applicants shall submit a college transcript verifying college credits and degrees or a high school diploma with a copy of their DD-214 or notarized letter from law enforcement employer certifying sworn officer employment [~~high school diplomas or GED equivalency certificates~~] to establish the education qualification of KRS 16.040(2)(d). [~~Five (5) years of full time employment as a law enforcement officer or police administrator shall suffice to meet the education qualification.~~]

Section 7. All persons appointed as officers shall be physically

able to safely perform essential job tasks, either with or without reasonable accommodation, including but not limited to reading, writing, operating a police pursuit vehicle at high speed under all weather and lighting conditions, running, climbing stairs and fences and hillsides, overcoming violent physical resistance from persons arrested or detained, handcuffing persons arrested or detained, lifting and carrying or dragging incapacitated persons, firing a handgun with either hand and reloading, and firing and reloading a shotgun. To determine these physical qualifications, a medical examination shall be conducted of applicants who are offered employment as cadet troopers. The medical examination may include physical tests to determine ability to perform the essential job tasks. Applicants hired as cadet troopers shall be required to perform simulated essential job tasks during basic training at the Kentucky State Police Academy. Inability to safely perform essential job tasks, either with or without reasonable accommodation, shall be grounds for disqualification or dismissal.

JERRY W. LOVITT, Commissioner
APPROVED BY AGENCY: July 11, 1994
FILED WITH LRC: July 11, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
502 KAR 45:035E

In order to begin recruitment for a new cadet class in July, 1994 it is necessary to advertise the qualifications for applicants. House Bill 864 changed the educational requirements and accordingly requires changes in candidate selection regulations along with clarifications in related areas. No offer of employment will be made until after July 15, 1994, but compliance with the new law will be required for applicants in the coming class. This regulation established guidelines and also explains portions of existing regulations for applicants. This regulation will be replaced by an ordinary regulation to be filed with the Regulations Compiler on July 11, 1994.

BRERETON C. JONES, Governor
JERRY W. LOVITT, Commissioner

DEPARTMENT OF STATE POLICE

502 KAR 45:035E. Application.

RELATES TO: 1994 Ky. Acts ch. 16 [~~KRS 16.040, 16.050~~]
STATUTORY AUTHORITY: KRS 16.050, 16.080
EFFECTIVE: July 11, 1994
NECESSITY AND FUNCTION: KRS 16.040 and 16.050 provide that the Commissioner of the Kentucky State Police and the State Police Personnel Board may adopt such administrative regulations as necessary to assure appointment of qualified officers to the department. This administrative regulation requires applicants to complete a written application form.

Section 1. Applications shall be made on forms prescribed by the commissioner and provided by the department. The application for employment form was adopted May 1, 1994, [~~December 1, 1992,~~] and is hereby incorporated by reference. Application forms may be inspected and copied by contacting the Kentucky State Police Personnel Section, 919 Versailles Road, Frankfort, Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday.

Section 2. Failure to submit the application by the specified due date or to comply with all instructions for completion and submission shall disqualify the applicant from further consideration.

JERRY W. LOVITT, Commissioner
APPROVED BY AGENCY: July 11, 1994
FILED WITH LRC: July 11, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
502 KAR 45:055E

In order to begin recruitment for a new cadet class in July, 1994 it is necessary to advertise the qualifications for applicants. House Bill 864 changed the educational requirements and accordingly requires changes in candidate selection regulations along with clarifications in related areas. No offer of employment will be made until after July 15, 1994, but compliance with the new law will be required for applicants in the coming class. This regulation established guidelines and also explains portions of existing regulations for applicants. This regulation will be replaced by an ordinary regulation to be filed with the Regulations Compiler on July 11, 1994.

BRERETON C. JONES, Governor
JERRY W. LOVITT, Commissioner

DEPARTMENT OF STATE POLICE

502 KAR 45:055E. Oral interview.

RELATES TO: 1994 Ky. Acts ch. 16 [~~KRS 16.050~~]
STATUTORY AUTHORITY: KRS 16.050
EFFECTIVE: July 11, 1994
NECESSITY AND FUNCTION: KRS 16.050 requires the State Police Personnel Board to establish open competitive examination of applicants for employment as officers. This administrative regulation establishes the oral interview component of the examination.

Section 1. (1) Applicants who have completed the written examination shall be eligible to participate in the oral interview component of the selection process. Oral interviews shall be conducted by oral interview panels appointed by the commissioner, who shall determine the number of applicants to be interviewed. The commissioner shall determine the number of applicants to be interviewed based upon the number of available vacant funded positions and projections based upon past selection processes of the number of applicants necessary to process in order to fill the available positions. Applicants shall be selected for interviews in rank order as determined by their scores on the written examination. The commissioner may deviate from the rank order of score only when necessary to correct a manifest imbalance in the representation of minorities or women in the pool of qualified applicants.

(2) Each oral interview panel shall consist of three (3) members, at least one (1) of whom shall be a female or a member of a minority group, and at least one (1) of which shall be a sworn officer. To ensure fairness and consistency, panel members shall receive training related to interview methodology and equal employment opportunity law.

(3) Members of the oral interview panels shall disclose each instance in which they are personally acquainted with an applicant to be interviewed or with any member of the applicant's immediate family, and that applicant shall be interviewed by another panel.

Section 2. (1) Each interview shall be structured so that all applicants are asked the same initial questions and rated in the same manner, although panel members may ask supplementary questions if they deem it necessary.

(2) Each applicant interviewed shall be scored in each of five (5) [~~six (6)~~] categories by each panel member. The categories shall be:

(a) Maturity, emotional stability and ego strength;

(b) Conscientiousness and persistence;

(c) Social boldness and venturesomeness;

(d) Self-assuredness; and
(e) [~~Self-sufficiency; and~~
~~(f)~~] Self-discipline.

For each category, the applicant shall be scored on a range from zero to six (6) [~~five (5)~~], with six (6) [~~five (5)~~] being the highest score and zero being the lowest score.

(3) The oral interview score shall constitute sixty (60) percent of the overall score. As soon as practicable after the oral interview, each applicant shall be advised of his score and ranking, and shall be requested to inform the department in writing as to whether the applicant wishes to continue to participate in the selection process by consenting to a background investigation.

JERRY W. LOVITT, Commissioner
APPROVED BY AGENCY: July 11, 1994
FILED WITH LRC: July 11, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
502 KAR 45:065E

In order to begin recruitment for a new cadet class in July, 1994 it is necessary to advertise the qualifications for applicants. House Bill 864 changed the educational requirements and accordingly requires changes in candidate selection regulations along with clarifications in related areas. No offer of employment will be made until after July 15, 1994, but compliance with the new law will be required for applicants in the coming class. This regulation established guidelines and also explains portions of existing regulations for applicants. This regulation will be replaced by an ordinary regulation to be filed with the Regulations Compiler on July 11, 1994.

BRERETON C. JONES, Governor
JERRY W. LOVITT, Commissioner

DEPARTMENT OF STATE POLICE

502 KAR 45:065E. Background investigation.

RELATES TO: 1994 Ky. Acts ch. 16 [~~KRS 16.040, 16.050~~]
STATUTORY AUTHORITY: KRS 16.050, 16.080
EFFECTIVE: July 11, 1994
NECESSITY AND FUNCTION: KRS 16.040 and 16.050 direct the Commissioner of the Department of State Police and the State Police Personnel Board to assure the fitness of candidates for employment. This administrative regulation establishes a background investigation as a component of the selection process.

Section 1. Applicants who have completed the written examination and the oral interview and who have requested to remain in the selection process shall be required to submit to a background investigation which may include a polygraph examination.

Section 2. Background investigations shall be conducted by individuals selected by the commissioner. Applicants who have lived in another state shall be investigated by an appropriate law enforcement agency in that state, at the request of the commissioner. Applicants shall not be considered for employment until the background investigation is completed. Reports of all background investigations shall remain confidential and shall be filed in headquarters.

Section 3. Background investigators may discontinue an investigation and recommend disqualification or deferral when the investigation reveals facts or circumstances which constitute grounds for disqualification or deferral.

Section 4. Background investigators may express opinions about the suitability of applicants for employment, but their opinions shall be expressed in writing and supported by specific factual reasons. The commissioner may give such weight to an opinion by an investigator as he deems appropriate.

Section 5. All reports of background investigations shall be confidential. Information obtained as a result of a background investigation shall not be disseminated. Reports of background investigations shall be filed at Kentucky State Police Headquarters in a secure file to which only the commissioner or persons specifically designated by the commissioner shall have access.

JERRY W. LOVITT, Commissioner
APPROVED BY AGENCY: July 11, 1994
FILED WITH LRC: July 11, 1994 at 4 p.m.

STATEMENT OF EMERGENCY
902 KAR 8:051E

This emergency administrative regulation repeals 902 KAR 8:050 which provides for the Local Health Personnel Advisory Council for Local Health Departments and administrative support of the council. House Bill 631 (1994 Ky. Acts ch. 336) which becomes effective July 15, 1994 describes in detail the Local Health Department Employment Personnel Council and the responsibility of the cabinet to establish policies and procedures for the personnel program. KRS Chapter 13A prohibits repeating or summarizing legislation in administrative regulation. House Bill 631 (1994 Ky. Acts ch. 336) which becomes effective July 15, 1994 provides that the Cabinet for Human Resources shall establish policies and procedures for the local health department personnel program. An emergency regulation is necessary in order to have procedures mandated by House Bill 631 in effect. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation has been filed with the Regulations Compiler.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Health Services

902 KAR 8:051E. Repeal of 902 KAR 8:050.

RELATES TO: KRS 211.170(1),(2), 212.170(4), 212.870
STATUTORY AUTHORITY: KRS 194.050, 194.170, 211.170, 212.170, 1994 Acts ch. 336
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: KRS 211.190, 212.170, and 212.870 requires the Cabinet to supervise the personnel functions of local health departments. House Bill 631 (1994 Acts ch. 336) amends KRS Chapter 211 by establishing the Local Health Department Employment Personnel Council. This administrative regulation repeals 902 KAR 8:050 because KRS Chapter 13A prohibits the promulgation of an administrative regulation that repeats or summarizes a statute.

Section 1. 902 KAR 8:050, Local Health Personnel Advisory Council, is hereby repealed.

RICE C. LEACH, M.D., Commissioner
MASTEN CHILDERS II, Secretary
APPROVED BY AGENCY: July 5, 1994
FILED WITH LRC: July 15, 1994 at 10 am.

STATEMENT OF EMERGENCY
902 KAR 8:120E

This emergency administrative regulation governs the leave provisions applicable for employees of local health departments. These provisions address hours of work, earning of annual and sick time, holiday schedules, other leave provisions and the earning of compensatory time. House Bill 631 (1994 Ky. Acts ch. 336) which becomes effective July 15, 1994 provides that the Cabinet for Human Resources shall establish policies and procedures for the local health department personnel program. An emergency regulation is necessary in order to have procedures mandated by House Bill 631 in effect. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation has been filed with the Regulations Compiler.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Health Services

902 KAR 8:120E. Leave provisions applicable to employees of local health departments.

RELATES TO: KRS 211.170(1), (2), 212.170(4), 212.870
STATUTORY AUTHORITY: KRS 194.050, 211.090, 212.170, 1994 Ky. Acts ch. 336
EFFECTIVE: July 15, 1994 at 11 a.m.
NECESSITY AND FUNCTION: KRS 211.090, 212.170, and 212.870 requires the cabinet to supervise the personnel functions of local health departments. House Bill 631 provides that the cabinet shall establish policies and procedures for the local health department personnel program. This administrative regulation governs the leave provisions applicable for employees of local health departments. These provisions address hours of work, earning of annual and sick time, holiday schedules, other leave provisions and the earning of compensatory time.

Section 1. Hours of Work. (1) The normal work week shall consist of thirty-seven and one-half (37.5) hours per week.

(a) The normal work day shall be 8 a.m. to 4:30 p.m. Monday through Friday.

(b) The hours of work and days of work, other than normal, of the agency or specific employees may be changed by the appointing authority to provide for flexibility in meeting particular work requirements of the agency or specific employees whose schedules may require them to work different hours.

(2) The hours worked in excess of the thirty-seven and one-half (37.5) hours during the standard work week are subject to compensatory time and overtime provisions of this administrative regulation.

(3) The standard pay period shall consist of seventy-five (75) hours.

Section 2. Earning of Annual Leave. (1) Each full-time employee except seasonal, temporary, and emergency employees shall be allowed to earn annual leave credit at the following rate:

Years of Service	Annual Leave Hours Earned Per Pay Period/Per Year
0 to 5 years	3.5 hours per pay period/91.0 hours per year
5 to 10 years	4.4 hours per pay period/114.4 hours per year
10 to 15 years	5.2 hours per pay period/135.2 hours per year
15 years & over	6.1 hours per pay period/158.6 hours per year
20 years & over	7.0 hours per pay period/182 hours per year

(2) Annual leave for full-time employee[:]s shall accrue only when an employee has been in pay status at least thirty-seven and one-half (37.5) hours of the standard pay period. The employee shall be credited with additional leave credit upon the first day of the pay period following the pay period in which the leave was earned.

(3) Each part-time employee except a seasonal, temporary, or emergency employee, designated as serving on a part-time 100 hour basis, who works an average of 100 hours a month shall earn annual leave credit at the following rate:

Years of Service	Annual Leave Hours Earned Per Pay Period/Per Year
0 to 5 years	2.1 hours per pay period/54.6 hours per year
5 to 10 years	2.6 hours per pay period/67.6 hours per year
10 to 15 years	3.1 hours per pay period/80.6 hours per year
15 years & over	3.6 hours per pay period/93.6 hours per year
20 years & over	4.2 hours per pay period/109.2 hours per year

(4) In computing years of total service for the purpose of allowing annual leave for designated part-time 100 hour employees, only those months in which the employee worked at least 100 hours or was on educational leave with pay shall be used. Employees designated as part-time 100 hour employees who work less than 100 hours a month shall not earn annual leave for that month.

(5) Annual leave shall accrue only if an employee is working or on authorized leave with pay. Annual leave shall not accrue when an employee is on authorized educational leave with pay.

(6) The maximum amount of annual leave earned by full-time employees that may be accumulated and carried forward to the next calendar year shall not exceed the following amounts:

Years of Service	Maximum Amount
0 - 5 years	225.0 hours
5 - 10 years	277.5 hours
10 - 15 years	337.5 hours
15 - 20 years	390.0 hours
Over 20 years	450.0 hours

(7) The maximum amount of annual leave for a designated part-time 100 hour employee who works an average of 100 hours per month that may be accumulated and carried forward to the next calendar year shall not exceed the following amounts:

Years of Service	Maximum Amount
0 - 5 years	120 hours
5 - 10 years	148 hours
10 - 15 years	180 hours
15 - 20 years	208 hours
Over 20 years	240 hours

(8) Annual leave earned in excess of that which is allowed to be accumulated shall be converted to sick leave at the end of the calendar year. Annual leave shall not be granted in excess of that earned.

Section 3. Use of Annual Leave Credit. (1) An employee who has accumulated annual leave credit, upon request and approval of the appointing authority, shall be granted leave subject to the operating requirements of the agency.

(2) Employees shall be charged with annual leave for absence only on days upon which they would otherwise work and receive pay.

(3) Absence for a fraction or part of a day that is chargeable to annual leave shall be charged in fifteen (15) minute periods.

(4) Employees shall be paid a lump sum for accumulated annual leave, not to exceed the maximum amounts as set forth in Section 2 of this administrative regulation, if separated by proper resignation,

layoff, retirement, or granted leave without pay in excess of three (3) pay periods.

(5) Upon the death of an employee, the employee's estate shall be entitled to be paid for the unused portion of the employee's accumulated annual leave, not to exceed the maximum amount allowable.

(6) Annual leave shall not be advanced or taken until it is earned.

(7) Absences due to sickness, injury, or disability in excess of accumulated sick leave, may be charged against annual leave if approved by the appointing authority.

Section 4. Earning of Sick Leave. (1) A full-time employee, except an emergency employee, shall earn sick leave at the rate of three and one-half (3.5) hours per pay period.

(a) An employee shall have worked or been in pay status for at least thirty-seven and one-half (37.5) hours of the seventy-five (75) standard hours in each pay period in order to accumulate sick leave.

(b) The employee shall be credited with sick leave upon the first day of the pay period following the pay period in which the leave was earned.

(2) An employee designated as a part-time 100 hour employee, except an emergency employee, who works 100 hours or more per month shall earn sick leave at the rate of two and one-tenth (2.1) hours per pay period. A part-time 100 hour employee shall be credited with additional sick leave upon the first day of the month following the month in which the leave was earned.

(3) A full-time employee completing ten (10) years of total service with an agency shall be credited with seventy-five (75) additional hours of sick leave.

(4) An employee designated as a part-time 100 hour employee completing ten (10) years of total service with an agency shall be credited with forty-five (45) additional hours of sick leave.

Section 5. Uses of Sick Leave Credit. (1) The appointing authority, upon proper request, may grant sick leave with pay to an employee with sufficient leave credit, if the employee:

(a) Receives medical, psychiatric, dental, or optical examination or treatment; [~~or~~]

(b) Is disabled by sickness or injury; [~~or~~]

(c) Is required to provide personal care for a sick or injured member of his immediate family; [~~or~~]

(d) If an employee would jeopardize the health of others at his duty post because of exposure to a contagious disease; or

(e) Has lost by death a member of the employee's immediate family.

(2) Sick leave granted for death in the employee's immediate family shall be limited to three (3) days or a reasonable extension at the discretion of the appointing authority.

(3) If possible, an employee shall request sick leave absence with or without pay prior to the intended use.

(4) If an employee is unexpectedly required to be absent from work in case of illness, the employee shall notify the employee's supervisor or other designated person. Failure to do so in a reasonable time period may be cause for denial of the sick leave for the period of absence or disciplinary action.

(5) An employee may be required by the appointing authority to present a statement in the form of personal affidavit, physician's statement, or other statement certifying to the incapacity, examination, and treatment during the time for which sick leave was taken.

(6) If an employee requests leave in excess of five (5) working days a statement from the employees' physician shall accompany the request for leave. The physician statement shall contain the following:

(a) In the physician's judgement the employee is incapable of performing the essential duties of the job; [~~and~~]

(b) Length of time that the physician would estimate that the employee's illness or disability will last; [~~and~~]

(c) [~~Any~~] Restrictions which would render the employee in the physician's judgement incapable of performing the essential duties of the job; and

(d) [~~Any~~] Special considerations that the physician recommends be applied to accommodate the employee once released to return to work.

(7) An appointing authority may place an employee, who fails to provide a medical statement upon request, on sick leave if:

(a) The employees health might jeopardize others; or

(b) The employees health prevents performance of his duties and responsibilities.

(8) Absence for a fraction or part of a day that is chargeable to sick leave shall be charged in fifteen (15) minute periods.

(9) An employee who is transferred or otherwise changed from one (1) agency to another shall retain accumulated sick leave in the receiving agency.

(10) Former employees who are reinstated or reemployed shall have their previous accumulated and unused sick leave balances reinstated.

(11) Sick leave may be utilized in cases of absence due to illness or injury for which worker's compensation benefits are received for lost time to the extent of the differences between these benefits and the employee's regular salary.

Section 6. Maternity Leave. (1) The appointing authority shall grant a maternity leave of absence to an employee because of pregnancy. Maternity leave shall not exceed seven (7) pay periods, unless the appointing authority approves additional maternity leave provided the total leave does not exceed twenty-six (26) pay periods.

(2) The employee on maternity leave shall use accumulated sick leave credit if available.

(a) If sick leave is not available, the employee shall use accumulated annual and compensatory time.

(b) If all leave credit is exhausted, the employee shall be placed on leave without pay.

(3) The employee shall submit a written request for maternity absence which shall include a doctor's statement indicating the expected date of delivery.

(a) The request shall be submitted to the appointing authority as soon as practical to allow for adjustments in the work schedule during the employee's absence.

(b) Additional information from the employee's doctor may be required if there are complications and the period of absence begins sooner than agreed, extends further than agreed, or requires the use of maternity leave beyond the normal seven (7) pay periods.

Section 7. Sick Leave Without Pay. (1) An appointing authority may approve sick leave without pay upon request of an employee for reasons provided for in Section 6 of this administrative regulation and this section.

(2) An employee shall have used accumulated annual, sick, and compensatory leave credit prior to approved leave without pay.

(3) The amount of continuous sick leave without pay approved by an appointing authority shall not exceed twenty-six (26) pay periods.

(4) If an employee approved for leave with pay[~~,~~] exhausts accumulated annual, sick, and compensatory leave credit, the employee shall be placed on sick leave without pay, provided the total absence does not exceed twenty-six (26) pay periods.

(5) The appointing authority may require periodic doctor's statements during the sick leave without pay period attesting to the employee's inability to perform job duties.

Section 8. Return from Sick Leave With or Without Pay. (1) At the termination of sick leave with pay not exceeding thirteen (13) pay periods, the appointing authority shall return the employee to his former position. At the termination of sick leave with pay exceeding thirteen (13) pay periods, the appointing authority shall return the employee to a position for which he is qualified and which resembles

his former position as closely as circumstance permit.

(2) If an employee on approved sick leave without pay has given notice of his ability to resume his duties, the appointing authority shall return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit. If there is no available position which the employee is qualified or is willing to accept, the employee shall be laid off in accordance with administrative regulation 902 KAR 8:080.

(3) An employee who is unable to return to work at the end of one (1) year of sick leave without pay, after being requested by the appointing authority to return to work at least ten (10) days prior to the expiration of sick leave without pay, may be dismissed by the appointing authority.

Section 9. Sharing of Sick Leave. (1) An employee who has accrued a sick leave balance of more than seventy-five (75) hours may, with the approval of the appointing authority, request the transfer of a specified amount of the employee's sick leave balance in excess of seventy-five (75) hours to another named employee who is authorized to receive sick leave.

(2) The appointing authority, may approve the amount of sick leave received under this section, if any, if:

(a) The employee or a member of his immediate family suffers from a medically certified illness, injury, impairment, or physical or psychiatric condition which has caused, or is likely to cause, the employee to go on leave for at least ten (10) consecutive working days; [~~and~~]

(b) The employee's need for absence and use of leave are certified by a licensed practicing physician[(~~s~~)]; and

(c) The employee has exhausted his accumulated sick leave, annual leave, and compensatory leave balances; and

(3) Leave may be transferred from an employee of one agency to an employee within the same agency or may be transferred from an employee of one agency to an employee of another agency. The department shall maintain records of leave transferred between employees and the utilization of transferred leave.

(4) If an employee is on leave transferred under this section, he shall receive the same treatment with respect to salary, wages, and employee benefits.

(5) Salary and wage payments made to an employee while on leave transferred under this section shall be made by the agency employing the person receiving the leave. Leave transferred under this section which remains unused shall be returned, on a prorated basis, to the employees who transferred the leave if the appointing authority finds that the leave is no longer needed and will not be needed at a future time in connection with the illness or injury for which the leave was transferred to an employee in his agency.

(6) No employee shall directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other employee for the purpose of interfering with the employee's right to voluntarily contribute leave when authorized under this section.

Section 10. Court Leave. An employee shall be entitled to a leave of absence from duties, without loss of pay or time, on days during which the employee is subpoenaed by a court to serve as a juror or witness except in those cases where the employee or a member of the employee's family is a party plaintiff. If relieved from duty as a juror or witness during normal working hours, the employee shall return to work.

Section 11. Military Leave. (1) An employee who is an active member of the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Public Health Service Reserve, or the Kentucky National Guard shall be relieved from his duties without the loss of pay or time, upon request, to serve under orders on training duty for a period not to exceed seventy five (75) hours in any one (1) calendar year. The appointing authority may require a copy of the orders requiring the attendance of an employee before granting military leave.

(2) The appointing authority shall grant an employee entering military duty a leave of absence without pay for a period of active duty not to exceed six (6) years. Accumulated annual leave and compensatory leave may be paid in lump sum at the request of the employee, upon being placed on leave.

Section 12. Voting Leave. The appointing authority shall allow each employee ample time to vote. The absence shall not be charged against accumulated leave.

Section 13. Special Leave of Absence. (1) The appointing authority may grant leave without pay for a period or periods not to exceed thirty (30) working days in any calendar year.

(2) An appointing authority, with the approval of the department, may grant a leave of absence with or without pay for a period not to exceed twenty-six (26) pay periods for the following purposes:

(a) Assignment to and attendance at college, university, or business school for the purpose of training in subjects related to the work of the employee and which will benefit the agency; or

(b) Purposes other than the above which are deemed to be in the best interest of the agency.

(3) An agency shall comply with the Family and Medical Leave Act, PL 103-3, if applicable.

(4) Special leave of absence approved under this section may be continued for an additional period not to exceed twenty-six (26) pay periods with the approval of the department.

Section 14. Absence Without Leave. Unauthorized or unreported absence shall be considered absence without leave and deduction of pay may be made by the appointing authority for each period of such absence. The absence without leave may constitute grounds for disciplinary action.

Section 15. Holidays. (1) Agency full-time employees shall be given a holiday on the following days:

(a) The first day of January and one (1) extra day;
(b) The third Monday in January;
(c) The third Monday in February;
(d) One-half (1/2) day for Good Friday;
(e) The last Monday in May;
(f) The fourth day of July;
(g) The first Monday in September;
(h) The fourth Thursday in November plus one (1) extra day;
(i) The twenty-fifth of December and one (1) extra day;
(j) Presidential election day.

(2) If any of the days enumerated above falls on a Saturday, the preceding Friday shall be observed as the holiday. If the day enumerated falls on a Sunday, the following Monday shall be observed as the holiday. If an extra day is provided for it shall be observed as stated by the department.

(3) A full-time employee shall be in pay status on the work day prior to the holiday in order to receive the holiday benefit.

(4) Full-time employees required to work on a holiday shall accrue compensatory time for the time worked.

Section 16. Earning of Compensatory Time. (1) A full-time employee authorized by the appointing authority to work in excess of the prescribed thirty-seven and one-half (37.5) hours of duty in one (1) week shall accumulate compensatory time in fifteen (15) minute periods for all time worked that the employee does not receive overtime pay subject to the provisions of the Fair Labor Standards Act, 29 USC 206, and Kentucky Wage and Labor Law KRS Chapter 337. The maximum amount of compensatory time that can be

accumulated shall be 200 hours.

(2) An employee shall have the prior approval of the appointing authority or the employee's immediate supervisor before compensatory leave may be earned.

Section 17. Using Accumulated Compensatory Time. (1) An employee who has accrued compensatory time shall be permitted by the appointing authority to take compensatory time off if practical and upon proper request by the employee.

(2) An employee who has accumulated at least thirty (30) hours of compensatory time may be paid for the accumulated leave by the appointing authority upon written request. If payment is approved by the appointing authority, it shall be at the employee's regular rate of pay and in thirty (30) hour increments.

(3) An agency, with the approval of the department, may elect to compensate employees at the rate of time and one-half (1/2) for each hour worked in excess of forty (40) hours per week.

(4) If an employee has accumulated the maximum amount of compensatory leave, the appointing authority shall pay the employee for at least fifty (50) hours of accumulated compensatory leave at the employee's regular rate of pay and reduce the employee's compensatory leave balance accordingly.

(5) The appointing authority may direct an employee to use accumulated compensatory time to reduce accumulation to an acceptable level.

(6) Upon separation from service or transfer to another agency, unused compensatory time shall be reimbursed in a lump sum payment to the employee.

(7) Upon the death of an employee, the employee's estate shall be paid for any unused accumulated compensatory time.

RICE C. LEACH, MD, Commissioner
MASTEN CHILDERS II, Secretary
APPROVED BY AGENCY: July 5, 1994
FILED WITH LRC: July 15, 1994 at 11 a.m.

STATEMENT OF EMERGENCY
902 KAR 8:130E

This emergency administrative regulation governs participation of local health department employees in political activities. House Bill 631 (1994 Acts Ky. ch. 336) which becomes effective July 15, 1994 provides that the Cabinet for Human Resources shall establish policies and procedures for the local health department personnel program. An emergency regulation is necessary in order to have procedures mandated by House Bill 631 in effect. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation has been filed with the Regulations Compiler.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Health Services

902 KAR 8:130E. Participation of local health department employees in political activities.

RELATES TO: KRS 211.170(1), (2), 212.170(4), 212.870
STATUTORY AUTHORITY: KRS 194.050, 211.090, 212.170, 1994 Ky. Acts ch. 336
EFFECTIVE: July 15, 1994 at 11 a.m.
NECESSITY AND FUNCTION: KRS 211.090, 212.170, and 212.870 requires the cabinet to supervise the personnel functions of local health departments. House Bill 631 provides that the cabinet shall establish policies and procedures for the local health department personnel program. This administrative regulation governs participation of local health department employees in political activities.

Section 1. Political Activities of Employees. An employee in the classified service shall not:

(1) Serve on or for any political committee, party, or other similar organization; [or]

(2) Serve as a delegate or alternate to a caucus or party convention, but may vote in the selection of delegates to a party convention and in the selection of precinct committeemen and committeewomen; [or]

(3) Solicit or handle political contributions; [or]

(4) Solicit the sale of or sell items or tickets for any political party, faction, or candidate; however, an employee may voluntarily purchase the [such] items or tickets; [or]

(5) Serve as an officer of a political club, as a member or officer of any of its committees, or address a club on any partisan political matters, or be active in organizing it; [or]

(6) Serve in connection with the preparation for, organizing or conducting a political meeting or rally or address a political meeting on any partisan political matter except to vote; [or]

(7) Engage in partisan activity at the polls during primary, regular, or special elections in the position of checker, challenger, or watcher; [or]

(8) Solicit votes and assist voters to mark ballots; [or]

(9) Become a candidate for nomination or election to a federal, state, county, or municipal office, except for a school board district office, which is to be filled in an election in which party candidates are involved or for which compensation is paid; [or]

(10) Solicit others to become candidates for nomination or election to those offices described above; [or]

(11) Distribute partisan campaign literature or material; [or]

(12) Initiate or circulate partisan political nominating petitions; or

(13) Canvass a district or solicit political support for a party, faction, or candidate, [either] in person or in writing.

RICE C. LEACH, M.D., Commissioner
MASTEN CHILDERS II, Secretary
APPROVED BY AGENCY: July 5, 1994
FILED WITH LRC: July 15, 1994 at 11 a.m.

STATEMENT OF EMERGENCY
902 KAR 8:140E

This emergency administrative regulation describes the process of appointing directors of health departments and the provision of coverage or noncoverage of the provisions of the merit system. House Bill 631 (1994 Ky. Acts ch. 336) which becomes effective July 15, 1994 provides that the Cabinet for Human Resources shall establish policies and procedures for the local health department personnel program. An emergency regulation is necessary in order to have procedures mandated by House Bill 631 in effect. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation has been filed with the Regulations Compiler.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Health Services

902 KAR 8:140E. Appointment of a health officer or a health department director of a local health department.

RELATES TO: KRS 211.170(1), (2), 212.170(4), 212.870
STATUTORY AUTHORITY: KRS 194.050, 211.090, 212.170, 1994 Ky. Acts ch. 336
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: KRS 211.090, 212.170, and 212.870 requires the cabinet to supervise the personnel functions of local health departments. House Bill 631 provides that the cabinet shall establish policies and procedures for the local health department personnel program. KRS 212.170, 212.230, and 212.870 describes the requirements for and process of appointing a health officer or a health department director for a local health department. This administrative regulation describes the process of appointing a health officer or a health department director of a health department and the provision of coverage or noncoverage of the merit system.

Section 1. Appointment of Health Officer. (1) An agency shall be under the direction of a health officer appointed in accordance with the provisions of KRS 212.170, 212.230, or 212.870.

(2) The health officer shall be an unclassified employee and hold office at the pleasure of both the board of health of the agency and the department.

(3) The health officer in the unclassified service shall be subject to the following administrative regulations:

(a) 902 KAR 8:070, Recruitment, examination, and certification of eligibles for local health departments; and

(b) 902 KAR 8:080, Initial appointment, probationary period, and performance evaluation; and

(c) 902 KAR 8:120, Leave provisions applicable to employees of local health departments; and

(d) 902 KAR 8:140, Appointment of a health officer or a health department director of a local health department.

Section 2. Appointment of Health Department Director. (1) In the absence of a health officer provided for in this administrative regulation, an agency shall be under the direction of a health department director who shall meet minimum qualifications of education and experience established by the department.

(2) A qualified individual appointed or promoted to the position of health department director after the effective date of this administrative regulation, shall be employed in the unclassified service and hold office at the pleasure of both the board of health of the agency and the department.

(3) Individuals who are in the position of physician director or health department director shall maintain their status after the effective date of this administrative regulation.

(4) A health department director in the unclassified service shall be subject to the following administrative regulations:

(a) 902 KAR 8:070, Recruitment, examination, and certification of eligibles for local health departments; and

(b) 902 KAR 8:080, Initial appointment, probationary period, and performance evaluation; and

(c) 902 KAR 8:120, Leave provisions applicable to employees of local health departments; and

(d) 902 KAR 8:140, Appointment of health officers of local health departments.

Section 3. Removal of a Health Officer or Health Department Director in the Unclassified Service. (1) Except as provided for in Section 2(3) and (4) of this administrative regulation, if a health officer or health department director in the unclassified service is removed by the board of health or the department, he shall be notified in writing, and within fourteen (14) days may make a written request for a hearing.

(2) If no request is made, the removal shall become effective upon the expiration of fourteen (14) days.

(3) If a request for hearing is made, the hearing shall be held at the office of the agency within fourteen (14) calendar days after the request is received by the board of health of the agency.

(4) The health officer or director of health shall not be removed until the hearing has been held and a decision rendered by the board of health of the agency and the department.

(5) Upon termination of employment, an employee who was promoted to the health officer or health department director position may revert to the position from which he was promoted or may be considered for a vacant position for which he qualifies in the agency. The employee shall have had at least five (5) years of continuous service with the agency prior to the promotion to be considered for reversion. The reversion shall be subject to the approval of the board of health of the agency.

(6) An employee originally appointed to the health officer or health department director position, may only be reverted to a position in the classified service for which he qualifies.

RICE C. LEACH, M.D., Commissioner
MASTEN CHILDERS II, Secretary
APPROVED BY AGENCY: July 5, 1994
FILED WITH LRC: July 15, 1994 at 11 a.m.

STATEMENT OF EMERGENCY
903 KAR 5:270E

Under KRS the administrative body is required to implement this regulation in order to have sufficient authority for the declaring of a maximum benefit rate. Therefore, in order to properly establish a maximum weekly unemployment insurance rate for the year beginning July 1, 1994, the Cabinet for Human Resources needs to implement this emergency regulation. An ordinary administrative regulation will not suffice because the correct weekly benefit amount would not be declared in a timely manner. This emergency regulation will be replaced by an ordinary administrative regulation in accordance with KRS Chapter 13A. The ordinary administrative regulation will be filed with the Regulations Compiler prior to June 15, 1994.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Employment Services
Division of Unemployment Insurance

903 KAR 5:270E. Maximum weekly benefit rates.

RELATES TO: KRS 341.380
STATUTORY AUTHORITY: KRS 194.050, 341.380
EFFECTIVE: June 23, 1994
NECESSITY AND FUNCTION: KRS 341.380 requires the Secretary for Human Resources to determine the average weekly wage for insured employment. Fifty-five (55) percent of this amount adjusted to the nearest multiple of one (1) dollar constitutes the maximum weekly unemployment insurance benefit rate for those workers whose benefit year commences on or after July 1, 1994 [~~1993~~], and prior to July 1, 1995 [~~1994~~]. This administrative regulation applies the mathematical computation required by statute and contains the determination of the maximum weekly benefit rate.

Section 1. The secretary finds the following to exist:

(1) The "total monthly employment" reported by subject employers

for the calendar year of 1993 [~~1992~~] was 17,399,143 [~~16,834,545~~];

(2) The "average monthly employment," obtained by dividing the total monthly employment by twelve (12), was 1,449,929 [~~1,402,879~~];

(3) The "total wages" reported by subject employers for the calendar year of 1993 [~~1992~~] was $31,764,500,460 [~~30,342,989,530;~~]

(4) The "average weekly wage" for the calendar year of 1993 [~~1992~~] for insured employment, obtained by dividing the average monthly employment into total wages for such year and dividing by fifty-two (52), was $421.30 [~~415.94~~];

(5) Fifty-five (55) percent of the average weekly wage of $421.30 [~~415.94~~] for the calendar year of 1993 [~~1992~~] was $231.72 [~~228.77~~].

Section 2. On the basis of the above findings, and in accordance with KRS 341.380(3), the maximum weekly benefit rate for those workers whose benefit year commences on or after the first day of July, 1994 [~~1993~~], and prior to the first day of July, 1995 [~~1994~~], is determined to be $232 [~~229~~].

TREVA B. WRIGHT-DONNELL, Commissioner
MASTEN CHILDERS II, Secretary
APPROVED BY AGENCY: June 6, 1994
FILED WITH LRC: June 23, 1994 at 2 p.m.

STATEMENT OF EMERGENCY
904 KAR 2:361E

This emergency administrative regulation repeals 904 KAR 2:360, Transitional and at-risk child care. The Department for Social Services will assume responsibility for the Transitional and At-risk Child Care Programs effective July 14, 1994. This is as a result of the Title IV-A single state agency being changed from the Department for Social Insurance to the Cabinet for Human Resources. In order to enable the transition of responsibilities as stated in the Supportive Services State Plan, it is necessary for us to repeal the Department for Social Insurance administrative regulation that currently governs these programs. With the Department for Social Services assuming responsibility for these programs, we are providing "seamless services" in the Child Care Programs as outlined in KRS 199.8982. This emergency administrative regulation shall be replaced by an ordinary administrative regulation. The ordinary administrative regulation was filed with the Regulations Compiler for the July, 1994 filing.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Social Insurance
Division of Management and Development

904 KAR 2:361E. Repeal of 904 KAR 2:360.

RELATES TO: 45 CFR 256, 45 CFR 257
STATUTORY AUTHORITY: KRS 194.050, 45 CFR 205.100
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: The Cabinet for Human Resources shall administer the Transitional and At-risk Child Care Programs. The administrative regulation 904 KAR 2:360, Transitional and at-risk child care, set forth the technical and financial requirements of these child care programs. The Department for Social Services has assumed responsibility for the Transitional and At-risk Child Care Programs. This is as a result of the single state agency being changed from the Department for Social Insurance to the Cabinet for Human Resources. Information contained in 904 KAR 2:360, Sections 2 and 3, has been relocated to 905 KAR 2:140, Child day care programs. The definition for "at-risk" has also been relocated to 905 KAR 2:140. Since the body of information contained in this administrative regulation has now been incorporated into another administrative regulation in another department, 904 KAR 2:360, Transitional and at-risk child care, is no longer necessary.

Section 1. 904 KAR 2:360, Transitional and at-risk child care, is hereby repealed.

JOHN CLAYTON, Commissioner
MASTEN CHILDERS II, Secretary
APPROVED BY AGENCY: June 30, 1994
FILED WITH LRC: July 15, 1994 at 11 a.m.

STATEMENT OF EMERGENCY
905 KAR 1:330E

This emergency regulation implements provisions of HB 223 and HB 479, enacted by the 1994 General Assembly. This administrative regulation may expedite the investigative process by requiring joint investigations with law enforcement and revising the time frame for reporting initial results of an investigation from 48 hours to 72 hours. These revisions will result in a more efficient use of staff time. It is necessary to promulgate an emergency regulation to implement the provisions of these new statutes by the effective date of July 15, 1994. This emergency regulation shall be replaced by an ordinary administrative regulation. The ordinary regulation shall be filed with the Regulations Compiler on or about July 15, 1994.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Social Services

905 KAR 1:330E. Child protective services.

RELATES TO: KRS 600.10, 605.130, 620.010 to 620.050, 620.990, 1994 Ky. Acts ch. 207, 217
STATUTORY AUTHORITY: KRS 194.050, 605.150, 620.180
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: KRS 194.050 requires the Secretary for the Cabinet for Human Resources to promulgate administrative regulations necessary to operate programs and fulfill the responsibilities vested in the Cabinet for Human Resources. This administrative regulation sets forth the procedures for child protection investigations of abuse, neglect, or dependency by the Department for Social Services in compliance with KRS 605.150 and 620.180.

Section 1. Definitions. (1) "Child protective services" means preventive and corrective services directed toward:

(a) Strengthening family life;

(b) Improving the abilities of parents to carry out parental responsibilities;

(c) Assuring for each child a safe and nurturing home;

(d) Safeguarding the rights and welfare of abused, neglected or dependent children;

(e) Assisting parents or other persons responsible for the care of a child in recognizing and remedying conditions detrimental to the welfare of a child; and

(f) Identifying and correcting conditions in society which contribute to the neglect, abuse or dependency of a child.

(2) "Failure to locate" means the identifying information about the family is insufficient for locating them or the family has moved and their new location is not known.

(3) "Found and substantiated" means a type of physical abuse, sexual abuse, neglect or dependency not originally reported by the

referral source was found and substantiated during the investigation;

(4) "Prior involvement" means:

(a) Either the child or caretaker are currently registered DSS clients or have been registered clients within one (1) year of the reported fatality; or

(b) A protective service investigation was completed in regard to the child or caretaker, regardless of the status of the investigation, within one (1) calendar year preceding the reported fatality.

(5) "Some indication" means some indicators that abuse, neglect or dependency may exist or some circumstances or conditions are sufficient to arouse suspicion;

(6) "Substantiated" means an admission of abuse, neglect or dependency by the persons responsible or a judicial determination of abuse, neglect or dependency or strong circumstantial or other supportive indicators that abuse, neglect, or dependency by the persons responsible exist;

(7) "Unsubstantiated" means there is no evidence, indicators or justification for suspicion of abuse, neglect or dependency.

Section 2. Receiving a Report. (1) The Department for Social Services shall accept reports of child abuse, neglect or dependency as governed by KRS 620.030.

(a) The home telephone numbers of family services workers, family services office supervisors, and the child abuse hotline shall be made available to agencies in the community who may encounter child abuse, neglect or dependency for emergency reports after normal office hours unless a formalized on call system exists.

(b) The intake worker shall attempt to elicit from the person reporting the suspected abuse, neglect or dependency as much information about the child's circumstances, as possible, including:

1. Specific information as to the nature and extent of abuse or neglect;

2. The causes of the abuse;

3. The location of the child and family;

4. Determine if there have been previous incidents;

5. Witnesses to the incident which caused the child's conditions;

6. Whether the reporting person or others have taken any action;

7. Present danger to child or staff; and

8. The reporting persons identity and relationship to the child assuring him that his identity shall not be revealed unless the court orders his name divulged.

(c) Anonymous reports which give sufficient information and report abuse, neglect or dependency by a caretaker shall be investigated.

(2) Acceptance criteria.

(a) The department shall receive and investigate reports of physical abuse if there are reported to be or have been observable marks on a child which were allegedly inflicted nonaccidentally by a caretaker. The department may accept a report of physical abuse or risk of physical injury if no observable marks are seen and if:

1. There are reports of a child being hit in critical areas of the body, including but not limited to, the head, face, neck, genitals, abdomen, and kidney areas;

2. There are reports of threats of physical injury; or

3. There are allegations of injuries to a child which are the result of altercations between the child and the custodian. The worker shall explore the precipitating factors, the degree of appropriateness of force used by the caretaker and the need for further services to assist in eliminating the violent behavior in the home.

(b) The department shall receive and investigate reports which allege neglect of a child by a caretaker which may result in harm to the physical health and safety of the child in the following areas:

1. Hygiene neglect exists if:

a. A child has physical symptoms that require treatment due to poor care; or

b. The child's physical health and safety is negatively affected due to an act or omission by the caretaker;

2. Supervision neglect exists if the caller has reason to believe that the physical health and safety of the child may be negatively affected by lack of necessary and appropriate supervision;

3. Food neglect exists if a child shows symptoms of:

a. Malnutrition;

b. Dehydration;

c. Food poisoning; or

d. Not having been provided adequate food for a period of time that interferes with the health needs of the child based on age and other conditions;

4. Clothing neglect exists if a child suffers:

a. Illness;

b. Exposure; or

c. Frostbite due to inadequate clothing or the clothing is insufficient to protect the child from the elements.

5. Environmental neglect exists if a serious health and safety hazard is present and the caretaker is not taking appropriate action to eliminate the problem;

6. Educational neglect exists if the school system has exhausted their resources to correct the problem and the caretaker's negligence prevents the child from attending school or receiving appropriate education; and

7. Medical neglect exists if a child is not receiving medical assessment or treatment for an injury or illness or disability which if left untreated may:

a. Be life-threatening;

b. Result in permanent impairment;

c. Interfere with normal functioning and worsen without treatment; or

d. Be a serious threat to the child's health due to the outbreak of a vaccine preventable disease.

(c) The department shall receive and investigate reports which allege sexual abuse of a child committed or allowed to be committed by a caretaker or the risk that an act of sexual abuse, sexual exploitation, or prostitution shall be committed on a child. Reports of sexual abuse shall include contacts and interactions in which a child is used to sexually stimulate or gratify another person. An investigation may be conducted without a specific allegation if a child has a sexually transmitted disease and the child exhibits physical or behavioral indicators of abuse.

(d) The department may receive and investigate reports which allege risk of sexual harm to a child, if there are factors which cause a person to believe that an act of sexual abuse may be committed on a child.

(e) The department shall receive and investigate reports which allege emotional injury or risk of emotional injury of a child by a caretaker as governed by KRS 600.020(20).

(f) The department shall receive and investigate reports which allege a child is dependent as governed by KRS 600.020(15).

Section 3. The cabinet shall not investigate reports of abuse or neglect by a noncaretaker but shall comply with KRS 620.030(1).

(1) Staff shall keep a log of these referrals specifying the date received and date referred to the Commonwealth's or county attorney and local law enforcement.

(2) Staff may at the request of local law enforcement provide assistance in interviewing alleged child abuse victims.

(3) Staff may refer to other agencies referrals not requiring mandatory child protection services investigations.

(4) The following criteria shall be used in identifying referrals not requiring investigation:

(a) The victim of the report is age eighteen (18) or over;

(b) There is insufficient information to locate the child or explore leads to locate;

(c) The problem described does not meet the statutory definitions of abuse, neglect or dependency;

(d) Reporter notifies the department that a child is injured, but the

reporter does not allege injuries were the result of abuse or neglect;

(e) If the report concerns custody changes or custody related issues or lifestyles issues without allegations of abuse, neglect or dependency;

(f) Corporal punishment appropriate to the age of the child without injuries, marks or bruises or substantiated risk of harm. This type of corporal punishment by foster parents shall be reported;

(g) Allegations of abuse or neglect of a fetus;

(h) Allegations of spouse abuse to a married youth, under age eighteen (18). These reports shall be forwarded to the adult services worker.

(i) If the report concerns a specific incident previously investigated and no new information or change in the child's circumstances is communicated.

Section 4. Report of Suspected Child Abuse, Neglect, Dependency. Following the receipt of the report, the DSS-115, Report of Suspected Child Abuse, Neglect, Dependency, herein incorporated by reference, shall be completed and the report investigated. Investigations shall be conducted according to the following time frames as governed by KRS 620.040(1):

(1) If the report indicates the child is in imminent danger, the investigation shall be initiated within the hour.

(2) If the report indicates nonimminent danger of physical or sexual contact, effort shall be made to have personal contact with the child and family within twenty-four (24) hours, but contact shall be made within forty-eight (48) hours. Unsuccessful attempts to locate shall be documented in the investigative narrative.

(3) If the report indicates nonimminent danger, not involving physical or sexual contact, the investigation shall be initiated within twenty-four (24) hours. Efforts shall be made to have personal contact with the child and family within forty-eight (48) hours. Unsuccessful attempts to locate shall be documented in the investigative narrative.

(4) Reports of dependency if a child is not in imminent danger shall be investigated within forty-eight (48) hours.

Section 5. Reports of Abuse, Neglect, and Dependency. (1) If a report of alleged child abuse, neglect or dependency in an approved foster home or adoptive home is received, the supervisor shall immediately contact the family services district manager who shall designate a worker to conduct the investigation. If abuse or neglect or dependency is substantiated or there is some indication, a review of the home shall be completed. The decision to close or continue using the home shall be made by the family services district manager based on pertinent available information.

(2) If a report of alleged child abuse or neglect in a licensed child care facility, private child care or a day care center is received the worker shall notify the Division of Licensing and Regulation. This notification shall be documented in the case and may be done by phone and followed up in writing. If possible, the investigation shall be coordinated and conducted jointly; however, if not possible within the designated time frame, the worker shall proceed with the investigation. In joint investigations the DSS worker shall with the Division of Licensing and Regulation staff:

(a) Conduct an entrance interview with the facility administrator or designee outlining the nature of the report without disclosing the name of the reporter; and

(b) Discuss their findings privately prior to conducting an exit interview.

(3) If a report of alleged child abuse or neglect in a Cabinet for Human Resources operated treatment facility is received the worker shall immediately telephone the Office of Inspector General who shall investigate the report. The phone contact shall be followed by completing a DSS-115 and further action shall not be taken unless specifically requested by the Office of Inspector General.

(4) Reports of abuse or neglect involving school personnel.

(a) If allegations of child abuse or neglect have been made about a school employee, with the incident occurring during school time or other school related activities, the worker shall:

1. Complete the DSS-115 and forward copies to appropriate law enforcement and county or commonwealth attorney;

2. Interview child and natural parents or legal guardians. Conduct the interview away from school grounds, if possible;

3. Interview the alleged perpetrator away from the school grounds if possible.

(b) If the referral is unsubstantiated, further action shall not be taken. Information regarding the finding of the report may be shared with the alleged perpetrator and the custodial parent. Other information shall be requested through open records procedures.

(c) If the referral is substantiated or shows some indication of abuse or neglect: the worker shall notify the appropriate supervisor of the alleged perpetrator that an investigation has been conducted and of the results of the investigation.

(5) If a report of alleged child abuse or neglect in a certified family child care home is received the worker shall notify the Department's Child Care Services Branch.

Section 6. Prior Reports. Before investigating the referral regarding a child unknown to the local office, the district data center shall be contacted to determine the existence of prior reports or if there exists a closed case or case opened elsewhere in the state. This information shall be documented in the case record but failure to secure this information shall not delay the investigation within the stated time frames.

Section 7. Initial Investigation. Information necessary for determining the validity of the report, and if valid, the existence of imminent danger and risk to the child shall be obtained during the investigation. Investigations shall entail face-to-face contact with the alleged victim. Victims, if of appropriate age, and if possible, parents or caretakers, appropriate household and family members, and alleged perpetrators shall be interviewed.

(1) If determining whether to interview the child, or parent or caretaker first, consideration shall be given to the:

(a) Nature of the referral;

(b) Current location of the child;

(c) Indicated risk to the child; and

(d) Known violence on the part of the parent.

(2) A child shall not be interviewed in the presence of alleged perpetrators or others who may put pressure on the child.

(3) If the worker is unable to contact the parents or caretaker, he shall notify the supervisor and document the case record.

(4) Collateral contacts shall be interviewed if the validity or severity of the report cannot be determined from the interviews. Collateral sources may include:

(a) Officers of the court;

(b) School personnel;

(c) Neighbors;

(d) Medical personnel;

(e) Law enforcement officers; and

(f) Personnel of other agencies.

(5) Medical and psychological examinations may be required if the report alleges that the child has suffered sufficient physical harm of a serious nature, emotional harm or emotional injury. The worker, if possible, shall obtain a copy of the report.

(6) The worker shall cooperate with law enforcement.

(a) Child sexual abuse investigations shall be investigated jointly with law enforcement. The investigation shall be initiated within time frames established in Section 4 of this administrative regulation.

(b) Attempts shall be made to ensure that the worker shall not impede the criminal investigation; however, the worker's primary responsibility shall be the protection of the child.

(7) To prevent a child from experiencing multiple interviews a videotaped interview may be appropriate.

Section 8. Alleged Perpetrators Age Twelve (12) or Older. Reports involving perpetrators in a caretaking role under the age of twelve (12), shall be investigated. However, the child shall not be identified as the alleged perpetrator on the DSS-150, Initial Results of Child Abuse, Neglect, Dependency Investigation, herein incorporated by reference.

Section 9. Interviewing Children in Schools. Worker's shall have the authority to investigate child abuse, neglect or dependency reports at school without parental consent. The worker shall inform appropriate school personnel of the need to interview a child regarding a referral. Details of the allegation and investigation shall only be given to school personnel with a legitimate interest in the case.

Section 10. Notice of Results of Investigation. The worker shall complete the notification section of the DSS-115, and forwarded to law enforcement and the county or commonwealth attorney within seventy-two (72) ~~[forty-eight (48)]~~ hours of receipt of the report, exclusive of weekends and holidays as governed by KRS 620.040(1).

Section 11. Medical Neglect of Disabled Infants. (1) The department shall be notified of known or suspected instances of the withholding of medically indicated treatment of disabled infants with life threatening conditions in hospitals or health care facilities. Federally funded hospitals and health care facilities shall be given the department's toll-free child abuse hotline number.

(2) If a report is received, hotline staff shall notify a child protective services specialist in central office if received during working hours or a designated person at home if received outside working hours.

(3) Central office staff shall contact one (1) of the department's medical consultants who shall investigate the report.

Section 12. Denied Entry to a Home for a Protective Service Investigation. (1) The worker shall not enter a home during the investigation of a report if an adult is not present in the home. If there is reason to believe the child is in imminent danger, law enforcement shall be contacted for assistance.

(2) If the parents or caretakers of a child refuse the worker entry to the child's home or refuse to allow the child to be interviewed, the worker with approval of the supervisor may request an order from the court.

(a) If the court issues a search warrant the worker may accompany law enforcement officers if the warrant is served.

(b) With the exception of removal of a committed child, the worker shall not remove a child from the home without a court order to remove;

(c) If the court refuses to issue a search warrant, the family service worker shall document the attempts to secure one in the narrative.

Section 13. Risk Assessment. During an investigation of alleged child abuse and neglect, the worker shall assess the strengths of the family and risk to the child by completing the DSS-897, Child Protective Services Risk Assessment Guidelines, herein incorporated by reference. The worker shall not be required to complete the DSS-897 if the:

(1) Child is found dependent;

(2) Alleged perpetrator is not the child's primary caretaker;

(3) Investigation determines the referral to be unsubstantiated or unable to locate;

(4) Investigation of a child fatality determines there are no surviving children in the home; or

(5) The supervisor deems the use of the DSS 897 to be unnecessary, based on the training and experience of the worker, or inappropriate; and the reasons are documented in the case record.

Section 14. Child Fatality Investigations. (1) Reports that a child fatality has occurred due to abuse or neglect by a parent, guardian or other person exercising custodial control or supervision of the child shall be investigated by the department.

(2) If the alleged perpetrator was not a parent or in a caretaker role, the reports shall be forwarded as governed by KRS 620.030.

(3) If it is determined that the department has prior involvement, the commissioner, the Office of Communications and the general counsel of the cabinet shall be notified of the situation immediately through the established channels of communication. The notification shall include:

(a) Name and age of victim;

(b) Known circumstances around the death;

(c) Description of physical injuries or medical condition of the child;

(d) Names, ages and location of other children in the family;

(e) Brief description of the department's history with the family caretaker;

(f) Actions taken by the department to date and future actions to be taken; and

(g) Involvement of other professionals in the case.

(4) It may be advisable that staff who have had prior direct involvement with the case not be assigned to conduct the investigation.

(a) The assigned investigator, if feasible, shall consult with social workers who have direct involvement with the case prior to investigating.

(b) A joint investigation with law enforcement shall be conducted if possible. The designated investigator shall be cooperative, but not usurp the roles of law enforcement or the coroner or interfere with their respective investigations. The investigator shall contact appropriate law enforcement and coroner to clarify roles and establish a common channel of communication, particularly if the intake information indicates other children are present in the household.

(c) Worker safety in a potentially dangerous setting shall be considered during the course of the investigation. Collateral contacts with medical personnel, the coroner and other appropriate persons may be made to assess potential danger to staff.

(5) The worker shall determine the safety of any surviving children through immediate assessment to assure their safety. The risk assessment guidelines shall be completed if there are surviving children in the home, unless the family services office supervisor deems the use of the risk assessment guidelines inappropriate and the reason is documented in the case record. This assessment includes:

(a) Arranging for physical examinations to check for injuries to the surviving children, if indicated;

(b) Determining whether there has been any history of prior abuse, neglect to the children or other family members by the alleged perpetrator;

(c) Interviewing the children to assess present emotional condition and to determine to what extent they may have witnessed family violence;

(d) Interviewing the parent or caretaker to observe interaction with children and to discuss parent or family history of the caretaker;

(e) Making collateral contacts with neighbors, schools and extended family;

(f) Determining whether the surviving children were present during the time the deceased child received injuries and witnessed what occurred; and

(g) Initiating mental health counseling immediately, if appropriate, for the emotional stability of the children;

(6) If parental rights have been terminated and there has been ongoing contact or other special circumstances, the decision to notify biological parents shall be made by the manager or designee. The Department of Public Advocacy, Protection and Advocacy Division, shall be notified if a child, identified as a protection and advocacy

client, dies as a result of abuse or neglect and the perpetrator is in a caretaker role.

(7) In the case of the death of a youthful offender, the sentencing circuit court and the Parole Board shall be notified.

(8) If a fatality occurs in either a foster home, Cabinet for Human Resources facility, psychiatric unit or hospital or private child care facility, and parental rights are intact, efforts shall be made to immediately notify the parents. The judge of the committing court and the guardian ad litem for the deceased child shall be informed of the fatality in writing within three (3) working days after receipt of the report.

(9) The following procedures apply to staff in a Cabinet for Human Resources facility if a death occurs:

(a) Emergency medical services and police shall be contacted immediately. Location and phone number shall be posted by the telephone in each program;

(b) The program director, branch manager, and division director through normal chain of command are to be notified immediately. The division director shall notify the Commissioner for Social Services;

(c) Staff on duty shall not disturb the body or the immediate area beyond any action necessary to provide emergency resuscitation techniques, or to check for vital signs;

(d) Notification shall be given to the local office of the coroner in compliance with KRS 72.020;

(e) Notification to the family and community worker shall be delivered, after direction by the program director, who shall select the individual to present the information in a therapeutic manner to the person;

(f) Detailed documentation shall be entered in the case record by staff describing the event, including:

1. The time the coroner was notified;
2. The time pronouncement of death was given;
3. Names of staff involved; and
4. Notification of parents and guardians. Pertinent notifications and significant facts related to the death shall be fully documented.

(g) A final report shall be prepared by the program director to be submitted to the Commissioner for Social Services through established channels.

(h) The record of the juvenile shall be maintained at the facility until a final report of the coroner is entered into the record. A copy of this report shall be sent to the Commissioner for Social Services through established channels.

(10) Funeral arrangements shall remain the responsibility of the natural parents unless parental rights have been terminated.

(a) Staff shall explore with the natural parents their ability to accept financial responsibility for the funeral. Personal and family resources, including trust fund and insurance in the name of the child, shall be exhausted prior to approval of department funds for funeral and burial expenses. Costs shall have prior approval by the appropriate level of supervision.

(b) The selection of a funeral home, mortician, casket, and burial lot shall be based on estimates of cost which are reasonable and on consideration of the choice of the natural parents.

(c) Clothing for burial may be provided by the natural family, foster family, or may be purchased by the department staff.

(d) Flowers may be selected by the department staff and billed to the department.

(e) Arrangements for religious services may be made with a clergyman of the faith of the natural parents. If the faith of the natural parents is unknown, a clergyman of the faith of the foster parents may conduct services.

Section 15. Determining the Validity of the Report. After the interviews and the necessary information is gathered, the social worker shall determine the validity of the report and submit the DSS-150, within thirty (30) working days of the receipt of the report from the reporting person, unless there are extenuating circumstances which are documented in the narrative. The family services office supervisor or designee shall review, sign and date the original DSS-150.

Section 16. Central Registry. (1) Reports of alleged abuse, neglect, or dependency are computerized for the purposes of compiling statistical information, aiding in diagnostic treatment, and providing management with a means for program evaluation.

(2) Reports that are found to be unsubstantiated or unable to locate shall include:

(a) Child demographics;
(b) The type of report alleged;
(c) Source of report; and
(d) Status of case.

(3) Reports that are found to be substantiated, and some indication shall include:

(a) Both child and alleged perpetrator demographics;
(b) Specific characteristics relating to the report;
(c) Type of report; and
(d) Status and relationship of alleged perpetrator to child involved.

(4) The only information that shall be released from the child abuse, neglect, or dependency central registry is statistical information. Social agencies demonstrating a legitimate interest may be told if a case exists in the registry, but all requests for details related to that case shall go through open records process.

Section 17. Photographs. Photographs may be taken of a child during a protective service investigation without parental consent. If it appears that photographs of abused or neglected children are necessary for proof of abuse or neglect, it is advised that law enforcement take the photographs. If a family services worker takes the photographs, there shall be a witness and documentation made of the subject, date, and witnesses to the photograph.

Section 18. Case Planning. (1) If a case is to be opened, a maximum of fifteen (15) working days shall be allowed to open the case and complete the case plan.

(a) Priority for opening cases shall be given to cases in which the child is at greatest risk for harm.

(b) Within ten (10) working days of the decision to open a case, the family services office supervisor shall assign or transfer the case for treatment.

(2) The case plan shall be based on assessment and goal formation. It shall include a limited number of attainable, specific objectives agreed upon between the social worker and the family. The case plan shall take into account the following:

(a) The assets and strengths of the family unit and its members;

(b) The options, priorities and needs of the family unit and its members;

(c) The clarification and definition in behavior-specific terms of what needs to change and what new skills need to be learned;

(d) The identification and impact of community forces over which the family may have little or no control;

(e) The opinions of expert consultants regarding medical, mental health, legal and other factors;

(f) The input from referring agencies; and

(g) The resources available within the agency and the community and delineation of roles and functions to bring about the specified changes.

(3) The social worker shall develop a treatment plan designed to provide a safe environment for the child and engage the commitment and cooperation of the family. Family members and children of appropriate age shall be encouraged to participate in the development and updating of case plans.

(4) A copy of the case plan shall be given to the parent or caretaker. The case plan shall be reviewed by the family, worker and supervisor, to include case closure assessment no less frequently

than every six (6) months.

(5) A DSS-154, Request for Hearing, shall be given to the family advising them of the right to a fair hearing in compliance with 905 KAR 1:320.

(6) If termination of parental rights becomes the goal, case planning and service delivery shall continue until the judgment order is received.

Section 19. Service Delivery. Service delivery shall be provided as outlined and stated in the case plan. Service delivery shall encompass identified expectations of the family, staff and the implementation of resources in the community. Service recordings shall be completed within thirty (30) days of the contact and shall reflect progress toward treatment goals. Recordings shall be signed and dated by the worker.

Section 20. Case Closure. (1) The decision to close a case which has received services shall be based on evidence that the original factors resulting in the abuse, neglect or dependency have been resolved to the extent that the family can protect the child and can, at least minimally, meet the needs of the child. A child protective services case shall not be closed if withdrawal of services places the child in danger. Consideration for closure of a child protective service case may occur if the following conditions are met:

(a) The child is no longer in need of protection;

(b) The goals have been achieved; or

(c) The client is not making progress toward treatment goals and there are no legal grounds for intervention.

(2) The closing summary of the child protective services case shall be included in the case record. A brief narrative regarding the case and the reasons for closure shall be entered. The summary may include:

(a) Number of months of child protective services;

(b) Agencies still involved in the case;

(c) Assessment of family functioning and of conditions that have changed to make closure possible;

(d) Reason and date of closure.

(3) The form shall be signed and dated by the worker. Notification to client of closure with a 154-A shall be documented in the case as required by 905 KAR 1:320.

Section 21. Material Incorporated by Reference. (1) The DSS-115, Suspected Abuse, Neglect, Dependency or Exploitation Reporting Form, revised July, 1994 [~~May, 1993, the DSS-116, Notification of Initial Results of Child Abuse Investigations, became obsolete May, 1993, the DSS-150, Initial Child Abuse, Neglect or Dependency Investigation, revised December, 1991, and the DSS-897, Child Protective Services Risk Assessment Guidelines, revised January, 1993~~] shall be herein incorporated by reference.

(2) Material incorporated by reference may be inspected and copied at the Department for Social Services, CHR Building, 6th Floor, 275 East Main Street, Frankfort, Kentucky 40621. Office hours are 8 a.m. to 4:30 p.m.

MASTEN CHILDERS II, Secretary
PEGGY WALLACE, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 15, 1994 at 11 a.m.

STATEMENT OF EMERGENCY
905 KAR 2:140E

These emergency and proposed regulations were promulgated to enable the cabinet to qualify to receive federal funds for Child Day Care Programs under the Social Services Block Grant, Child Care and Development Block Grant, and the Transitional and At-Risk Child Care Programs. This administrative regulation establishes the guidelines for the provision of a seamless service of child day care to needy families in the Commonwealth. This regulation was promulgated as an emergency as the previous regulation, 905 KAR 2:080, sunset upon adjournment of the 1994 General Assembly. This emergency regulation should be replaced by an ordinary administrative regulation. The ordinary regulation shall be filed with the Regulations Compiler on or about July 15, 1994.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Social Services

905 KAR 2:140E. Child day care programs.

RELATES TO: KRS 199.892 - 896, 45 CFR 98, 256, 257, PL 99-457 Part H, PL 94-142.2

STATUTORY AUTHORITY: KRS 194.050, 199.892

EFFECTIVE: July 15, 1994

NECESSITY AND FUNCTION: KRS 194.050 provides that the Secretary for the Cabinet for Human Resources shall adopt administrative regulations necessary to operate programs and fulfill the responsibilities vested in the Cabinet for Human Resources. This administrative regulation is necessary to enable the Cabinet for Human Resources to qualify to receive federal funds under the Social Services Block Grant, Child Care and Development Block Grant and the Transitional and At-risk Child Care Programs. The function of this administrative regulation is to establish procedures for the implementation of child day care programs.

Section 1. Definitions. (1) "At-risk child care (ARCC)" means child care assistance provided to non-AFDC families who need care in order to work and who may otherwise be at risk of becoming dependent upon AFDC.

(2) "Attending a job training or educational program" means regular and scheduled participation in a program offering appropriate skills training or education, if postsecondary, consistent with employment goals.

(3) "Certificate" means a payment mechanism provided by DSS and used by a family to secure day care from the provider of choice.

(4) "Certified family child care home" means a home as governed by KRS 199.8982(1)(c) and 905 KAR 2:100.

(5) "Child care and development block grant (CCDBG)" means child care assistance provided to families through the state to improve the affordability, quality and availability of child care services for a low income family to work or attend training or educational programs.

(6) "Child protective cases" means cases registered for services in which the case file contains case documentation that substantiates or reflects some indication of child abuse, neglect, dependency or exploitation. This category may include services to prevent abuse, neglect, dependency or exploitation, including multiproblem families.

(7) "Corporal physical discipline" means the deliberate infliction of physical pain and does not include spontaneous physical contact which is intended to protect a child from immediate danger.

(8) "Day care" means the provision of essential child care for a portion of a day on a regular basis and is designed to supplement, but not substitute for, the parent's responsibility for the child's protection, development and supervision.

(9) "Dedicated child care workers (DCW)" means the Department for Social Services staff who work strictly with the day care program. The dedicated child care worker provides services to families through the following federally funded programs: Social Services Block Grant,(SSBG), Child Care and Development Block Grant (CCDBG), At-risk Child Care (ARCC), and Transitional Child Care (TCC).

(10) "Dependent care disregard" means a method of providing

child care for AFDC and medical assistance recipients with earned income and food stamp recipients with earned income or in training or educational programs which are preparatory to employment by deducting child care expenses from the gross income, thus allowing the AFDC recipient to retain more income to pay child care expenses. In cases where recipients are receiving assistance under more than one (1) program, the highest disregard shall be used.

(11) "Eligibility requirements" means that for a family to qualify for child day care funds, except in those instances where day care is provided under SSBG for child protective cases, a family shall meet both need and income status criteria.

(12) "Employment" means public or private, full or part time, permanent or temporary work, including self-employment.

(13) "Family" means one (1) or more adults and children related by blood or law, including stepparents, residing in the same residence.

(14) "Licensed child day care facility" means a facility as governed by KRS 199.894.

(15) "Physical or mental incapacity" means a child under the age of eighteen (18) who has multiple or severe problems diagnosed by a physician or qualified professional, that prevent the child from caring for himself or herself for a part of the day.

(16) "Priorities" mean that the client groups identified for receipt of day care are ranked in chronological order by priority.

(17) "Provider" means owner, operator or employee, including a volunteer, who works in a Type I or Type II licensed day care facility, certified family child care home, unregulated home or registered home.

(18) "Purchase of care" means the purchase of child day care services from licensed facilities, certified registered homes or other eligible provider for authorized children to the extent funds are available.

(19) "Registered provider" means a provider that is registered with the Department for Social Services as a provider of child care services through the Child Care and Development Block Grant (CCDBG) or At-risk Program (ARCC).

(20) "Relative" means for registration purposes:

(a) Grandparents, aunts and uncles who are required to register with the Department for Social Services before being eligible to receive payment for child care under CCDBG; and

(b) Relatives of the child by blood or marriage, eighteen (18) years or older, including grandfather, grandmother, brother, sister uncle, aunt, nephew, niece or first cousin, including half-blood and preceding generations, who are not required to register with the Department for Social Services to be eligible to receive payment for child care under ARCC.

(21) "Social services block grant (SSBG)" means child care assistance provided by licensed or certified providers for families receiving protective and preventive services, including multiproblem families, and low income working parents.

(22) "Special needs child" means a child who has multiple or severe problems, and the severity of the disability requires ongoing specialized care as defined under PL 99-457 Part H or PL 94-142.2.

(23) "Transitional child care (TCC)" means child care assistance provided to families whose eligibility for AFDC has ceased due to earnings from employment, or as a result of the loss of income disregards due to the expiration of the time limit according to the federal regulation on AFDC. The purpose of TCC is to help prevent welfare dependency or potential welfare dependency.

(24) "Type I day care facility" means a facility:

(a) Other than a dwelling unit which regularly receives four (4) or more children for day care; or

(b) A facility, including a dwelling unit, which regularly provides day care for thirteen (13) or more children.

(c) If preschool children of any day care staff receive care in the facility, they shall be included in the number for which the facility is licensed.

(25) "Type II day care facility" means a home or dwelling unit which regularly provides care apart from parents for seven (7), but not more than twelve (12) children. The provider's own preschool children shall be included in the number for which the home is licensed.

(26) "Unregulated provider" means a child care provider who is not subject to be licensed, certified or registered by the state or federal government. Families receiving day care funds through the SSBG may not use unregulated care, however, unregulated care may be used by families receiving TCC or ARCC funds. Relative care as provided through the ARCC program, which is not required to be registered, shall be deemed unregulated.

(27) "Waiting list" means a list that may be maintained by district DSS staff once funds are obligated in a district. The list is based on the availability of district day care funds. TCC families shall not be placed on a waiting list due to the uncapped funding source.

(28) "Without regard to income" means that SSBG child day care services for child protective cases shall be provided or purchased without regard to family income. In situations where the court is involved, parents may be ordered to pay for part or all of the cost of day care for their child. Voluntary payments by parents may be accepted.

Section 2. Technical Eligibility for CCDBG. A child shall be eligible for services as verified on the DSS-1A, Application for Services, herein incorporated by reference, if he:

(1) Is under the age of thirteen (13) or is under the age of eighteen (18) and:

(a) Is physically or mentally incapable of caring for himself as verified by the written determination of:

1. A physician;
2. A licensed or certified psychologist;
3. A qualified mental health professional; or
4. As accepted by a collateral agency (schools, comprehensive care center); or

(b) Is under court supervision;

(2) Resides with a family whose income does not exceed:

(a) Sixty (60) percent of the states median income for a family of the same size at time of application; or

(b) Seventy-five (75) percent of the states median income for a family of the same size at the time of reauthorization; and

(c) To the extent necessary the eligibility levels of state median income specified in paragraph (a) and (b) of this subsection may be revised based on the availability of state and federal funds.

(3) Resides with parents who are working or attending a job training or educational program;

(4) Fee requirement.

(a) A family receiving CCDBG funds shall be required to contribute toward the payment based on the family's income as described in Section 7(3) of this administrative regulation.

(b) An individual who fails to cooperate in paying required fees may, subject to notices and hearing requirements, lose eligibility for the period of time back fees are owed, unless satisfactory arrangements are made to make full payment.

(5) Other eligibility conditions or priority requirements including childhood development and before and after school care services, may be established in addition to Sections 3(1) through (5) and 5(4) of this administrative regulation as long as they shall not:

(a) Discriminate against children on the basis of:

1. Race;
2. National origin;
3. Ethnic background;
4. Sex;
5. Religious affiliation; or
6. Disability.

(b) Limit parental rights as governed by Section 4 of administrative regulation; or

(c) Violate provisions of Section 5(4) of this administrative

regulation.

Section 3. Technical Eligibility for SSBG. (1) The child shall have met the requirements specified in Section 2(1) of this administrative regulation.

(2) The case records shall:

(a) Substantiate or reflect some indication of child abuse, neglect, dependency or exploitation; or

(b) Provide documentation that a family has a need for child care services and with the use of child care the need for protective services may be prevented.

(3) Working parents may be eligible if:

(a) Child care needs exist in order to allow the parent to work;

(b) The family is income eligible as specified in Section 2(2)(a) and (b) of this administrative regulation; and

(c) ARCC and CCDBG funds are obligated.

Section 4. Technical Eligibility and Limitations for TCC. A family shall be notified of its potential eligibility for TCC when its AFDC benefits are terminated.

(1) The following requirements shall be met during any month for which TCC is paid:

(a) The child shall have met the requirements specified in Section 2(1) of this administrative regulation or would be a dependent child except for the receipt of benefits under Supplemental Security Income (SSI) under 42 USC 1382 or foster care under 42 USC 672.

(b) Child care shall be necessary in order to permit a member of an AFDC family to accept or retain employment;

(c) Payments shall not be made for care provided by:

1. Parents;

2. Legal guardians;

3. Members of the assistance group; and

4. Providers not meeting applicable standards of state and local law.

(d) The family shall have ceased to be eligible for AFDC as a result of:

1. Increased hours of, or increased income from, employment; or

2. The loss of income disregards due to the time limitations at Section 4(3)(b) of 904 KAR 2:016;

(e). The family shall have received AFDC:

1. In at least three (3) of the six (6) months preceding the first month of ineligibility; and

2. At least one (1) of the three (3) months was received in the state of Kentucky.

(f). The family:

1. Requests TCC benefits;

2. Provides the information necessary for determining eligibility and fees; and

3. Meets application requirements.

(2) Time limitations.

(a) Eligibility for TCC:

1. Begins with the first month that the family is ineligible for AFDC; and

2. Continues for a period of twelve (12) consecutive months.

(b) A family may begin to receive child care in any month during the twelve (12) month eligibility period.

(3) Sanctions. The family is not eligible for TCC for any remaining portion of the twelve (12) month period if the caretaker relative:

(a) Terminates employment, unless good cause exists as follows:

1. The individual:

a. Is personally providing care for a child under age six (6); and

b. Employment will require the individual to work more than twenty (20) hours per week.

2. Child care:

a. Is necessary for the individual to participate in the program or accept employment; and

b. Is not available; or

c. The available child care does not meet the special needs of the child, e.g., physically or mentally disabled child.

3. The individual is unable to engage in employment or training for mental or physical reasons, including participation in a drug or alcohol rehabilitation program.

4. Transportation is unavailable and there is no readily accessible alternative means of transportation available.

5. Travel time to work site exceeds two (2) hours daily.

6. Illness of another household member requiring the presence of the participant at home.

7. Temporary incarceration.

8. Discrimination by an employer based on age, race, sex color, disability, religious beliefs, national origin or political beliefs.

9. Work demand or conditions that render continued employment unreasonable. Examples are:

a. Consistently not being paid on schedule; or

b. The work presents a risk to the individual's health or safety.

10. Wage rates are decreased subsequent to acceptance of employment.

11. Acceptance of a better job which, because of circumstances beyond the control of the recipient, does not materialize.

12. Employment would result in a net loss of cash income.

13. The client experiences a household emergency, including but not limited to: death of a member of the immediate family, entry into a spouse abuse center, or a natural disaster.

(b) Fails to cooperate with the State IV-A agency in establishing payment and enforcing child support obligations, per 904 KAR 2:006, Section 16.

(4) Fee requirements.

(a) A family receiving TCC shall be required to contribute toward the payment based on the family's income as described in Section 5(3) of this administrative regulation.

(b) An individual who fails to cooperate in paying required fees may, subject to notices and hearing requirements, lose eligibility for the period of time back fees are owed, unless satisfactory arrangements are made to make full payment.

Section 5. Technical Eligibility and Limitations for ARCC. (1) The following requirements shall be met during any month for which ARCC is paid:

(a) The child shall have met the requirements specified in Section 2(1) and (2)(a) and (b) of this administrative regulation.

(b) The family:

1. Is at risk of becoming eligible for AFDC;

2. Is not receiving AFDC; and

3. Needs child care in order to accept employment and remain employed.

(2) Child care limitations:

(a) Child care payments shall be provided:

1. Directly to the provider;

2. In an amount equal to the actual cost up to the payment maximum based on market rates described in Section 7(2) of this administrative regulation; or

3. In an amount equal to the difference between paragraph (b) of this subsection and the amount allowed as a deduction for child care costs to recipients of statutory benefits; and

4. If child care arrangements would otherwise be lost:

a. For up to two (2) weeks prior to the start of employment; or

b. For up to one (1) month during a break in employment if subsequent employment is scheduled to begin within that period.

(b) Payments shall not be made to a provider if the provider is:

1. The parent;

2. The legal guardian;

3. Not meeting applicable standards of state and local law;

4. Not registered by the department as required in Section 5 of this administrative regulation; or

5. Not allowing parental access.

(3) Fee requirements.

(a) A family receiving ARCC shall be required to contribute toward the payment based on the family's income as described in Section 7(3) of this administrative regulation.

(b) An individual who fails to cooperate in paying required fees may, subject to notices and hearing requirements, lose eligibility for the period of time back fees are owed, unless satisfactory arrangements are made to make full payment.

Section 6. Parental Rights and Responsibilities. (1) Parents of an eligible child who receive or are offered child care services subject to the availability of state and federal funds shall be offered a choice:

(a) To enroll the child with an eligible child care provider that has a grant or contract, selected by the parent to the maximum extent practicable; or

(b) To receive a child care certificate, the DSS-76, Day Care Services Agreement and Child Care Certificate, herein incorporated by reference, which shall:

1. Be issued to the parent;

2. Be of value commensurate with the value of child care services provided in paragraph (a) of this subsection;

3. If chosen by the parent, may be used for child care services provided by a sectarian organization or agency;

4. Not be considered a contract or grant to the provider but assistance to the parent;

5. Allow parents to chose from a variety of child care categories in compliance with federal regulations governing child day care programs including:

a. Licensed child care facilities;

b. Certified family child care facilities (CFCCH);

c. Unregulated child care facilities; or

d. Registered child care facilities; and

6. Inform parents and providers that the agreement may be terminated upon notice that the Department for Social Services has determined that conditions or circumstances at the child day care premises place children at risk of abuse, neglect, or exploitation pursuant to KRS Chapter 620.

(2) Providers of child care services shall afford parents unlimited access to their children and to the provider during normal hours of operation and whenever the child is in the care of the provider.

(3) The cabinet shall:

(a) Maintain a record of substantiated parental complaints; and

(b) Make information regarding parental complaints available to the public upon request.

(4) The cabinet shall make available to the parents and general public, consumer education about parental options relating to child care services including:

(a) Licensing and regulatory requirements; and

(b) Complaint procedures.

Section 7. State and Provider Requirements. (1) The cabinet shall assure that providers of child care services:

(a) Shall comply with licensing and regulatory requirements as governed by 905 KAR 2:001, 905 KAR 2:090, 905 KAR 2:110, 905 KAR 2:120 and 905 KAR 2:100;

(b) That are not required to be licensed or certified as governed by 905 KAR 2:001, 905 KAR 2:090, 905 KAR 2:110, 905 KAR 2:120 and 905 KAR 2:100 shall be registered with the cabinet prior to payment under the block grant using the DSS-77, Day Care Billing Statement, herein incorporated by reference except under TCC and relative provided care under ARCC; and

(c) Under CCDBG, nonrelative providers registered with the cabinet shall become certified as governed by 905 KAR 2:100.

(d) Nonrelative providers providing care in the child's home shall be certified by meeting the requirements as follows:

1. The provider shall be at least eighteen (18) years of age;

2. The provider shall be physically capable of providing care to children, as stated by a qualified physician;

3. The provider shall be free of tuberculosis, as stated by a qualified physician or health care specialist;

4. The provider shall not have been convicted of crimes against children, as shown by a criminal records check conducted within the past year by the Kentucky State Police; and

5. The provider shall sign an agreement not to use any form of corporal physical discipline on the children entrusted into their care.

(2) The cabinet has established maximum child day care payments as follows:

(a) Except fees shall not be assessed in:

1. A child protective case under SSBG; or

2. An AFDC, medical assistance or food stamp case where clients are receiving dependent care disregard.

(b) The DCW shall determine the maximum daily reimbursement rate and parent fee, not to exceed rates as specified in this subsection and monitor the payment to the child care provider. If the parent fails to pay the fee the DCW shall develop a plan with the parent to pay the fee.

(c) The DCW shall advise the client to report family and financial changes that may affect authorization of payments. Reauthorizations shall be determined:

1. Every six (6) months; and

2. Upon receipt of reported changes.

(4) The Cabinet for Human Resources may, except for TCC and protective service cases, establish priorities for child care services as follows:

(a) Children with special needs;

(b) Job Opportunity and Basic Skills Program or TCC participants who have children ineligible for child care payments under the programs;

(c) Families who lose eligibility in another child care program; and

(d) Other low income working parents or parents attending training or educational programs.

(5) The Department for Social Services shall exchange TCC client specific information to the Department for Social Insurance within ten (10) days of discovery.

(a) The DCW shall report the following case terminations to the local DSI, Division of Field Services Office:

1. When a TCC client quits a job without good cause;

2. Based on a TCC client's failure to pay a parent fee;

3. Based on a TCC client's refusal to cooperate with the Division of Child Support Enforcement; and

4. Client makes suitable arrangements to pay parent fee.

(b) The DCW shall report the following changes in client information to the Division for Child Support Enforcement:

1. TCC case approval for payments;

2. A child left the home;

3. Payments cease for a child;

4. Client's address changes;

5. An absent parent returns to the home;

6. A TCC case is terminated; or

7. A child is added to the case.

(6) Recoupment. The following provisions apply to overpayment in SSBG, CCDBG, TCC and ARCC;

(a) Necessary action shall be taken promptly to correct and recoup an overpayment in a case:

1. Of fraud;

2. Involving a current recipient; and

3. In which the overpayment would equal or exceed the cost of recovery.

(b) An overpayment shall be recovered from the child care provider.

(c) An overpayment shall be recovered through a reduction in the amount payable to the provider.

(d) An underpayment and an overpayment may be offset against each other in adjusting an incorrect payment.

(e) For TCC cases an overpayment, including assistance paid pending a hearing decision, shall be recovered from:

1. The responsible party;
2. The family unit which was overpaid;
3. The provider who was responsible for the overpayment;
4. Individuals who were members of the family when overpaid; or
5. A family that includes a member of a previously overpaid family.

(7) The DCW shall terminate day care services when due to need or income criteria, clients lose eligibility.

(a) If due to program policy changes the DCW shall:

1. Reassess the families so clients may be given ten (10) days notice of their eligibility, if they do not meet the new criteria after their authorization period expires;
2. Send written notices explaining new eligibility criteria with a notice of intended action.

(b) TCC clients may lose eligibility during the entitlement period without causing permanent termination of benefits if:

1. The client fails to cooperate in paying the parent fee, but later makes suitable arrangements;
2. The client moves out of state and returns to Kentucky within the entitlement period; and
3. The child requiring paid care leaves the home and returns.

(c) AFDC unemployed parent cases continue to be eligible for TCC without a deprivation.

(8) The child care worker shall notify the client of their rights to notice of adverse actions, hearings and appeals as governed by 905 KAR 1:320, Fair hearing.

Section 8. Material Incorporated by Reference. (1) Forms necessary for the implementation of child day care services are herein incorporated by reference.

(2) Material incorporated by reference may be inspected and copied at the Department for Social Services, CHR Building, 6th Floor, 275 East Main Street, Frankfort, Kentucky 40621. Office hours are 8 a.m. to 4:30 p.m.

MASTEN CHILDERS II, Secretary
PEGGY WALLACE, Commissioner
APPROVED BY AGENCY: July 7, 1994
FILED WITH LRC: July 15, 1994 at 10 a.m.

STATEMENT OF EMERGENCY
905 KAR 7:240E

These emergency and proposed regulations establish the Kentucky Educational Collaborative for State Agency Children to enhance educational services to state agency children through the development of a dynamic education and social service partnership directed at meeting the needs of delinquent and at-risk youth. This administrative regulation establishes the guidelines for the governance, finance and operation of the collaborative. It is necessary to promulgate an emergency regulation to implement the guidelines for the operation of the KECSAC pursuant to KRS 605.110. This emergency regulation shall be replaced by an ordinary administrative regulation. The ordinary regulation shall be filed with the Regulations Compiler on or about July 15, 1994.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Social Services

905 KAR 7:240E. Kentucky Educational Collaborative for State Agency Children.

RELATES TO: KRS Chapters 158, 161, 605, 610, 630, 635, 640, 645, 1994 Acts ch. 326
STATUTORY AUTHORITY: KRS 158.135, 194.050, 605.110
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: KRS 605.110 requires that children maintained in a facility or program operated by the Cabinet for Human Resources shall so far as possible maintain a common school education. This administrative regulation sets forth policies for complying with KRS 158.135 and KRS 605.110 in Department for Social Services (DSS), Children's Residential Services (CRS), residential, day treatment programs, and group homes; other treatment programs operated or contracted by the Cabinet for Human Resources serving committed youth and private child caring agencies serving committed children.

Section 1. Definitions. (1) "Cabinet for Human Resources programs" means both state-operated and state-contracted programs.

(2) "Citizens interest committee (CIC)" means the community group of volunteers and parents of youth currently served by the treatment facility, who serve as liaisons to the local treatment facility.

(3) "Department" means the Department for Social Services (DSS), Cabinet for Human Resources.

(4) "Educational administrative staff" means a principal, assistant principal, supervisor, coordinator, director, pupil personnel worker or guidance counselor employed or contracted by the Kentucky Educational Collaborative for State Agency Children to provide educational services.

(5) "Head teacher" means the lead teacher, principal, or lead educator designated by the local district or by the Kentucky Educational Collaborative for State Agency Children (KECSAC) to be responsible for the operation of the daily education program. The head teacher may also be the program director in some facilities.

(6) "Individual education plan (IEP)" means the instructional plan required for state agency children identified as having educational disabilities.

(7) "Individual plan of instruction (IPI)" means the instructional plan required for state agency children not identified as having educational disabilities.

(8) "Individual treatment plan (ITP)" means a social and behavioral intervention plan, including the plan for educational instruction, that is developed for each state agency child being served by a treatment institution or facility.

(9) "Instructional calendar" means the yearly schedule of educational events, including instructional, recreational, and teacher professional development days, holidays and vacation days.

(10) "KDE" means the Kentucky Department of Education.

(11) "KECSAC" means the Kentucky Educational Collaborative for State Agency Children.

(12) "KERA" means Kentucky Education Reform Act.

(13) "Local school district" means the school district where state agency children are provided educational services.

(14) "Program director" means the administrator at a state operated or contracted institution or day treatment facility or administrator of a private child care agency that is responsible for the safety and security of youth and staff and the operation of the treatment facility.

(15) "Private child care agency" means a private, not state operated program, which provides care or treatment for committed children on a per child contractual basis.

(16) "SAEC" means State Agency Education Council that functions as the site-based decision-making body for state agency

children schools.

(17) "School" means the site where the educational program for state agency children is provided.

(18) "State agency children" means those children of school age committed to or in the custody of the Cabinet for Human Resources and placed in a Cabinet for Human Resources operated or contracted institution, facility or day treatment program, or committed children placed in private child care agencies as governed by KRS 158.135(1)(a).

(19) "State agency children's fund" means appropriations to support KRS 158.135 previously known as out-of-district funds.

(20) "Treatment" means the total array of services utilized to produce a positive change in children served by the treatment facility.

Section 2. Governance. (1) An advisory board for the Kentucky Educational Collaborative for State Agency Children (KECSAC) composed of twelve (12) members appointed by the Governor shall provide recommendations in policy development. The KECSAC shall determine the length of terms for members. The advisory board shall meet at a minimum biannually.

(2) Contracting procedures.

(a) The department shall contract with a university training resource center for the establishment of the KECSAC which shall be responsible for the oversight or administration of state and federal education funding to provide educational services to state agency children. The KECSAC shall be financed by the state agency children's fund. The KECSAC shall have knowledge and experience in the following:

1. Kentucky Education Reform Act (KERA), and Kentucky's system of schools;

2. State and federal statutes pertaining to youth with educational disabilities;

3. Kentucky Unified Juvenile Code and the operation of agency programs for juvenile offenders, status offenders and dependent children; and

4. Research regarding the education of at-risk, incarcerated and difficult to motivate youth.

(b) KECSAC shall cooperatively plan programs and state agency children's fund budgets with the department, KDE, State Agency Education Councils (SAEC) and local school districts providing programs to state agency children. Local school districts shall be notified of projected funding levels by KECSAC by January 1, for the following school year.

(c) The KECSAC application to the department shall contain educational goals and objectives for the biennium for which funding is requested. The goals and objectives shall reflect KERA mandates, American Correctional Association standards, Correctional Education Association standards and the specific educational needs of state agency children. The educational goals and objectives shall be compatible with and complimentary to the treatment goals for state agency children.

(d) The KECSAC with the cooperation of the department and KDE shall develop written procedures for the operation of the statewide education system for state agency children to be completed by July, 1995.

(3) Staffing.

(a) Teachers and other educational staff shall be employed through the local school district where the treatment facility is located. If the local school district is not able or willing to provide the educational personnel for the state agency children's treatment facility, the KECSAC shall be notified in writing no later than one year prior to the expiration of the current contract. The KECSAC may contract with another school district for educational staff.

(b) Educational administrative staff, supervisors and teachers employed or contracted by the KECSAC shall meet Kentucky education certification requirements and shall be annually evaluated. Educational staff employed by school districts shall be evaluated in accordance with local school district policy. The KECSAC shall develop procedures for evaluating staff employed directly by the KECSAC and shall receive copies of the evaluation of educational staff by the local school district.

(c) Each state agency school program shall designate a head teacher.

(d) Education staff directly employed by the KECSAC shall be compensated at rates at least commensurate with public school employees with comparable qualifications, experience and assignments in the school district where the treatment facility is located. Statewide KECSAC positions shall be compensated at rates comparable to the average of education positions with similar responsibilities, credentials and experience providing education to state agency children.

(e) State agency children programs shall have a minimum of one (1) certified special education teacher on staff by the 1995-96 school year. The employment of special education certified teachers shall reach at least one-half (1/2) of the total teachers employed in each state agency program by the school year 1996-97. Exceptions shall be made only with the agreement of the agency treatment facility, the local school district, and KECSAC.

(f) Other specific services identified by the admission and release committee as needed for a youth shall be accessed by contract agent. The KECSAC shall comply with the following administrative regulations relating to youth with disabilities: 707 KAR 1:170, 707 KAR 707 KAR 1:180, 707 KAR 1:190, 707 KAR 1:200, and 707 KAR 1:220.

(4) State Agency Education Council (SAEC). Pursuant to KERA requirements related to site-based decision making councils, state agency education programs shall establish SAEC for each school operated under KECSAC by school year 1996-1997.

(a) Formation of SAEC.

1. The SAEC shall have as members, two (2) teachers, one (1) head teacher, one (1) juvenile counselor or one (1) direct care staff in private child care program, one (1) local citizens interest committee member from the treatment facility and the facility program director. In cases where the head teacher or principal and program director are the same person, an additional educational representative shall be selected. The head teacher shall serve as the chair of the SAEC.

2. Teacher members of the council shall be nominated and elected by the teachers at the school where they are assigned. The juvenile counselor or direct care staff council member shall be nominated and elected by juvenile counselors or staff at the facility where the counselor is assigned.

3. The local CIC members of the SAEC shall be nominated and elected by CIC members, and shall not be an employee or relative of an employee of the school district, local school board, or employees or relative of an employee of the state or private child care agency staff.

4. Nomination and election of council members shall be held during April each year with the term of services to begin July 1. Each member shall be selected by secret ballot by their respective classification peers, except in circumstances where that member class is comprised of only one individual who shall automatically be a member of the council. Council members shall serve terms of one (1) year and are eligible for reelection.

(b) Training of council members shall be the responsibility of the KECSAC. The council shall work cooperatively with the local school district, KDE, and KECSAC to pursue training that meets the needs of the council.

(c) Responsibilities of the SAEC.

1. The SAEC shall have the authority to establish school policy which provides an environment to enhance student achievement and assist schools in meeting goals established by state and federal regulations, local school district policy, KECSAC and program contract requirements and the school council itself. Activities of the SAEC shall be designed to improve the identified educational goals

of state agency youth.

2. The head teacher shall be the primary educational administrator and the instructional leader of the school and shall be responsible for insuring implementation decisions of the council.

3. Areas of responsibility assumed by the council shall be in compliance with KRS 160.345. The council, within KECSAC, department and local school district policies, shall adopt policies to be implemented by the state agency school program. The SAEC functions may include the following:

a. Establish rules and bylaws for general operating procedures;

b. Determining school priorities, based on an assessment of the educational needs of the students and goals for schools as established in KRS 158.6451 for state agency children.

c. Plan the process for the initial and periodic academic, behavioral, cognitive and vocational assessments of state agency youth.

d. Plan for regular involvement of educational personnel on state agency program treatment teams.

e. Establish procedures to coordinate the educational planning with treatment planning.

f. Establish program-level budget priorities within funding allocations to assist the students in the school in meeting the established educational goals.

g. Plan the curriculum to enhance the attainment of student educational goals;

h. Conduct educational program needs assessment;

i. Plan for technology and its utilization;

j. Select instructional materials appropriate to address educational goals improvement;

k. Review and determine instructional practices and needed professional development for improved programs;

l. Determine which instructional supplies shall be ordered in the school;

m. Prioritize and select equipment;

n. Determine educational staff time and assignments including paraprofessional and other support personnel;

o. Schedule the academic day and week consistent with treatment facility policy and local education agency policy;

p. Make recommendation of use of school space during the school day;

q. Establish relationships with parents and members of the surrounding community;

r. Coordinate the implementation of special programs as mandated by state and federal statute and regulation;

s. Develop procedures for and facilitation of academic transition of youth to local educational and work settings;

t. Recommend the employment of head teacher or principal and other teacher and staff vacancies within contract limitations and in consultation with the local education agency or the Director of KECSAC.

4. The SAEC shall submit to the KECSAC and the local school district an annual program plan or transformation plan. The components of the plan shall be specified by KECSAC.

5. SAEC meetings.

a. The head teacher or principal shall be the chair of the council and shall be responsible for securing minutes that record the council's actions.

b. Decisions shall be made by consensus.

c. Meetings of the council are open to the public and subject to open meetings as governed by KRS 61.805, KRS 61.810 and KRS 61.815.

6. Appeal of SAEC decisions. Appeal of council decisions may be made by a parent, student, employee of the school, state agency program staff or resident of Kentucky. The SAEC and the KECSAC shall develop a process for appealing a decision made by the SAEC as governed by KRS 160.345.

(5) Policy application. In the case of conflicting policies (e.g. the use of corporal punishment), the Cabinet for Human Resources policies for the care and treatment of youth shall be followed.

(6) Student eligibility. If a specific activity (e.g., football, debate, etc.) is not provided to youth in a state or private contracted agency program, the youth shall not lose eligibility to participate based on the requirements in 702 KAR 7:070. Eligibility shall be figured on a month to month basis (e.g., nine (9) months in a DSS facility without a formal football program leaves nine (9) months of eligibility in a local school district). The eligibility period shall not exceed one (1) additional year. Other eligibility criteria however, shall be met by the youth.

Section 3. Finance. (1) The amount of funds generated by state agency children under the Support Education Excellence in Kentucky (SEEK) Program as specified in KRS 157.360 for the guaranteed SEEK base and adjustments shall be sent annually to the Cabinet for Human Resources to utilize in total to contract with the KECSAC for the purpose of providing education for state agency children as governed by KRS 158.135. The KECSAC shall contract with local school districts where state agency programs are located. If a school district has elected not to provide educational services to state agency children, the KDE shall annually deduct the state SEEK base and adjustments and an amount equal to the local portion of the SEEK base and adjustments from the school district that choose not to provide services. This amount shall be sent to the Cabinet for Human Resources to utilize in total to contract with the KECSAC to provide educational services to state agency children.

(2) Funds generated by the Support Educational Excellence in Kentucky (SEEK) formula by state agency children shall be used to fund the contract budgets between the KECSAC and local school districts and shall be used in total for direct and supportive educational services for state agency children. The base funding level set out in KRS 157.360 and KRS 160.470 which is the guaranteed amount of revenue per pupil which is generated by the state agency children shall:

(a) Consist of a combination of state SEEK funds and state funds designated through KRS 158.135 for state agency children who were not residents of local school districts providing education to the children prior to placement in the state agency program; and

(b) Consist of a combination of state and local SEEK funds and state agency children's funds designated through KRS 158.135 for children in state agency programs who were already residents of the local school district providing education to the children prior to placement in the state agency program.

(3) The KECSAC shall be considered the same as a school district for the generation, application, distribution and accountability of state and federal funds, other than SEEK, available to educate state agency children.

(4) An annual contract or memorandum of agreement shall be negotiated between the KECSAC and each school district providing education to state agency children. An itemized budget shall be part of the contract.

(5) The State Agency Children's Fund as specified in KRS 158.135 shall be sent from KDE to the Cabinet for Human Resources and provided to the KECSAC through contract with the Cabinet for Human Resources. Budgeting procedures utilized for the school year 1993-94 shall be utilized as part of the 1994-96 biennial plan for allocation of funds. By the 1996-1998 biennium, the KECSAC shall design and phase in an equitable system to distribute these funds by approved contract with local school districts to provide state agency children educational programs, educational administration, educational support services and discretionary funds which support projects designed to improve the education of state agency children.

(6) The KECSAC as part of the contract with each local school district shall facilitate, with the State Agency Education Council and the local school district, the plan for professional development of certified staff. If the local school district has chosen not to provide the educational services to state agency children, the KECSAC with the

State Agency Education Council shall develop and present to the KDE a plan for professional development. The KECSAC shall submit the annual consortia professional development plan to the KDE. The professional development plan shall summarize the professional development activities for certified education staff.

(7) The KECSAC shall submit a master technology plan to the School Facilities Construction Commission and the KECSAC shall receive a direct allocation of technology funds which shall be matched by state agency children's funds.

(8) Pursuant to KRS 157.190, 157.110, and 160.330 the KECSAC staff shall, as part of the biennial budget plan, make a request to the Commissioner of KDE for the textbook needs of state agency children. The State Agency Educational Councils shall provide the KECSAC with projected textbook needs for the children in their specific state agency program.

(9) The KECSAC shall obtain information from the Kentucky Department of Education and the Workforce Development Cabinet regarding all discretionary and entitlement state, federal and miscellaneous funding opportunities available to local school districts and file applications or reports necessary to procure and use funds for the education of state agency children.

(10) If the Cabinet for Human Resources is opening or contracting with a new program for treatment services, the Cabinet for Human Resources shall notify KDE and KECSAC prior to the biennial budget submission regarding the projected number of youth to be educated in the new program. The education budget for the new program shall be based on expected capacity for the first year of operation rather than prior year average daily attendance. Thereafter, the budget shall be based on prior year average daily attendance.

(11) The KECSAC shall submit an application for adult education services for youth age sixteen (16) years and above who are committed to the Cabinet for Human Resources and shall use funds received to provide Adult Basic Education services to eligible youth.

Section 4. Operations. (1) Assessments.

(a) KECSAC shall develop procedures for the assessment of state agency children in the cognitive, social, academic and vocational areas in order to determine educational objectives for the individual treatment plan. Educational goals and objectives shall be consistent with goals specified in each youth's individual treatment plan.

(b) If the youth is suspected to have an educational disability as governed by 707 KAR 1:180 and 707 KAR 1:190 an assessment shall be administered, following required due process procedures.

(c) School psychologists may be employed or contracted by the KECSAC for purposes of meeting required procedures for state agency children with educational disabilities.

(2) State agency children with identified educational disabilities. In school districts providing contract services, the KECSAC staff and agency program staff shall coordinate the completion of required individual education plan procedures for the identification, evaluation, implementation and placement of children with educational disabilities pursuant to 707 KAR 1:180 and 707 KAR 1:190.

(3) Instructional services.

(a) The teacher pupil ratio for state agency children shall be no more than ten (10) students to one (1) teacher without a classroom aide and fifteen (15) students to one (1) teacher with a classroom aide and comply with 707 KAR 1:230.

(b) An individual plan of instruction shall be developed for state agency children with goals and objectives that relate to the education goals set out in KRS 158.6451. The individual plan of instruction shall be developed in coordination with the ITP. If a youth is determined to have an educational disability the IEP requirements as governed by 707 KAR 1:180 shall apply.

(c) A 230 day school calendar year shall be in operation unless specified otherwise in the youth's ITP or IEP. The head teacher in consultation with the local school district and program director shall submit a 230 day school calendar to the KECSAC with the annual contract for services. The calendar shall specify instructional, professional development, holiday and vacation days for the school year beginning July 1 of the contract year.

(d) State agency children who are fourteen (14) years of age or older who do not have an identified educational disability with an IEP and who do not read at a sixth grade level as measured by a standardized achievement test, shall be provided developmental reading, listening and writing instruction.

(4) Accountability.

(a) State agency children shall have the same assessments administered as other public school youth in A-5 and A-6 schools as specified in 703 KAR 4:080. The average daily attendance data for day treatment programs and the results of the assessments shall be included in the accountability index of the last A-1 school the youth attended prior to admittance to a state agency program or the A-1 school the youth would have attended if the youth had remained in that local school district.

(b) State agency children shall develop portfolios consistent with the content requirements of the state's assessment program. A youth's portfolio shall be sent to the receiving school as part of the educational records when youth transition from the state agency program.

(c) An accountability system shall be designed by the KECSAC for state agency school programs. The accountability system shall address the attainment of the goals for schools set out in KRS 158.6451 for state agency children. A companion system of rewards and sanctions to those specified in 703 KAR 4:080 for A-2 through A-6 schools shall be designed by the KECSAC.

(d) State agency children's school programs shall be in compliance with accreditation standards of the American Correctional Association and the Correctional Educational Association, if appropriate and if consistent with the KECSAC mission and school goals set out in KRS 158.6451.

(5) Transition.

(a) The KECSAC shall develop transition procedures for state agency children moving from the treatment programs to the next instructional or vocational setting. The transition procedures shall address responsible staff, timelines, format of information to be transmitted, support systems necessary and follow-up schedules.

(b) The KECSAC shall design and implement a system to collect school follow-up data.

(c) The last school or school district a state agency youth attends prior to placement in a state agency program shall be responsible for forwarding the educational records to the state agency program within five (5) school days of receipt of the request. Upon receipt of the school records, the state agency program shall notify the sending school district office of the pupil personnel director, that the child is now in school attendance and not a drop out.

(d) The head teacher shall insure that the educational records of state agency children be forwarded to the receiving school within five (5) school days following the release of the youth from the treatment facility.

(e) The KECSAC shall develop a systematic transition process for students with disabilities in compliance with requirements in 707 KAR 1:220, Section 10.

MASTEN CHILDERS II, Secretary
PEGGY WALLACE, Commissioner
APPROVED BY AGENCY: July 7, 1994
FILED WITH LRC: July 15, 1994 at 10 a.m.

STATEMENT OF EMERGENCY
907 KAR 1:022E

This emergency administrative regulation is being amended to provide for coverage of rehabilitation services for brain injured

individuals with neurobehavioral sequelae. This action must be taken on an emergency basis to ensure coverage of these services in a timely manner. This emergency administrative regulation shall be replaced by an ordinary administrative regulation filed with the Regulations Compiler on or about July 15, 1994.

BRERETON JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Medicaid Services

907 KAR 1:022E. Nursing facility and intermediate care facility for the mentally retarded services.

RELATES TO: KRS 205.520
STATUTORY AUTHORITY: KRS 194.050, 42 CFR 430, 431, 432, 433, 435, 440, 441, 442, 447, 455, 456, 42 USC 1396, 1396a, b, c, d, g, i, l, n, o, p, r, r-2, r-3, r-5, s
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: The Cabinet for Human Resources has responsibility to administer Medicaid the program. KRS 205.520 empowers the cabinet, by administrative regulation, to comply with any requirement that may be imposed or opportunity presented by federal law for the provision of medical assistance to Kentucky's indigent citizenry. This administrative regulation sets forth the provisions relating to nursing facility and intermediate care facility for the mentally retarded services for which payment shall be made by the Medicaid program in behalf of both the categorically needy and medically needy.

Section 1. Definitions. The following definitions shall be applicable:

(1) "Patient status" means that the individual has care needs meeting the criteria set forth in this administrative regulation for treatment in the institutional setting.

(2) "Intermittent high intensity services" means the individual requires high intensity nursing services at regular or irregular intervals, but not on a twenty-four (24) hour per day basis.

(3) "Stable medical condition" means one which is capable of being maintained in accordance with a planned treatment regimen requiring a minimum amount of medical supervision without significant change or fluctuation in the patient's condition or treatment regimen.

(4) "Nursing facility" (NF) means a facility which has a license as a nursing facility and which is certified to the Department for Medicaid Services by the state survey agency as meeting nursing facility standards. A facility which is certified to the department as meeting skilled nursing facility standards based on a survey agency survey made prior to October 1, 1990 shall be deemed to meet the requirements for participation as a nursing facility until the first survey agency survey of the facility which occurs on or after October 1, 1990. Hospital swing beds providing services in accordance with 42 USC 1395tt and 42 USC 13961 shall also be considered nursing facilities if the swing beds are certified to the department as meeting requirements for the provision of swing bed services under federal laws and regulations. Each nursing facility shall have Medicare participatory status in at least twenty (20) percent of the facility's Medicaid participating beds (but not less than ten (10) beds); if the facility has less than ten (10) Medicaid participating beds, all participating beds shall participate in the Medicare Program).

(5) "Nursing facility with waiver" (NF-W) means a facility which has a license as a nursing facility and which is certified to the Department for Medicaid Services by the state survey agency as meeting all nursing facility requirements except for the nurse staffing requirement for which a Medicaid waiver has been granted by the survey agency; some nursing facilities with waiver do not meet Medicare participation requirements. A facility which is certified to the department as meeting intermediate care facility standards based on a survey agency survey made prior to October 1, 1990 shall be deemed to meet the requirements for participation as a nursing facility with waiver until the first survey agency survey of the facility which occurs on or after October 1, 1990. If a facility which has a Medicaid waiver chooses to participate in the Medicare Program, the facility shall be required to have Medicare participatory status in at least twenty (20) percent of the facility's Medicaid participating beds (but not less than ten (10) beds; if the facility has less than ten (10) Medicaid participating beds, all participating beds shall participate in the Medicare Program).

(6) "Intermediate care facility for the mentally retarded" (ICF-MR) means a licensed intermediate care facility for the mentally retarded certified to the Department for Medicaid Services as meeting all standards for intermediate care facilities for the mentally retarded.

(7) "High intensity nursing care services" means care provided to Medicaid eligible individuals who meet high intensity patient status criteria by nursing facilities (NFs) and nursing facilities with waiver participating in the Medicaid program with the care provided in beds also participating in the Medicare Program. High intensity nursing care patient status criteria shall be equivalent to skilled nursing care standards under Medicare.

(8) "Low intensity nursing care services" means care provided to Medicaid eligible individuals who meet low intensity patient status criteria by nursing facilities (NFs) or nursing facilities with waiver (NFs-W) participating in the Medicaid program. Low intensity nursing care patient status criteria shall be equivalent to the former intermediate care patient status standards.

(9) "Intermediate care for the mentally retarded and persons with related conditions services" means care provided to Medicaid eligible individuals who meet ICF-MR patient status criteria by ICF-MRs participating in the Medicaid program.

Section 2. Participation Requirements. Each facility desiring to participate as a nursing facility, nursing facility with waiver, or ICF-MR shall meet the following requirements:

(1) An application for participation shall be made to the cabinet using the procedures specified by the Commissioner, Department for Medicaid Services, Cabinet for Human Resources. A vendor number shall be assigned to the facility by the cabinet when participation status is achieved.

(2) Each nursing facility shall be required to have participatory status in the program of health care known as Medicare in at least twenty (20) percent of the facility's Medicaid participating beds (but not less than ten (10) beds; if the facility has less than ten (10) Medicaid participating beds, all participating beds shall participate in the Medicare Program) before the conditions of participation for Medicaid shall be deemed met.

(3) If a nursing facility with waiver chooses to participate in the Medicare Program, the facility shall meet Medicare participation requirements in at least twenty (20) percent of the facility's Medicaid participating beds (but not less than ten (10) beds; if the facility has less than ten (10) Medicaid participating beds, all participating beds shall participate in the Medicare Program.)

(4) Each nursing facility and nursing facility with waiver shall be required to comply with the preadmission screening and annual resident review requirements specified in 42 USC 1396r, effective with regard to admissions and resident stays occurring on or after January 1, 1989. Facilities failing to comply with this requirement shall be subject to disenrollment, with exclusion from participation to be accomplished in accordance with 907 KAR 1:220, Terms and conditions of provider participation; provider appeals, and federal regulations at 42 CFR 431.153 and 431.154.

(5) A facility shall be required to be certified by the state survey agency as meeting NF, NF-W, or ICF-MR status; a facility not appropriately certified shall not participate in the Medicaid program except for appropriately certified SNFs or ICFs during the grandfather-

ed period which ends upon the facility's first survey by the state survey agency on or after October 1, 1990.

(6) A facility shall have appropriate accreditation to provide specialized rehabilitation services as approved by the state.

Section 3. Provision of Service. (1) Payment for high intensity, low intensity and ICF-MR services shall be limited to those services meeting the care definitions shown in Section 1 of this administrative regulation. A nursing facility or nursing facility with waiver may provide and receive payments for high intensity services provided to Medicaid eligible individuals meeting high intensity patient status criteria if the services are provided in beds also participating in the Medicare Program and a nursing facility or nursing facility with waiver may provide and receive payments for low intensity services provided to Medicaid eligible individuals meeting low intensity patient status criteria when the services are provided in any Medicaid participating beds; an ICF-MR may provide and receive payments for ICF-MR services only.

(2) A participating nursing facility may be certified, in accordance with standards and conditions specified in 907 KAR 1:545, Incorporation by reference of the nursing facility services manual, to operate a unit providing preauthorized specialized rehabilitation services for persons with brain injuries.

Section 4. Determining Patient Status. Professional staff of the cabinet, or a peer review organization operating under its lawful authority pursuant to the terms of its agreement with the cabinet, shall review and evaluate the health status and care needs of the recipient in need of institutional care giving consideration to the medical diagnosis, care needs, services and health personnel required to meet these needs and the feasibility of meeting the needs through alternative institutional or noninstitutional services.

(1) A patient shall not qualify for Medicaid patient status unless the person is qualified for admission, and continued stay as appropriate, under the preadmission screening and annual resident review criteria specified in 42 USC 1396r with regard to admissions and resident stays occurring on or after January 1, 1989.

(2) Patients qualify for high intensity nursing care when their needs mandate high intensity nursing or high intensity rehabilitation services on a daily basis and when, as a practical matter, the care can only be provided on an inpatient basis. Where the inherent complexity of a service prescribed for a patient exists to the extent that it can be safely or effectively performed only by or under the supervision of technical or professional personnel, the patient would qualify for high intensity nursing care. A patient with an unstable medical condition manifesting a combination of care needs in the following areas shall qualify for high intensity nursing care:

(a) Intravenous, intramuscular, or subcutaneous injections and hypodermoclysis or intravenous feeding;

(b) Nasogastric or gastrostomy tube feedings;

(c) Nasopharyngeal and tracheotomy aspiration;

(d) Recent or complicated ostomy requiring extensive care and self-help training;

(e) In-dwelling catheter for therapeutic management of a urinary tract condition;

(f) Bladder irrigations in relation to previously indicated stipulation;

(g) Special vital signs evaluation necessary in the management of related conditions;

(h) Sterile dressings;

(i) Changes in bed position to maintain proper body alignment;

(j) Treatment of extensive decubitus ulcers or other widespread skin disorders;

(k) Receiving medication recently initiated, which requires high intensity observation to determine desired or adverse effects or frequent adjustment of dosage;

(l) Initial phases of a regimen involving administration of medical gases;

(m) Receiving services which would qualify as high intensity rehabilitation services when provided by or under the supervision of a qualified therapist(s), for example: ongoing assessment of rehabilitation needs and potential; therapeutic exercises which must be performed by or under the supervision of a qualified physical therapist; gait evaluation and training; range of motion exercises which are part of the active treatment of a specific disease state which has resulted in a loss of, or restriction of, mobility; maintenance therapy when the specialized knowledge and judgment of a qualified therapist is required to design and establish a maintenance program based on an initial evaluation and periodic reassessment of the patient's needs, and consistent with the patient's capacity and tolerance; ultrasound, short wave, and microwave therapy treatments; hot pack, hydrocollator infrared treatments, paraffin baths, and whirlpool (in cases where the patient's condition is complicated by circulatory deficiency, areas of desensitization, open wounds, fractures or other complications, and the skills, knowledge, and judgment of a qualified physical therapist are required); and services by or under the supervision of a speech pathologist or audiologist when necessary for the restoration of function in speech or hearing.

(3) An individual shall be determined to meet low intensity patient status when the individual requires intermittent high intensity nursing care, continuous personal care or supervision in an institutional setting. In making the decision as to patient status, the following criteria shall be applicable:

(a) An individual with a stable medical condition requiring intermittent high intensity services not provided in a personal care home shall be considered to meet patient status.

(b) An individual with a stable medical condition, who has a complicating problem which prevents the individual from caring for himself in an ordinary manner outside the institution shall be considered to meet patient status. For example, ambulatory cardiac and hypertensive patients may be reasonably stable on appropriate medication, but have intellectual deficiencies preventing safe use of self-medication, or other problems requiring frequent nursing appraisal, and thus be considered to meet patient status.

(c) An individual with a stable medical condition manifesting a significant combination of the following care needs shall be determined to meet low intensity patient status when the professional staff determines that the combination of needs can be met satisfactorily only by provision of intermittent high intensity nursing care, continuous personal care or supervision in an institutional setting:

1. Assistance with wheelchair;

2. Physical or environmental management for confusion and mild agitation;

3. Must be fed;

4. Assistance with going to bathroom or using bedpan for elimination;

5. Old colostomy care;

6. In-dwelling catheter for dry care;

7. Changes in bed position;

8. Administration of stabilized dosages of medication;

9. Restorative and supportive nursing care to maintain the patient and prevent deterioration of his condition;

10. Administration of injections during time licensed personnel is available.

11. Services that could ordinarily be provided or administered by the individual but due to physical or mental condition is not capable of self-care.

12. Routine administration of medical gases after a regimen of therapy has been established.

(d) An individual shall not generally be considered to meet patient status criteria when care needs are limited to the following:

1. Minimal assistance with activities of daily living;

2. Independent use of mechanical devices, for example, assistance in mobility by means of a wheelchair, walker, crutch(es) or cane;

3. Limited diets such as low salt, low residue, reducing and other minor restrictive diets;

4. Medications that can be self-administered or the individual requires minimal supervision.

(4) Evaluation of patient status for persons with mental disorders or mental retardation. A person with a mental disorder or mental retardation meeting the health status and care needs specified in subsections (2) and (3) of this section shall generally be considered to meet patient status. However, these individuals shall be specifically excluded from coverage in the following situations:

(a) When the cabinet determines that in the individual case the combination of care needs are beyond the capability of the facility, and that placement in the facility is inappropriate due to potential danger to the health and welfare of the patient, other patients in the facility, or staff of the facility; and

(b) When the nursing care needs result directly and specifically from a mental disorder; i.e., are essentially symptoms of the mental disorder; and

(c) When the patient does not meet the preadmission screening and annual resident review criteria specified in 42 USC 1396r for entering or remaining in a facility.

(5) An individual shall be determined to meet patient status for an intermediate care facility for the mentally retarded and persons with related conditions when the individual requires physical or environmental management or rehabilitation for moderate to severe retardation. In making the decision as to patient status the following criteria shall be applicable:

(a) An individual with significant developmental disabilities and significantly subaverage intellectual functioning who requires a planned program of active treatment to attain or maintain the individual's optimal level of functioning, but does not necessarily require nursing facility or nursing facility with waiver services, shall be considered to meet patient status.

(b) An individual requiring a protected environment while overcoming the effects of developmental disabilities and subaverage intellectual functioning shall be considered to meet patient status while:

1. Learning fundamental living skills;

2. Learning to live happily and safely within his own limitations;

3. Obtaining educational experiences that will be useful in self-supporting activities;

4. Increasing his awareness of his environment.

(c) An individual with a psychiatric primary diagnosis or needs shall be considered to meet patient status criteria only when the individual also has care needs as shown in paragraph (a) or (b) of this subsection, the mental care needs are adequately handled in a supportive environment (i.e., the intermediate care facility for the mentally retarded), and the individual does not require psychiatric inpatient treatment.

(d) An individual that does not require a planned program of active treatment to attain or maintain the individual's optimal level of functioning shall not be considered to meet patient status.

(e) It shall be the policy of the cabinet that no individual shall be denied patient status solely due to advanced age, or length of stay in an institution, or history of previous institutionalization, if the individual qualifies for patient status on the basis of all other factors.

(f) With regard to an individual with a "related condition" (not mental retardation) the illness or ailment shall have manifested itself prior to the individual's 22nd birthday.

Section 5. Reevaluation of Need for Service. Nursing facility, nursing facility with waiver, and ICF-MR services shall be provided if the health status and care needs are within the scope of program benefits as described in Sections 3 and 4 of this administrative regulation. Patient status shall be reevaluated at least once every six (6) months. If a reevaluation of care needs reveals that the patient no longer requires high intensity, low intensity, or intermediate care for the mentally retarded services and payment is no longer appropriate in the facility, payment shall continue for ten (10) days to permit orderly discharge or transfer to an appropriate level of care.

Section 6. Preauthorization of Provision of Specialized Rehabilitation Services for Persons with Brain Injuries. Patients who are brain injured and meet usual high intensity nursing facility patient status criteria or as qualified under subsection (5) of this section may be provided care in a certified unit providing specialized rehabilitation services for persons with brain injuries (i.e., brain injury unit) when the care is preauthorized by staff of the Department for Medicaid Services using criteria specified in this section. For coverage to occur, authorization of coverage shall be granted prior to admission of the individual with the head injury into the certified head injury unit, or if previously admitted to the unit with other third party coverage, authorization shall be granted prior to exhaustion of those benefits.

(1) Injuries within the scope of benefits shall be:

(a) Central nervous system injury from physical trauma;

(b) Central nervous system damage from anoxia or hypoxic episodes; and

(c) Central nervous system damage from allergic conditions, toxic substances and other acute medical/clinical incidents.

(2) The following is a list of indicators [~~Indications~~] for admission and continued stay [~~shall be as follows~~]:

(a) The individual sustained a traumatic brain injury with structural, nondegenerative brain damage and is medically stable;

(b) The individual shall not be in a persistent vegetative state;

(c) The individual demonstrates physical, behavioral, and cognitive rehabilitation potential;

(d) The individual requires coma management; and

(e) The individual has sustained diffuse brain damage caused by anoxia, toxic poisoning, or encephalitis[~~, or cardiovascular accident with rehabilitation potential~~].

(3) The determination as to whether preauthorization is appropriate shall be made taking into consideration the following:

(a) The presenting problem;

(b) The goals and expected benefits of the admission;

(c) The initial estimated time frames for goal accomplishment; and

(d) The services needed.

(4) The following is a list of conditions which are not considered brain injuries requiring specialized rehabilitation under this section [~~are indicators that show it shall be inappropriate to preauthorize coverage for services provided in a certified brain injury unit~~]:

(a) Strokes treatable in [~~, (note:~~] nursing facilities providing routine [~~provide~~] rehabilitation services [~~that are expected to meet the needs of most stroke patients)~~];

(b) Spinal cord injuries in which there are no known or obvious injuries to the intercranial central nervous system;

(c) Progressive dementias and other mentally impairing conditions;

(d) Depression and psychiatric disorders in which there is no known or obvious central nervous system damage;

(e) Mental retardation[~~, developmental disabilities,~~] and birth defect related disorders of long standing; and

(f) Neurological degenerative, metabolic and other medical conditions of a chronic, degenerative nature.

(5) A patient may qualify for coverage under the brain injury program if the patient meets low-intensity level of care and has sufficient neurobehavioral sequelae resulting from the brain injury which when taken in combination require an intensity of care which is equal to high intensity nursing care, if the following criteria are met:

(a) The patient shall not have previously received specialized rehabilitation services (persons discharged for the purpose of transfer to another brain injury facility are not considered to have "previously received specialized rehabilitation services") as provided for in this section;

(b) The patient shall have the potential for rehabilitation;

(c) The care shall be prior authorized on an individual basis by the Department for Medicaid Services; and

(d) The care shall be authorized for no more than six (6) months at any one (1) time.

Section 7. Reserved Bed Days. The cabinet shall cover reserved bed days in accordance with the following specified upper limits and criteria.

(1) Reserved bed days for nursing facilities and nursing facilities with wavier shall be covered for a maximum of fourteen (14) days per absence for a hospital stay with an overall maximum of forty-five (45) days per provider during the calendar year. Reserved bed days shall be covered for a maximum of fifteen (15) days per provider during the calendar year for leaves of absence other than for hospitalization.

(2) For intermediate facilities for the mentally retarded and persons with related conditions, reserved bed days shall be covered for a maximum of forty-five (45) days per provider within a calendar quarter. Reserved bed days for hospital stays shall not exceed fifteen (15) days per stay. No more than thirty (30) consecutive reserved bed days (for hospital stay(s) plus leave(s) of absence, or leave of absence only) shall be approved for coverage.

(3) Coverage during a recipient's absence for hospitalization or leave of absence shall be contingent on the following conditions being met:

(a) The person shall be in Medicaid payment status in the level of care he/she is authorized to receive and shall have been a resident of the facility at least overnight. Persons for whom Medicaid is making Medicare coinsurance payments shall not be considered to be in Medicaid payment status for purposes of this policy;

(b) The person can be reasonably expected to return to the same level of care;

(c) Due to demand at the facility for beds at that level, there is a likelihood that the bed would be occupied by some other patient were it not reserved;

(d) The hospitalization shall be for treatment of an acute condition, and not for testing, brace-fitting, etc.; and

(e) For [~~In the case of~~] leaves of absence other than for hospitalization, the patient's physician orders and plan of care provide for such leaves. Leaves of absence include visits with relatives and friends, and leaves to participate in state-approved therapeutic or rehabilitative programs.

Section 8. The provisions of this administrative regulation shall apply to covered services provided on or after July 15, 1994 [~~1, 1993~~].

MASTEN CHILDERS II, Commissioner, Secretary
APPROVED BY AGENCY: June 29, 1994
FILED WITH LRC: July 14, 1994 at 3 p.m.

STATEMENT OF EMERGENCY
907 KAR 1:025E

This emergency administrative regulation is being promulgated to provide for payments for treatment of brain injured individuals with neurobehavioral sequelae. This action must be taken on an emergency basis to ensure that treatment and payment for the care of these brain injured individuals is begun in a timely manner. This emergency administrative regulation shall be replaced by an ordinary administrative regulation filed with the Regulations Compiler on or about July 15, 1994.

BRERETON JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Medicaid Services

907 KAR 1:025E. Payments for nursing facility and intermediate care facility for the mentally retarded services.

RELATES TO: KRS 205.520
STATUTORY AUTHORITY: KRS 194.050, 42 CFR 430, 431, 432, 433, 435, 440, 441, 442, 447, 455, 456; 42 USC 1396, a, b, c, d, g, i, l, n, o, p, r, r-2, r-3, r-5, s
EFFECTIVE: July 14, 1994
NECESSITY AND FUNCTION: The Cabinet for Human Resources has responsibility to administer the program of Medical Assistance. KRS 205.520 empowers the cabinet by administrative regulation, to comply with any requirement that may be imposed, or opportunity presented, by federal law for the provision of medical assistance to Kentucky's indigent citizenry. This administrative regulation sets forth the method for determining amounts payable by the cabinet for nursing care facility services and intermediate care facility for the mentally retarded services.

Section 1. Definitions. (1) "Allowable cost" means that portion of the facility's cost which may be allowed by the cabinet in establishing the reimbursement rate. Cost shall be considered allowable if the item of supply or service is necessary for the provision of the appropriate level of patient care and the cost incurred by the facility is within cost limits established by the cabinet, i.e., the allowable cost is "reasonable."

(2) "Ancillary services" means those direct services for which a separate charge is customarily made, and which, except for ventilator therapy services, and brain injury unit services are retrospectively settled on the basis of reasonable allowable cost at the end of the facilities' fiscal year. Ancillary services are limited to the following:

(a) Physical, occupational and speech therapy;

(b) Laboratory procedures;

(c) X-ray;

(d) Oxygen and other related oxygen supplies;

(e) Respiratory therapy (excluding the routine administration of oxygen);

(f) Psychological and psychiatric therapy (for intermediate care facilities for the mentally retarded only); and

(g) Ventilator therapy services, subject to the coverage limitations shown in the reimbursement manual.

(3) "Nursing facility (NFs)" means a facility certified to the Medicaid program by the state survey agency as meeting all nursing facility requirements, and in at least twenty (20) percent of the facility's Medicaid participating beds (but not less than ten (1) beds meeting all conditions of participation in the Medicare program. The phrase "nursing facility" also includes a nursing facility with waiver, as provided for in 42 USC 1396r(b)
(4)(C)(ii), unless the context specifies otherwise.

(4) "Nursing facilities with waiver (NFs/W)" means facilities certified to the Medicaid program by the state survey agency as meeting all NF requirements except the nurse staffing requirement for which an NF waiver has been granted by the survey agency.

(5) "Hospital based nursing facilities" means those nursing facilities in the same building with or attached to an acute care hospital and which share common administration, nursing staff, and ancillary services with the hospital; however, those facilities classified as hospital based skilled nursing facilities on June 30, 1989 shall remain classified as hospital based nursing facilities.

(6) "Nursing services costs" means the direct costs associated with nursing services.

(7) "All other costs" means other care-related costs, other operating costs, capital costs, and indirect ancillary costs.

(8) The "basic per diem cost" for each major cost category (nursing services costs and all other costs) shall be the computed

rate arrived at when otherwise allowable costs are trended and adjusted in accordance with the inflation factor, the occupancy factor, and the median cost center per diem upper limits.

(9) "Inflation factor" means the comparison of allowable routine service costs, not including fixed or capital costs, with an inflation rate to arrive at projected current year cost increases, which when added to allowable costs, including fixed or capital costs, yields projected current year allowable costs.

(10) "Incentive factor" means the comparison of the basic per diem cost (for facilities qualifying for a cost savings incentive) with the upper limit for the appropriate cost arrays using the cost savings incentive (CSI) percentage (and taking into consideration the maximum allowable CSI amount for each cost array) to arrive at the actual dollar amount of cost savings incentive return to be added to the basic per diem cost.

(11) "Maximum allowable cost" means the maximum amount which may be allowed to a facility as reasonable cost for provision of an item of supply or service while complying with limitations expressed in related federal or state regulations.

(12) "Upper limit" means the maximum level at which the cabinet shall reimburse, on a facility by facility basis, for routine services.

(13) "Occupancy factor" means the imposition of an assumed level of occupancy used in computing unadjusted basic per diem rates.

(14) "Prospective rate" means a payment rate of return for routine services based on allowable costs and other factors, and includes the understanding that except as specified the prospective rate shall not be retroactively adjusted, either in favor of the facility or the cabinet.

(15) "Routine services" means the regular room, dietary, medical social services, nursing services, minor medical and surgical supplies, and the use of equipment and facilities. Routine services include but are not limited to the following:

(a) All general nursing services, including administration of oxygen and related medications, handfeeding, incontinency care and tray services;

(b) Items which are furnished routinely and relatively uniformly to all patients, such as patient gowns, water pitchers, basins and bed pans. Personal items such as paper tissues, deodorants, and mouthwashes shall be allowable as routine services if generally furnished to all patients;

(c) Items stocked at nursing stations or on the floor in gross supply and distributed or utilized individually in small quantities, such as alcohol, applicators, cotton balls, band-aids and tongue depressors;

(d) Items which are utilized by individual patients but which are reusable and expected to be available in an institution providing a nursing facility level of care, such as ice bags, bed rails, canes, crutches, walkers, wheelchairs, traction equipment, and other durable medical equipment;

(e) Laundry services including personal clothing to the extent it is the normal attire for everyday facility use, but excluding dry cleaning costs; and

(f) Other items or services generally available or needed within a facility unless specifically identified as ancillary services. (Items excluded from reimbursement include private duty nursing services and ambulance services costs.)

(16) "Nursing facility with a mental retardation specialty (NF/MRS)" means a nursing facility in which at least fifty-five (55) percent of the patients have demonstrated special needs relating to the diagnosis of mental retardation.

(17) "Necessary function" means that had the owner not rendered services pertinent to the operation of the institution, the institution would have had to employ another person to perform the service.

Section 2. Reimbursement for Nursing Facilities (NFs) (Including Nursing Facilities with Waiver) and Intermediate Care Facilities for the Mentally Retarded (ICF-MRs). (1) All nursing facilities (NFs) (including nursing facilities with waiver) or intermediate care facilities for the mentally retarded (ICF-MRs) participating in the Medicaid program shall be reimbursed in accordance with this administrative regulation.

(2) Payments made shall be in accordance with the requirements set forth in 42 CFR 447.250 through 42 CFR 447.280 and the coverage requirements specified in 907 KAR 1:022, Nursing facility and intermediate care facility for the mentally retarded services.

(3)(a) A nursing facility desiring to participate in Medicaid shall be required to have at least twenty (20) percent of its Medicaid participating beds (but not less than ten (10) beds; for a facility with less than ten (10) beds, all beds) participate in the Medicare program unless the nursing facility has been granted a waiver of the nursing facility nurse staffing requirement and, as a result, cannot participate in Medicare.

(b) If a nursing facility with waiver chooses to participate in the Medicare Program, the facility shall be required to have at least twenty (20) percent of its Medicaid participating beds (but not less than ten (10) beds; if the facility has less than ten (10) beds, all beds) participate in the Medicare Program.

(4) The Medicaid program does not recognize multilevel nursing facilities, and therefore all participating beds in nursing facilities (including nursing facilities with waiver but not including ICF-MRs) shall be reimbursed at the same rate established for the entire facility.

Section 3. Basic Principles of Reimbursement. (1) Payment shall be on the basis of rates which have been determined by the cabinet to be reasonable and adequate to meet the costs which are required to be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable state and federal laws, regulations, and quality and safety standards, in accordance with the requirements set forth in 42 USC 1396(a)(13)(A).

(2) Payment amounts shall be arrived at by application of the reimbursement principles developed by the cabinet and contained in the Kentucky Medicaid Program Nursing Facility Reimbursement Manual, revised July 1, 1993 which is incorporated by reference in this administrative regulation and supplemented by the use of the Medicare reimbursement principles. The Kentucky Medicaid Program Nursing Facility Reimbursement Manual may be reviewed during regular working hours (8 a.m. to 4:30 p.m. eastern standard time) in the Office of the Commissioner, Department for Medicaid Services, 275 East Main Street, Frankfort, Kentucky 40621. Copies may also be obtained from that office upon payment of an appropriate fee which shall not exceed approximate cost.

Section 4. Implementation of the Payment System. The cabinet's reimbursement system shall be supported by the Medicare Principles of Reimbursement, with the system utilizing the principles as guidelines in unaddressed policy areas. The cabinet's reimbursement system includes the following specific policies, components or principles:

(1) Prospective payment rates for routine services shall be set by the cabinet on a facility by facility basis, and shall not be subject to retroactive adjustment except as specified in this section of the administrative regulation, including the provisions contained in subsections (13) and (14) of this section.

(a) Prospective rates shall be cost based annually, and may be revised on an interim basis in accordance with procedures set by the cabinet.

(b) An adjustment to the prospective rate (subject to the maximum payment for that type of facility) shall be considered only if a facility's increased costs are attributable to one (1) of the following reasons:

1. Governmentally imposed minimum wage increases;

2. The direct effect of new licensure requirements or new interpretations of existing requirements by the appropriate governmental agency as issued in administrative regulation or written policy which affects all facilities within the class; or

3. Other governmental actions that result in an unforeseen cost increase.

(c)1. The amount of any prospective rate adjustment shall not exceed that amount by which the cost increase resulting directly from the governmental action exceeds on an annualized basis the inflation allowance amount included in the prospective rate for the general cost area in which the increase occurs. For purposes of this determination, costs shall be classified into two (2) general areas, salaries and other.

2. The effective date of interim rate adjustment shall be the first day of the month in which the adjustment is requested or in which the cost increase occurred, whichever is later.

(2)(a) The prospective rate shall not exceed, on a facility by facility basis, an administratively established maximum payment for that type of facility as applicable (except that ICF-MRs shall have no administratively set upper limit).

(b)1. The state shall set a uniform rate year for NFs and ICF-MRs (July 1 - June 30) by taking the latest available cost data which is available as of May 16 of each year and trending the facility costs to July 1 of the rate year with prospective rates based on cost reports which are not audited or desk reviewed subject to adjustment when the audit or desk review is completed.

2. Appropriate cost report adjustments shall be made for the period between July 1, 1990 and October 1, 1990 to account for the fact a nursing facility rate adjustment related to nursing home reform shall be made effective October 1, 1990.

3. Partial year, or budgeted cost data may be used if a full year's data is unavailable. Unaudited reports are subject to adjustment to the audited amount.

(c) Facilities paid on the basis of partial year or budgeted cost reports shall have their reimbursement settled back to allowable cost, with usual upper limits applied.

(d) Facilities whose rates are subject to settlement back to cost will not be included in the arrays until the facilities are no longer subject to cost settlement.

(e) The following specific policies shall be used with regard to determination, application, and exclusion from upper limits.

1. Nursing facility arrays. For purposes of setting upper limits the freestanding NFs (exclusive of the NF/MRs, NF/IMDs, and NF/pediatric facilities) shall be divided into urban and rural arrays.

a. The urban array shall include all facilities within a standard metropolitan statistical area (SMSA).

b. The rural array shall include all facilities in non-SMSA counties.

c. For purposes of arraying, current multilevel facilities (i.e., SNF and ICF) shall be considered as one (1) facility, and the composite or overall rate for the facility shall be paid for services rendered in either level during the period of time preceding the first survey agency occurring on or after October 1, 1990 (with separate levels ceasing to exist for Medicaid purposes at the time of the first survey).

d. The urban and rural arrays shall be further broken down into a nursing cost center array and an "other cost center" array for each.

2. Nursing facility upper limits. The following NF upper limits shall be applied:

a. The upper limit for nursing costs for freestanding NFs shall be set at 115 percent of the median of the array of each facility's cost per case mix unit (urban or rural as applicable). The upper limit for "other costs" for freestanding NFs shall be set at 115 percent of the median of the allowable per diem cost array for the facilities (urban or rural as applicable);

b. The upper limit for hospital based nursing facilities shall be set at 125 percent of the appropriate upper limit for freestanding facilities; and

c. The upper limit for NF/MRS shall be set at 120 percent of the appropriate upper limit for freestanding facilities.

3. Exclusions from nursing facility upper limits. The following exclusions from usual NF payment methodology and upper limits shall be applied.

a. Nursing facilities designated as institutions for mental diseases or as pediatric facilities shall be reimbursed at full reasonable and allowable prospective cost;

b. Hospital swing beds shall be paid at the average of NF payments for the preceding calendar year; the swing bed rates shall change effective January 1, 1991 and each January 1 thereafter;

c. Hospital dual licensed beds shall be paid at the hospital based facility upper limits;

d. Facilities recognized as providing ventilator dependent care shall be paid at an all-inclusive (excluding drugs which shall be reimbursed through the pharmacy program) fixed rate which shall be equal to projected costs; and

e. Facilities which are Medicaid certified head injury units providing preauthorized specialized rehabilitation services for persons with brain injuries shall be paid at an all-inclusive (excluding drugs which shall be reimbursed through the pharmacy program) fixed rate which shall be set at $360 per diem. Facilities providing preauthorized specialized rehabilitation services for persons with brain injuries with rehabilitation complicated by neurobehavorial sequelae shall be paid an all-inclusive (excluding drugs) negotiated rate which shall not exceed the facilities' usual and customary charges.

4. Other factors relating to costs and upper limit determination shall be:

a. When the cabinet has made a separate rate adjustment as compensation to the facilities for minimum wage updates, the cabinet shall then adjust downward trending and indexing factors to the extent necessary to remove from the factors costs relating to the minimum wage updates already provided for by the separate rate adjustment. The purpose of the adjustment to the factors shall be to avoid paying the facilities twice for the same costs. If the trending and indexing factors include costs related to a minimum wage increase, the cabinet shall not make a separate rate adjustment, and the minimum wage costs shall not be deleted from the trending and indexing factors.

b. The allowable per diem cost for NFs (excluding swing beds, dual licensed hospital beds, and facilities with all inclusive rates) shall include (through June 30, 1991) thirty-eight (38) cents for nurse aide training; and one (1) dollar and thirty-eight (38) cents for implementation of universal precautions for disease control; and four (4) cents for medical director costs; these allowable cost amounts shall not be subject to adjustment or cost settlement.

c. A special access and treatment fee shall be added to the facility per diem (without regard to upper limits) for each individual identified as having care needs associated with high infectious or communicable diseases with limited treatment potential, such as hepatitis B, methicillin-resistant staphylococcus aureaus (MRSA), acquired immune deficiency syndrome (AIDS), or who test positive for human immunodeficiency virus (HIV).

d. The maximum payment amounts for the prospective uniform rate year shall be adjusted each July 1 so that the maximum payment amount in effect for the rate year shall be related to the cost reports used in setting the facility rates for the rate year.

e. For purposes of administrative ease in computations, normal rounding may be used in establishing the maximum payment amount, with the maximum payment amount rounded to the nearest five (5) cents. Upon being set, the arrays and upper limits shall not be altered due to revisions or corrections of data except as specified in this subsection.

(3) The reasonable direct cost of ancillary services provided by the facility as a part of total care shall be compensated on a reimbursement cost basis as an addition to the prospective rate except for ventilator therapy and brain injury unit services which shall be paid on the basis of all-inclusive rates.

(a) Ancillary services reimbursement shall be subject to a year-end audit, retroactive adjustment and final settlement.

(b) Ancillary costs may be subject to maximum allowable cost limits under federal regulations.

(c) Any percentage reduction made in payment of current billed

charges shall not exceed twenty-five (25) percent, except:

1. In the instance of individual facilities where the actual retroactive adjustment for a facility for the previous year reveals an overpayment by the cabinet exceeding twenty-five (25) percent of billed charges; or

2. Where an evaluation by the cabinet of an individual facility's current billed charges shows the charges to be in excess of average billed charges for other comparable facilities serving the same area by more than twenty-five (25) percent.

(4) Interest expense used in setting the prospective rate shall be an allowable cost if permitted under Medicare principles and if it meets these additional criteria:

(a) It represents interest on long-term debt existing at the time the vendor enters the program or represents interest on any new long-term debt, the proceeds of which are used to purchase fixed assets relating to the provision of the appropriate level of care. If the debt is subject to variable interest rates found in balloon-type financing, renegotiated interest rates shall be allowable. The form of indebtedness may include mortgages, bonds, notes and debentures when the principal is to be repaid over a period in excess of one (1) year; or

(b) It is other interest for working capital and operating needs that directly relate to providing patient care. The form of the indebtedness may include, but shall not be limited to, notes, advances and various types of receivable financing;

(c) For both paragraphs (a) and (b) of this subsection, interest on a principal amount used to purchase goodwill or other intangible assets shall not be considered an allowable cost.

(5) Compensation to owner/administrators shall be considered an allowable cost provided that it is reasonable, and that the services actually performed are a necessary function.

(a) Compensation shall include the total benefit received by the owner for the services he renders to the institution, excluding fringe benefits routinely provided to all employees and the owner/administrator.

(b) Payment for services requiring a licensed or certified professional performed on an intermittent basis shall not be considered a part of compensation. Reasonableness of compensation shall be based on total licensed beds (all levels).

(c) Compensation for owners and nonowner administrators (except for nonowner administrators of intermediate care facilities for the mentally retarded and dual licensed pediatric facilities) shall not exceed the amounts specified in the Nursing Facility Reimbursement Manual.

(6) The allowable cost for services or goods purchased by the facility from related organizations shall be the cost to the related organization, except when it can be demonstrated that the related organization is in fact equivalent to any other second party supplier, i.e., a relationship for purposes of this payment system is not considered to exist. A relationship shall be considered to exist when an individual (or individuals) possesses five (5) percent or more of ownership or equity in the facility and the supplying business; however, an exception to the relationship shall be determined to exist when fifty-one (51) percent or more of the supplier's business activity of the type carried on with the facility is transacted with persons and organizations other than the facility and its related organizations.

(7) The amount allowable for leasing costs shall not exceed the amount which would be allowable based on the computation of historical costs, except that for nursing facilities entering into lease/rent arrangements as intermediate care facilities prior to April 22, 1976, intermediate care facilities for the mentally retarded entering into lease/rent arrangements prior to February 23, 1977, and nursing facilities entering into lease/rent arrangements as skilled nursing facilities prior to December 1, 1979, the cabinet shall determine the allowable costs of these arrangements based on the general reasonableness of the costs.

(8) Certain costs not directly associated with patient care shall not be considered allowable costs. Costs which shall not be allowable include political contributions, travel and related costs for trips outside the state (for purposes of conventions, meetings, assemblies, conferences, or any related activities), specified vehicle costs as shown in the Kentucky Medicaid Program Nursing Facility Reimbursement Manual, and legal fees for unsuccessful lawsuits against the cabinet. However, costs (excluding transportation costs) for training or educational purposes outside the state are allowable costs unless the costs are incurred by administrators or owners.

(9) To determine the gain or loss on the sale of a facility for purposes of determining a purchaser's cost basis in relation to depreciation and interest costs, the following methods shall be used for changes of ownership occurring before July 18, 1984:

(a) Determine the actual gain on the sale of the facility.

(b) Add to the seller's depreciated basis two-thirds (2/3) of one (1) percent of the gain for each month of ownership since the date of acquisition of the facility by the seller to arrive at the purchaser's cost basis.

(c) Gain shall be defined as any amount in excess of the seller's depreciated basis as computed under program policies at the time of the sale, excluding the value of goodwill included in the purchase price.

(d) A sale shall be any bona fide transfer of legal ownership from an owner(s) to a new owner(s) for reasonable compensation, which shall usually be fair market value. Lease-purchase agreements or other similar arrangements which do not result in transfer of legal ownership from the original owner to the new owner shall not be considered sales until legal ownership of the property is transferred.

(e) If an enforceable agreement for a change of ownership was entered into prior to July 18, 1984, the purchaser's cost basis shall be determined in the manner set forth in paragraphs (a) through (d) of this subsection.

(10) Notwithstanding the provisions contained in subsection (9) of this section, or in any other section or subsection of this administrative regulation or the "Kentucky Medicaid Program Nursing Facility Reimbursement Manual," the cost basis for any facility changing ownership on or after July 18, 1984 (but not including changes of ownership pursuant to an enforceable agreement entered into prior to July 18, 1984 as specified in subsection (9)(e) of this section) shall be determined in accordance with the methodology set forth in this administrative regulation for the reevaluation of assets of nursing facilities.

(a) An increase shall not be allowed in capital costs;

(b) The allowable historical base for depreciation for the purchaser shall be the lesser of the allowable historical cost of the seller less any depreciation allowed to the seller in prior periods, or the actual purchase price; and

(c) The amount of interest expense allowable to the purchaser shall be limited to the amount that was allowable to the seller at the time of the sale.

(11) Each facility shall maintain and make available any records (in a form acceptable to the cabinet) which the cabinet may require to justify and document all costs to and services performed by the facility. The cabinet shall have access to all fiscal and service records and data maintained by the provider, including unlimited on-site access for accounting, auditing, medical review, utilization control and program planning purposes.

(12) The following shall apply with regard to the annual cost report required of the facility:

(a) The year-end cost report shall contain information relating to prior year cost, and shall be used in establishing prospective rates and setting ancillary reimbursement amounts;

(b) New items or expansions representing a departure from current service levels for which the facility requests prior approval by the program shall be so indicated with a description and rationale as a supplement to the cost report;

(c) Cabinet approval or rejection of projections or expansions

shall be made on a prospective basis in the context that if expansions and related costs are approved they shall be considered when actually incurred as an allowable cost. Rejection of items or costs shall represent notice that the costs shall not be considered as part of the cost basis for reimbursement. Unless otherwise specified, approval shall relate to the substance and intent rather than the cost projection; and

(d) When a request for prior approval of projections or expansions is made, absence of a response by the cabinet shall not be construed as approval of the item or expansion.

(13) The cabinet shall perform a desk review of each year-end cost report and ancillary service cost to determine the necessity for and scope of a field audit in relation to routine and ancillary service cost. If a field audit is not necessary, the report shall be settled without a field audit. Field audits shall be conducted when determined necessary. A desk review or field audit shall be used for purposes of verifying cost to be used in setting the prospective rate or for purposes of adjusting prospective rates which have been set based on unaudited data; audits may be conducted annually or at less frequent intervals. An audit of ancillary cost shall be conducted as needed.

(14) Year-end adjustments of the prospective rate and a retroactive cost settlement shall be made when:

(a) Incorrect payments have been made due to computational errors (other than the omission of cost data) discovered in the cost basis or establishment of the prospective rate.

(b) Incorrect payments have been made due to misrepresentation on the part of the facility (whether intentional or unintentional).

(c) A facility is sold and the funded depreciation account is not transferred to the purchaser.

(d) The prospective rate has been set based on unaudited cost reports and the prospective rate is to be adjusted based on audited reports with the appropriate cost settlement made to adjust the unaudited prospective payment amounts to the correct audited prospective payment amounts.

(15) The cabinet may develop and utilize methodology to assure an adequate level of care. Facilities determined by the cabinet to be providing less than adequate care may have penalties imposed against them in the form of reduced payment rates.

(16) Each facility shall submit the required data for determination of the prospective rate no later than sixty (60) days following the close of the facility's fiscal year. This time limit may be extended at the specific request of the facility (with the cabinet's concurrence).

(17) Allowable prior year cost, trended to the beginning of the rate year and indexed for inflation, shall be subject to adjustment based on a comparison of costs with the facility's occupancy rate (i.e., the occupancy factor) as determined in accordance with procedures set by the cabinet.

(a) The occupancy rate shall not be less than actual bed occupancy, except that it shall not exceed ninety-eight (98) percent of certified bed days (or ninety-eight (98) percent of actual bed usage days, if more, based on prior year utilization rates).

(b) The minimum occupancy rate shall be ninety (90) percent of certified bed days for facilities with less than ninety (90) percent certified bed occupancy.

1. The cabinet may impose a lower occupancy rate for newly constructed or newly participating facilities, or for existing facilities suffering a patient census decline as a result of a competing facility newly constructed or opened serving the same area.

2. The cabinet may impose a lower occupancy rate during the first two (2) full facility fiscal years an existing nursing facility participates in the program under this payment system.

(18) Qualifying nursing facilities (but not including swing beds, dual licensed hospital beds, IMDs, pediatric facilities, and facilities with all-inclusive rates) shall earn a cost savings incentive (CSI).

(a) Facilities qualifying for the CSI (except for NF/MRSs) shall be those facilities whose rate within the applicable cost array is not in excess of 110 percent of the median of the array.

(b) The CSI shall be computed at ten (10) percent of the difference between the facility's cost and the upper limit for the array with the CSI amount limited to not more than one (1) dollar and fifty (50) cents per day per facility for each cost array.

(c) NF/MRSs shall qualify for the CSI when the NF/MRS has costs less than the NF/MRS upper limit, and the CSI shall be ten (10) percent of the difference between the facility rate and the upper limit for the class of facility with the CSI amount limited to not more than one (1) dollar and fifty (50) cents per day per facility for each cost array.

(19) Intermediate care facilities for the mentally retarded may qualify for a cost incentive and investment factor (CIIF) allowance based on a comparison of the facility rate with the CIIF schedule shown in this subsection. No return for investment risk shall be made to nonprofit facilities, and publicly owned and operated facilities shall not receive the incentive or investment return. Cost incentive and investment schedule for intermediate care facilities for the mentally retarded:

(Effective 10-1-90)

Basic Per Diem Cost	Investment Factor Per Diem Amount	Incentive Factor Per Diem Amount
$ 96.99 & below	$1.38	$.87
97.00 -102.99	1.29	$.75
103.00 -108.99	1.18	$.62
109.00 -114.99	1.06	$.47
115.00 -120.99	.92	$.31
121.00 -126.99	.76	$.13
127.00 -133.49	*.53	----

*There is no maximum payment limit for intermediate care facilities for the mentally retarded.

(20) Hold harmless. The NFs (but not including swing beds or dual licensed hospital beds) shall be entitled to a "hold harmless" amount for the period from October 1, 1990 through June 30, 1992.

(a) This hold harmless amount shall be the amount, if any, by which the July 1, 1990 allowable facility rate plus an adjustment for ancillary costs shifted to routine costs (less a nurse aide training per diem allowance of one (1) dollar and twenty (20) cents) exceeds the allowable facility rate as computed on October 1, 1990 and July 1, 1991 (excluding the revised nurse aide training per diem allowance and other per diem add-ons in recognition of OBRA 87 requirements) under the revised reimbursement system.

(b) For hold harmless purposes, the July 1, 1990 rate shall be increased by an inflation allowance using the appropriate data resources, incorporated index for inflation.

(21) An adjustment shall be made to the usual rate for ICF-MRs, IMDs, and pediatric facilities to account for those medical supplies, catheters, syringes, and diapers not payable under the pharmacy program (and no longer payable as ancillaries under the nursing facility payment system) which are thus included under the routine cost category.

(22) Case-mix. The nursing costs for each facility shall be divided by the average case weight (as measured by each patient's needs with regard to activities of daily living and special needs using a standardized measurement as shown in the Nursing Facility Reimbursement Manual with a range from one (1.0) (lowest level of intensity) to 4.12 (highest level of intensity) to derive the facility average case unit cost.

(a)1. The average case weight for the period October 1, 1990 through June 30, 1991 shall be based on Medicaid patient level of care determinations made during the period July 1, 1990 through September 30, 1990 for each facility. (The peer review organization

(PRO) shall first determine whether a patient is high-intensity, low-intensity, or neither. For patients meeting patient status (high or low-intensity), the PRO will then determine the case weight).

2. The average case weight thereafter shall be based on all level of care determinations made during the period covered by the cost report (or as appropriate the most recent period available or a projection if a fully or partial cost report is not available).

(b) The facility nursing rate shall be adjusted for each quarter throughout the year and shall be the product of the average case unit cost (subject to upper limits and with the CSI adjustment as appropriate) times the average case weight for the prior quarter (as determined using standard methodology and point-in-time analysis). The actual facility payment amount for nursing care shall thus be subject to adjustment each calendar quarter based on changes in facility average case weight, though the average case unit cost (based on prior year costs) remains the same.

(23) Nursing home reform costs.

(a) Effective October 1, 1990 and thereafter, facilities shall be required to request preauthorization for costs that must be incurred to meet nursing home reform costs in order to be reimbursed for the costs.

1. The preauthorization request shall show the specific reform action that is involved and appropriate documentation of necessity and reasonableness of cost.

2. Upon authorization by the Medicaid agency, the cost shall be allowable.

3. A request for a payment rate adjustment may then be submitted to the Medicaid agency with documentation of actual cost incurred.

4. The allowable additional amount shall then be added on the facility's rate (effective with the date the additional cost was incurred) without regard to upper limits or the CSI factor (i.e., the authorized nursing home reform cost shall be passed through at 100 percent of reasonable and allowable cost).

(b) Preauthorization shall not be required for nursing home reform costs incurred during the period July 1, 1990 through September 30, 1990; however, the actual costs incurred shall be subject to tests of reasonableness and necessity and shall be fully documented at time of the request for rate adjustment.

(c) Facilities may request multiple preauthorizations and rate adjustments (add-ons) as necessary for implementation of nursing home reform.

(d) Facility costs incurred prior to July 1, 1990 shall not (except for the costs previously recognized in a special manner, i.e., the universal precautions add-on and the nurse aide training add-on) be recognized as being nursing home reform costs.

(e) The special nursing home reform rate adjustment shall be requested using forms and methods specified by the agency.

(f) A nursing home rate adjustment shall be included within the cost base for the facility in the rate year following the rate year for which the adjustment was allowed.

(g) Interim rate adjustments for nursing home reform shall not be allowed for periods after June 30, 1993.

(24) The provider tax on nursing facilities shall be considered allowable cost; for the period of July 1, 1993 through June 30, 1994 appropriate rate adjustment shall be made as a rate add-on, with no offset against the inflation allowance. For subsequent rate periods, the cost basis shall be adjusted as appropriate to reflect the cost of the provider tax.

Section 5. Prospective Rate Computation. The prospective rate for each facility (taking into account the factors described in this administrative regulation and the case mix methodology shown in the Nursing Facility Reimbursement Manual) shall reflect the following:

(1) The adjusted allowable cost for the facility;

(2) Adjustments to allowable cost related to occupancy;

(3) Adjustments to allowable cost related to application of upper limits;

(4) Adjustments to allowable cost related to application of the cost savings incentive factor, or for ICF-MRs, the cost incentive and investment schedule;

(5) Rates shall be recomputed quarterly based on revisions in the case mix assessment classification which affects the nursing services component as described in the Nursing Facility Reimbursement Manual; however, the cost basis and the upper limits shall be revised annually using the latest available cost reports and assessments from each provider;

(6) Adjustments as appropriate for costs shifted from ancillary to routine;

(7) Nursing home reform adjustments; and

(8) Hold harmless adjustments.

Section 6. Reimbursement Review and Appeal. Participating facilities may appeal cabinet decisions as to application of the general policies and procedures in accordance with the following:

(1) First recourse shall be for the facility to request in writing to the Director, Division of Reimbursement Operations, a reevaluation of the point at issue. This request shall be received within forty-five (45) days following notification of the prospective rate or forwarding of the desk review or audited cost report by the program. The director shall review the matter and notify the facility of any action to be taken by the cabinet (including the retention of the original application of policy) within twenty (20) days of receipt of the request for review or the date of the program/vendor conference, if one is held, except that additional time may be taken as necessary to secure further information or clarification pertinent to the resolution of the issue.

(2) Second recourse shall be for the facility to request in writing to the Commissioner, Department for Medicaid Services, a review by a standing reimbursement review panel to be established by the commissioner.

(a) This request shall be postmarked within twenty (20) days following notification of the decision of the Director, Division of Reimbursement Operations.

(b) The panel shall consist of three (3) members: one (1) member from the Division of Reimbursement Operations, one (1) member from the Kentucky Association of Health Care Facilities, and one (1) member from the Department for Medicaid Services (but not within the Division of Reimbursement Operations) as designated by the Commissioner, Department for Medicaid Services, with the designated member to act as chairperson of the review panel.

(c) A date for the reimbursement review panel to convene shall be established within twenty (20) days after receipt of the written request.

(d) The panel shall issue a binding decision on the issue within thirty (30) days of the hearing of the issue, except that additional time may be taken as necessary to secure further information or clarification pertinent to the resolution of the issue.

(e) In carrying out the intent and purposes of the program the panel may take into consideration extenuating circumstances in order to provide for equitable treatment and reimbursement of the provider.

(f) The attendance of the representative of the Kentucky Association of Health Care Facilities at review panel meetings shall be at the cabinet's expense.

Section 7. Implementation Date. The provisions of this administrative regulation shall be effective with regard to payments for services provided on or after July 15, 1994 [~~1, 1993~~].

MASTEN CHILDERS II, Commissioner, Secretary
APPROVED BY AGENCY: June 29, 1994
FILED WITH LRC: July 14, 1994 at 3 p.m.

STATEMENT OF EMERGENCY
907 KAR 1:635E

This emergency administrative regulation is being promulgated to provide eligibility conditions for the Kentucky Hospital Care Program as provided for in KRS 205.640. This emergency administrative regulation shall be replaced by an ordinary administrative regulation, filed with the Regulations Compiler on or about July 14, 1994.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Medicaid Services

907 KAR 1:635E. Conditions of coverage for the Kentucky Hospital Care Program (KHCP).

RELATES TO: KRS 205.520
STATUTORY AUTHORITY: KRS 194.050, 205.640
EFFECTIVE: July 15, 1994
NECESSITY AND FUNCTION: The Cabinet for Human Resources has responsibility to administer the Kentucky Hospital Care Program (KHCP) program, which is a program of hospital care for the indigent provided by Kentucky acute, psychiatric and rehabilitation hospitals participating in the Kentucky Medicaid Program. The cabinet is responsible for establishing eligibility guidelines for determinations of KHCP eligibility to be made by the hospitals. This administrative regulation sets forth provisions relating to the eligibility requirements and benefits for recipients under KHCP.

Section 1. Definitions. (1) "Family unit" means the parents, stepparents, their minor children and stepchildren living in the same household; unmarried couples who have at least one (1) minor child in common and siblings of that child living in the same household; or a child under age eighteen (18), legal guardian and the legal guardian's family living in the same household. A minor child who is also a minor parent and who lives with his parents is included in the family unit along with his child; if the minor parent, his child and the child's other parent, regardless of their marital status, are in the same household, they shall be considered a separate family unit from any other family unit in that household.

(2) "Kentucky Hospital Care Program" (KHCP) is a program of inpatient and outpatient hospital care, but excluding nonemergency care rendered in the emergency room, for Kentucky's indigent citizenry provided by Kentucky hospitals participating in the Kentucky Medicaid Program.

(3) "Minor children" means individuals under the age of twenty-one (21) living with a parent, or under the age of eighteen (18) living with a legal guardian in the same household, or one (1) of the previously described children attending college or a similar type of higher education facility.

(4) "Minor parent" means an individual under the age of twenty-one (21) who has a minor child.

(5) "Self-support" means a demonstration by the minor child that he is paying more than fifty (50) percent of his living expenses (i.e., proof of wages versus expenditures for living expenses, etc.).

Section 2. KHCP Eligibility Manual. (1) The KHCP Eligibility Manual, dated July 15, 1994, which describes the processes for determining KHCP eligibility, is incorporated by reference.

(2) The KHCP Eligibility Manual is available for inspection and copying during regular working hours (8 a.m. to 4:30 p.m. eastern standard time) in the Office of the Commissioner, Department for Medicaid Services, 275 East Main Street, Frankfort, Kentucky 40621.

(3) A fee shall be charged for the KHCP Eligibility Manual not to exceed the approximate cost of copying and materials.

Section 3. Eligibility Requirements. (1) For an individual or family unit to be KHCP eligible the following requirements shall be met:

(a) The individual or family unit shall be a resident(s) of Kentucky. Transients and non-U.S. citizens in visa status (i.e., visitors, students, etc.) shall not be eligible for KHCP;

(b) The individual's or family unit's income shall not exceed 100 percent of the official poverty income guidelines as promulgated by the Department of Health and Human Services, United State Government, and revised annually except for Medicaid recipients receiving additional days of coverage per hospital stay based on medical necessity determined in accordance with 907 KAR 1:012, Inpatient hospital services;

(c) The individual or family unit shall be encouraged to apply for Medicaid at the local Department for Social Insurance office if potentially eligible;

(d) Except for Medicaid recipients receiving additional days of coverage per hospital stay, a potential KHCP recipient receiving services on or after July 15, 1994 shall be required to apply for KHCP benefits by not later than thirty (30) days from the date of service or notification by the hospital of potential KHCP eligibility, whichever is later; and

(e) A potential KHCP recipient receiving services on or before June 30, 1994 shall be required to apply for KHCP services by August 15, 1994 or thirty (30) days from date of notification by the hospital of potential KHCP eligibility, whichever is later.

(2) Any Medicaid recipient receiving additional days of coverage per hospital stay, based on medical necessity determined in accordance with 907 KAR 1:012, shall be determined KHCP eligible without further verification.

(3) Individuals or families found eligible prior to July 1, 1993 for the Hospital Indigent Care Assurance Program for a period of time extending past July 1, 1993 shall be determined eligible for KHCP without further verification for that portion of the period of time extending past July 1, 1993.

Section 4. Exclusions from Eligibility. The following shall not be eligible for coverage under KHCP:

(1) Individuals within a correctional system (i.e., inmates of jails, prisons, etc.);

(2) Individuals in the custody of a unit of government which is responsible for coverage of the acute care needs of the individuals, with the exception of individuals in a state operated psychiatric hospital.

(3) Medicaid recipients who have been decertified by the peer review organization for not meeting psychiatric level of care;

(4) Individuals who receive ongoing Medicaid in any category including Aid to Families with Dependent Children (AFDC) and Supplemental Security Income (SSI); and

(5) KHCP eligibility shall not exist for Medicaid recipients during a hospital stay (during the first fourteen (14) day period) which would not have been approved or covered under the Medicaid Program.

Section 5. Eligibility Periods. The following provisions shall be applicable for eligibility periods.

(1) For inpatient hospital stays, each determination of eligibility shall be for the period of hospitalization.

(2) For major or minor outpatient procedures or services, a determination of eligibility shall be for the date or dates of service.

(3) A retroactive determination of eligibility shall be completed for inpatient hospital stays, and major or minor outpatient procedures or services for any period of time preceding the month of application. No retroactive coverage shall be provided for a period of time prior to July 1, 1993.

(4) No retroactive coverage for individuals between the ages of twenty-two (22) through sixty-four (64) residing in a psychiatric facility shall be available for any period prior to July 15, 1994.

Section 6. Income Considerations. Eligibility shall be determined by comparing the family unit's (or that of the individual not living with other family members) total annual gross income to the poverty income guidelines for the appropriate family size. In comparing the family unit's total annual gross income to 100 percent of the official poverty income guidelines, the following policies shall be applied:

(1) Total annual gross income shall be based on income received during the prior twelve (12) months with adjustments for projected changes in income as appropriate;

(2) Hospitals may require submission of tax returns, pay stubs, employer statements, and similar documents to verify income;

(3) Upon verification that income will increase or decrease, the anticipated income shall be used;

(4) The gross income or adjusted gross income for self-employment shall be used; the adjusted gross income shall be determined by allowing work expense deductions that are directly related to producing the goods or services and without which the goods or services could not be produced;

(5) Income of all family unit members, including ineligible members, shall be considered and compared to the appropriate KHCP family size;

(6) Parental income shall not be considered in eligibility determinations for children age twenty-one (21) or older. If the child, regardless of age, is not living with the parent or attending college or a similar type of higher education facility, parental income shall not be considered;

(7) A legal guardian's income shall be considered in determining eligibility for children living in the same household as the legal guardian until the child reaches the age of eighteen (18);

(8) A grandparent's income shall not be considered for grandchildren living with the grandparent (but not also living with the minor parent) unless the grandparent is the legal guardian;

(9) Income from a common law spouse living in the same household shall be considered. (Common law marriages shall be recognized if recognized by other states or the couple are holding themselves out to the community as married); and

(10) State supplemental payments to individuals in personal care homes shall be excluded from consideration.

Section 7. Resource Considerations. (1) Resources shall not be considered in determining KHCP eligibility for the period of July 1, 1993, through January 31, 1994.

(2) Effective for determinations of eligibility for the period beginning on February 1, 1994, and ending on April 15, 1994 the following upper limits for liquid assets (cash or assets readily convertible to cash including checking accounts, savings accounts, stocks, bonds, and similar financial instruments, but not including real or personal property including jewelry, household goods, clothing, buildings, land, businesses, and professional practices) shall be applicable: $2,000 for an individual; $4,000 for a family size of two (2); and fifty (50) dollars for each additional family member.

(3) Effective for determinations of eligibility for periods beginning on or after April 16, 1994 the following provisions shall be applicable with regard to the computation of allowable resources:

(a) The following upper limits for liquid assets (cash or assets readily convertible to cash including checking accounts, savings accounts, stocks, bonds, and similar financial instruments) shall be applicable: $2,000 for an individual; $4,000 for a family size of two (2); and fifty (50) dollars for each additional family member;

(b) A homestead, household goods, and personal property including jewelry, clothing, and other items of a personal nature shall be excluded from consideration;

(c) Equity of $6,000 in income producing nonhomestead real property, business or nonbusiness, essential for self-support shall be excluded from consideration;

(d) Equity of $4,500 in automobiles shall be excluded from consideration;

(e) Burial reserves of up to $1,500 per individual, burial spaces including the plot, casket, vault, and items of a similar nature, and irrevocable prepaid burial plans, contracts and burial trusts shall be excluded from consideration;

(f) The value of excludable assets in excess of excluded amounts shall be added to liquid assets for comparison against the liquid asset upper limits; and

(g) Other assets not excluded or within the upper limits shall be added to liquid assets for comparison against the liquid asset upper limits.

(4) Resources above the allowable amounts shall result in ineligibility for benefits under KHCP, but only to the extent that liquid resources exceed the allowable upper limits; this means that liquid resources can be spent down to establish eligibility. For example, if an otherwise eligible individual with $2,300 in liquid assets is hospitalized, he would become eligible for KHCP coverage after receiving $300 in billable services.

Section 8. Verification Requirements. Except as specified in Section 3 of this administrative regulation, the cabinet shall require verification in accordance with the following in eligibility determinations (although verification of residency should be accomplished in questionable situations):

(1) Income verification for all family unit members shall be required for inpatient hospital admissions and major outpatient procedures or services;

(2) Verification shall be required every six (6) months, or more frequently at the option of the hospital, unless the family unit's income has increased;

(3) If the family unit's income has increased, the hospital shall not be required but may require verification of income if the newly reported income exceeds the KHCP income limits;

(4) If the family unit alleges zero income, verification may be obtained or at the option of the hospital waived;

(5) Income and resource verification may be waived at the option of the hospital for minor outpatient procedures or services;

(6) Self-support verification for children under age twenty-one (21) not living with parents and who attend college or a similar type of higher education facility shall be required; and

(7) Applicants for KHCP benefits must provide requested information within ten (10) days unless this requirement is waived by the hospital.

Section 9. Dual Eligibility. The individual or family unit may be referred to apply for Medicaid benefits. The following provisions shall be applicable for dual eligibility.

(1) An individual may be KHCP eligible and simultaneously determined Medicaid eligible. An individual may apply for ongoing Medicaid and KHCP eligibility concurrently.

(2) An individual may apply for both KHCP and Medicaid spenddown eligibility.

(3) For Medicaid spenddown eligibility any hospital expense attributed to the individual's KHCP eligibility shall not be considered as an incurred cost in determining Medicaid spenddown eligibility.

(4) Individuals who are eligible as qualified Medicare beneficiaries (QMBs) only recipients may apply for KHCP eligibility.

(5) An individual may apply for both KHCP and SSI Medicaid benefits.

(6) If an individual or family unit is subsequently approved for Medicaid or QMB benefits during a period of KHCP eligibility, the hospital may bill the Medicaid Program in accordance with Medicaid policy shown in 907 KAR 1:013 and 907 KAR 1:015 provided the hospital reports the KHCP adjustment prior to billing the Medicaid Program.

Section 10. Fair Hearing. (1) An applicant may request a fair hearing on his KHCP eligibility determination within thirty (30) days of

the denial or approval date.

(2) Each hospital shall be responsible for conducting hearings to determine if KHCP eligibility was determined correctly and for correcting any errors in KHCP eligibility which have been made.

(3) The hearings shall be conducted by impartial hospital staff not involved in the KHCP eligibility determination.

(a) Hearings shall be conducted within thirty (30) days of the date of the hearing request.

(b) During the hearing:

1. The appellant shall be provided an opportunity to review evidence against him;

2. To cross-examine witnesses against him;

3. To present evidence in his behalf; and

4. To be represented by counsel.

(c) Hospital decisions regarding the hearing shall be rendered within fourteen (14) days of the hearing and a copy of the decision provided to the KHCP applicant and the Department for Medicaid Services.

(d) The hearing process may be terminated at any time a corrected decision of KHCP eligibility is made in favor of the potential KHCP recipient with appropriate notice of KHCP eligibility and termination of the hearing process required.

(e) Further appeal may be to the local court having competent jurisdiction.

(2) If a hospital contests medical necessity (whether before or after the fact) for a KHCP eligible person or for a Medicaid recipient with regard to additional days of inpatient coverage, the Medicaid Peer Review Organization (PRO) shall be contacted by the hospital for a determination of the appropriateness of the service using Medicaid standards of medical necessity; the decision of the PRO shall be binding upon the hospital for KHCP purposes. It shall be the PRO's responsibility to advise the hospital, the KHCP or Medicaid recipient, and the recipient's physician, in writing, of the PRO's decision. If the KHCP or Medicaid recipient is dissatisfied with the decision of the PRO, he may appeal the decision in accordance with 904 KAR 2:055.

Section 11. Benefits. Benefits under KHCP shall be as follows:

(1) Medicaid recipients shall receive any necessary days of coverage for hospital stay as specified in KRS 205.640;

(2) Except for nonemergency care rendered in the emergency room, KHCP recipients, including individuals with a pending KHCP application, shall not be billed for hospital services provided by Medicaid participating hospitals in accordance with KRS 205.640.

Section 12. Except as otherwise specified, the provisions of this administrative regulation shall be applicable for determinations of eligibility made, and services provided, on or after April 16, 1993 except that the Medicaid Program shall also recognize and accept determinations of eligibility made under the previous program guidelines for the period of July 1, 1993 through April 15, 1994.

MASTEN CHILDERS II, Commissioner and Secretary
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 15, 1994 at 10 a.m.

STATEMENT OF EMERGENCY
907 KAR 1:670E

This emergency administrative regulation is being promulgated to implement the provisions of House Bill 127 and Senate Bill 37 related to improvement of the Medicaid Program. This action must be taken on an emergency basis to insure accountability of funds spent in the Medicaid Program and conserve scarce state resources. This emergency administrative regulation shall be replaced by an ordinary administrative regulation, filed with the Regulations Compiler on or about July 14, 1994.

BRERETON C. JONES, Governor
MASTEN CHILDERS II, Secretary

CABINET FOR HUMAN RESOURCES
Department for Medicaid Services

907 KAR 1:670E. Conditions of Medicaid provider participation; enrollment, documentation of services, disclosure, appeals process, and sanctions.

RELATES TO: KRS 205.510 to 205.990, 1994 Ky. Acts chs. 96, 316, 42 CFR 431.107, Parts 455, 1002, 42 USC 1320a-3, a-3a, a-5, a-7, 1395cc, vv, 1396b, d, m, n

STATUTORY AUTHORITY: KRS 194.050, 205.520, 250.560, 42 USC 1396a

EFFECTIVE: July 15, 1994

NECESSITY AND FUNCTION: The Cabinet for Human Resources shall administer the Medicaid Program. 1994 Ky. Acts chs. 96 and 316 specify that the Cabinet for Human Resources and the Department for Medicaid Services shall be responsible for the control of Medicaid provider fraud and abuse. KRS 205.520 authorizes the cabinet, by administrative regulation, to comply with any requirement that may be imposed, or opportunity presented, by federal law for the provision of medical assistance to Kentucky's indigent citizenry. This administrative regulation sets forth the provisions relating to Medicaid provider participation. In the event of a conflict between other topical administrative regulations under Title 907, or manual materials incorporated by reference in administrative regulations under Title 907, and this administrative regulation, the latter shall prevail.

Section 1. Definitions. (1) "Abuse" shall have the same meaning as that shown in 1994 Acts ch. 316, sec. 1(8), p. 650.

(2) "Applicant" means a person or entity who submits an application to become a Medicaid provider.

(3) "Application" means completion and submission of forms MAP 343, MAP 343B, and MAP 343C, and any required addendum specific to a provider type.

(4) "Bribes and kickbacks" means soliciting or receiving any payment, or offering or paying any payment whether in cash or in kind, in return for:

(a) Referring a client to a person for any medical care, services or supplies; or

(b) Purchasing, leasing, ordering or recommending any medical care, services or supplies, for which payment is claimed under the Medicaid program.

(5) "Cabinet" means the Cabinet for Human Resources.

(6) "Claim" means any request for payment under the Medicaid program. A claim may be submitted on:

(a) A paper form;

(b) An electronic billing process; or

(c) Any format approved by the department.

(7) "Convicted" shall have the same meaning as that shown in 1994 Acts ch. 96, sec. 13(1), p. 186, regardless of whether an appeal from that judgment is pending.

(8) "Client deception" means misleading or threatening a client, or charging or agreeing to charge or collect any fee from a client in excess of the maximum fee, rate or schedule amount.

(9) "Conspiracy" means entering into any agreement, plan, scheme or understanding to defraud the Medicaid program by obtaining or aiding anyone to obtain payment of any false, fictitious or fraudulent claim.

(10) "Conversion" means converting a medical assistance payment, or any part of a payment, to a use or benefit other than for the use and benefit intended by the Medicaid program.

(11) "Department" means the Department for Medicaid Services.

(12) "Disclosure" means the provision of information in accordance with the requirements shown in 42 CFR 455, Subpart B.

(13) "Disclosing entity" means a Medicaid provider or a fiscal agent.

(14) "Exclusion" means the termination of the participation of a provider or the denial of the enrollment of a provider; and no reimbursement to the provider under Medicaid for items or services furnished by the provider.

(15) "Factoring" means assigning payments under the Medicaid program to a factor, either directly or by power of attorney; or receiving payment through any person whose compensation is not directly related to the cost of processing the claim, is related to the amount collected or is dependent upon collection of the payment.

(16) "False claims" are claims for:

(a) Unfurnished medical care, services or supplies;

(b) An amount in excess of established rates or fees;

(c) Medical care, services or supplies provided:

1. At a frequency or in amounts not medically necessary;

2. In amounts substantially in excess of the customary charges or costs to the general public; or

3. Which the provider is aware of the possibility of third party payment, but chooses not to bill the third party payor.

(17) "Fiscal agent" means a contractor that processes or pays provider claims on behalf of the department.

(18) "Full investigation" means the activities of the Medicaid Fraud Control Unit (MFCU) to resolve a complaint of Medicaid abuse or fraud which has been referred to it directly or from the Office of the Inspector General (OIG) of the Cabinet for Human Resources.

(19) "Furnish" means to provide medical care, services or supplies that are:

(a) Provided directly by the person;

(b) Provided under the supervision of the person: or

(c) Prescribed by the person.

(20) "Managing employee" means a general manager, business manager, administrator, director or other individual who exercises operational or managerial control over, or who conducts the day-to-day operation, of an institution, organization, or agency.

(21) "Medicaid Fraud Control Unit" (MFCU) means the unit of staff in the Office of the Attorney General of Kentucky, certified under the provisions of 42 USC 1396b(q), which conducts a statewide program for the investigation and prosecution of violations of all state laws regarding fraud and abuse in connection with the provision of medical assistance and the activities of providers of Medicaid.

(22) "Preliminary investigation" means the activities of the Office of Inspector General (OIG), MFCU, or the department to determine whether a complaint of Medicaid abuse or fraud has sufficient basis to warrant a full investigation.

(23) "Provider" shall have the same meaning as that shown in 1994 Acts ch. 316, sec. 1(7), p. 650.

(24) "Recipient" shall have the same meaning as that shown in 1994 Acts ch. 316, sec. 1(9), p. 650.

(25) "Reliable evidence" means:

(a) Preliminary determinations by audit or utilization review staff of unacceptable practices or significant overpayments;

(b) Information of an ongoing investigation of a provider involving fraud or criminal conduct involving the Medicaid program from state investigating or prosecutorial agency, or other law enforcement agency;

(c) Information from a state professional licensing or certifying agency of ongoing investigation of a provider involving fraud, abuse, professional misconduct, unprofessional conduct or utilization; or

(d) Information from department staff or other sources regarding unacceptable practices or program abuse which have been verified.

(26) "Sanction" means any final administrative action taken by the department which limits a person's or a provider's participation in the Medicaid program or imposes a fiscal penalty against the provider including the imposition of civil penalties and interest and the withholding of payments. Sanctions which may be imposed are described in 1994 Ky. Acts ch. 316, sec. 9(1)(a)-(e), p. 653, and 1994 Ky. Acts ch. 96, sec. 9(1)(a)-(e), p. 185, and Section 9 of this administrative regulation.

(27) "Services" means medical care, services or supplies provided to recipients under Medicaid.

(28) "Significant business transaction" means any business transaction or series of transactions that, during any one (1) fiscal year, exceed the lesser of $25,000 or five (5) percent of a provider's total operating expenses.

(29) "Subcontractor" means:

(a) An individual, agency, or organization to which a disclosing entity has contracted or delegated some of its management functions or responsibilities of providing medical care or services to its patients; or

(b) An individual, agency or organization with which a fiscal agent has entered into a contract, agreement, purchase order or lease including real property, to obtain space, supplies, equipment or services provided under Medicaid.

(30) "Supplier" means an individual, agency or organization from which a provider purchases goods and services used in carrying out its responsibilities under Medicaid.

(31) "Unacceptable practice" means conduct by a provider which constitutes "fraud" or "provider abuse", as defined in 1994 Ky. Acts ch. 316, sec. 1(2) and (8), pp. 649-650, and 1994 Ky. Acts ch. 96, sec. 1(2) and (8), p. 182, or willful misrepresentation, and includes the following practices:

(a) Submitting, or causing the submission of false claims, or inducing, or seeking to induce, any person to submit false claims;

(b) Making, or causing to be made, or inducing, or seeking to induce, any false, fictitious or fraudulent statement or misrepresentation of material fact in claiming a Medicaid payment, or for use in determining the right to payment;

(c) Having knowledge of any event affecting the right to payment of any person and concealing or failing to disclose the event with the intention that a payment be made when not authorized or in a greater amount than due;

(d) Conversion;

(e) Soliciting or accepting bribes and kickbacks except in the case of discounts or reductions in price which are disclosed to the client and the department and reflected in a claim, or payments which are made under the terms of a valid employer-employee relationship;

(f) Failing to maintain or to make available, for purposes of audit or investigation, administrative and medical records necessary to fully disclose the medical necessity for the nature and extent of the medical care, services and supplies furnished, or to comply with other requirements as contained in Section 4 of this administrative regulation;

(g) Submitting a claim or accepting payment for medical care, services or supplies furnished by a sanctioned person;

(h) Seeking or accepting additional payments such as gifts, money, donations, or other consideration in addition to the amount paid or payable under the Medicaid program for any medical care, services or supplies for which a claim is made;

(i) Deceiving, misleading or threatening a recipient, or charging or agreeing to charge or collect any fee from a recipient in excess of the maximum Medicaid fee, rate or schedule amount;

(j) Engaging in conspiracy;

(k) Furnishing medical care, services or supplies that fail to meet professionally recognized standards, or licensure standards promulgated under KRS Chapter 216B, for health care or which are beyond the scope of the person's professional qualifications or licensure;

(l) Illegally discriminating in the furnishing of medical care, services or supplies based on a recipient's race, color, national origin, religion, sex, age, disabling condition, or marital status;

(m) Factoring;

(n) Offering or providing any premium or inducement to a

recipient in return for the recipient's patronage of the provider or other person to receive medical care, services or supplies under the Medicaid program;

(o) Failure to meet disclosure requirements;

(p) Unbundling; and

(q) An act committed by a nonprovider which, if committed by a provider, would result in the termination of the provider's enrollment in the program.

(32) "Unbundling" means submitting multiple claims for constituent parts of services provided which results in enhanced reimbursement to a provider for a covered service.

(33) "Withholding" means the process by which claims are processed, but are not paid to a provider, with payments for such claims withheld, pending the investigation of a report of unacceptable practices.

Section 2. Enrollment Process for Participation in Medicaid. (1) Scope.

(a) The department shall contract with only those persons or entities who can demonstrate that they are qualified to participate as a provider.

(b) All persons or entities who wish to participate in the Medicaid program shall be enrolled as participating providers prior to being eligible to receive reimbursement.

(2) New enrollments. Any person or entity interested in participating as a provider on or after the effective date of this administrative regulation shall be required to submit an application for enrollment in accordance with this section.

(3) Enrolled providers. All persons or entities enrolled as participating providers in Medicaid prior to the effective date of this administrative regulation shall be required to submit an application for enrollment upon notice from the department.

(a) Providers shall have sixty (60) days from the date of the notice to submit a completed and signed application to the department.

(b) The notice shall inform the provider that failure to return the completed and signed application within sixty (60) days shall result in termination of participation and shall advise the provider of appeal rights as per Section 10(12)(c) of this administrative regulation.

(c) Submission of the application within sixty (60) days shall permit the continuation of the existing provider participation which shall remain in effect until a determination with respect to the application for enrollment is made and notice of approval or denial of enrollment is sent to the provider.

(d) The department may revise enrollment requirements and reenroll providers if necessary for effective management of the Medicaid program.

(4) Application for enrollment as a participating provider shall be processed in the following manner:

(a) All applicants for participation shall complete a provider agreement, disclosure of ownership and control interest statement, certification with regard to lobbying activity, provide proof of a currently valid license, registration, or certificate which allows the applicant to provide the services for which the applicant contracts, and provide any other information requested for processing of the application for participation.

(b) The department may require additional information from the applicant with regard to qualifications for participation. If the applicant does not respond within the time period specified in the request, the application for participation may be denied unless an extension of time is requested and granted.

(c) The department may require that an on-site inspection be performed to ascertain compliance with applicable licensure standards as promulgated under KRS Chapter 216B, and certification standards, prior to an enrollment determination.

(d) The department shall complete its application review and determine whether or not to enroll the applicant within ninety (90) days after receipt of the completed application and any additional information requested by the department. The department may take additional time for the decision when necessary for resolution of issues or disputes.

(5) Approval of an application.

(a) Upon approval of an application, the provider shall be issued an identifying number to be used exclusively by the provider for billing and identification purposes.

(b) A provider's participation shall begin on the date specified in the notification of approval of program participation and continue for the period specified in the notification, unless the provider participation is otherwise terminated in accordance with this administrative regulation.

(6) By enrolling, the provider (and all subcontractors pursuant to written agreement made a part of the contract) agrees to:

(a) Maintain the documentation for claims as required by Section 4 of this administrative regulation;

(b) Furnish all information regarding the nature and extent of services and claims for payment submitted by, or on behalf of, the provider to representatives of the cabinet, the Attorney General, the Auditor of Public Accounts, and the Secretary of the United States Department of Health and Human Services upon request;

(c) Comply with the disclosure requirements of Section 3 of this administrative regulation;

(d) Comply with the applicable advance directives requirements of 42 USC 1396a(w) with regard to the right to accept or reject extreme lifesaving medical procedures;

(e) Accept payment from Medicaid as payment in full for all care, services and supplies billed under the program, except where specifically provided for in law to the contrary;

(f) Submit claims for payment only for care, services and supplies actually furnished to eligible persons and medically necessary or otherwise authorized by law;

(g) Provide true, accurate and complete information in relation to any claim for payment;

(h) Permit review, or audit, by representatives of the cabinet, the Attorney General, the Auditor of Public Accounts, and the Secretary of the United States Department of Health and Human Services, or any other investigation authority, of all books or records or, in the discretion of the auditing agency, a sample thereof, relating to services furnished and payments received under Medicaid, including patient histories, case files and patient specific data;

(i) Not engage in any activity which would constitute unacceptable practice;

(j) Comply with all terms and provisions contained in the provider agreement; and

(k) Comply with all applicable federal and state statutes and regulations relating to their provider type and provision of services under the Medicaid program.

(7) Denial of an application.

(a) The following factors shall be reason for denial of participation:

1. Any false representation or omission of any material fact in making an application;

2. Any current suspension, exclusion or involuntary withdrawal from participation in any governmental or private medical insurance program;

3. Any false representation or omission relating to the application for any license, permit, certificate or registration related to a profession or business;

4. Any previous failure to correct a deficiency in the operation of a business or enterprise after having received written notice of the deficiencies from a state or federal licensing, certifying or auditing agency;

5. A current indictment for, or recent conviction for, fraud and abuse or unacceptable practice in Medicaid of this or any other state, Medicare, or any other publicly funded program;

6. Failure to comply with any policy of the department.

(b) If an application is denied, the applicant may resubmit only upon correction of the factors leading to its denial, or after the expiration of any period of exclusion imposed under 1994 Ky. Acts ch. 316, sec. 9(1)(e), p. 653, or 1994 Ky. Acts ch. 96, sec. 9(1)(e), p. 185, whichever is later.

(c)1. Notice of denial of enrollment.

2. A written notice of the denial shall be given which contains:

a. The reason for the denial;

b. The date the applicant may make a new submission for enrollment; and

c. The date of denial which shall be effective upon the date of the written notice.

(8) An out-of-state provider of care services or supplies may enroll for a limited time period of thirty (30) days in an exceptional situation for emergency services provided to an eligible recipient.

Section 3. Required Provider Disclosure. (1) Disclosure by providers and fiscal agents; information on ownership and control. Each provider and fiscal agent shall comply with the disclosure of information requirements contained in 42 CFR 455 Subpart B.

(2) Time and manner of disclosure.

(a) The required provider information specified in 42 CFR 455, Subpart B shall be provided to the department:

1. Upon application for enrollment;

2. Annually thereafter; and

3. Upon request by the department or the Secretary, United States Department of Health and Human Services.

(b) The disclosure requirement may coincide with the certification or recertification period except when the provider is certified other than on an annual basis.

(c) The provider shall file an amended, signed ownership and disclosure form with the department within fifteen (15) days if there is a:

1. Change in ownership or control;

2. Change of a managing employee or management company;

3. Change in a provider's federal tax identification number;

4. Change which could be considered to constitute a new entity; or

5. Change in any subcontractors with whom the provider subcontracts for the provision of medical care or supplies.

(3) If the provider or fiscal agent fails to disclose required information within the time period specified, the provider shall be terminated from participation in the Medicaid program on the day following the last day for submittal of the required information as per Section 10(3) of this administrative regulation.

Section 4. Required Provider Documentation. (1) Each provider shall maintain documentation of:

(a) Care, services or supplies provided to an eligible recipient;

(b) The patient's medical record (or other provider file, as appropriate) which shall demonstrate that the care, services, or supplies billed for, were actually performed or delivered;

(c) The medical necessity of the service performed or supplies provided; and

(d) The appropriate medical order which substantiates medical necessity.

(2) A cost based provider shall maintain all fiscal and statistical records and reports which are used for the purpose of establishing rates of payment made in accordance with Medicaid, and all underlying books, records, documentation and reports which formed the basis for the fiscal and statistical records and reports.

(3) All documentation required by this section shall be maintained by the provider for a minimum of five (5) years from the later of:

(a) The date of final payment for services;

(b) The date of final cost settlement for cost reports; or

(c) The date of final resolution of disputes (if any).

(4) If any litigation, claim, negotiation, audit, investigation or other action involving the records has been started before the expiration of the five (5) year period, the records shall be retained until the later of:

(a) The completion of the action and resolution of all issues which arise from it; or

(b) The end of the regular five (5) year period.

Section 5. Claims Processing. (1) Claim submittal.

(a) A provider shall submit a claim, using forms and procedures specified by the department, for covered services or supplies rendered to an eligible recipient within twelve (12) months of the provision of service.

(b) A provider shall submit additional documentation for claims processing when required by the department.

(c) By submitting a claim a provider shall:

1. Be liable for the accuracy of all claims submitted by the provider, on the provider's behalf or by employees of the provider.

2. Be responsible for reviewing the statement of payment or remittance statement to assure that paid claims shown are true and correct, and for informing the department of any discrepancy.

(d) If a provider submits a claim electronically, the provider's acceptance of payment shall be considered to be the provider's certification that a paid claim is true and correct; and

(e) Any submittal of a false claim, statement or document shall be considered to be an unacceptable practice.

(2) Claim payment.

(a) Payment shall be made by the department if:

1. The information required to pay the claim is complete;

2. The provider is not under investigation for an unacceptable practice;

3. The claim is not under review for medical necessity;

4. The provider is up-to-date on all reports and information required by the department; and

5. The department is not withholding the provider's payments in accordance with Section 8 of this administrative regulation.

(b) The department may audit paid claims to determine if any unacceptable practices have occurred which may result in repayment.

Section 6. Methods for Recoupment of Overpayments. (1)(a) Medicaid overpayments. When a determination is made by the department that a provider was overpaid, a demand letter is sent to the provider.

(b) In response to the demand letter, the provider shall, within thirty (30) days:

1. Pay the amount in full; or

2. Submit a written request for a payment plan.

(2) A payment plan may be approved by the department when a provider claims that payment in full would create an exceptional undue hardship. A declaration in writing to the department of exceptional undue hardship shall include the following:

(a) Copies of financial statements which indicate payment in full within thirty (30) days would create an exceptional undue hardship; and

(b) Copies from at least two (2) financial institutions indicating the provider's loan request was denied for the overpayment amount.

(3) Payment plans shall not extend beyond a six (6) month period except as provided for in subsection (4) of this section.

(4) The department may exercise discretion and approve a payment plan in excess of six (6) months when the monthly payment exceeds twenty-five (25) percent of the provider's average monthly Medicaid payment. The average monthly Medicaid payment is based on the previous twelve (12) month's payments.

(5) All payment plans shall include provisions for payments of both principal and interest.

(6) When a provider fails to make a payment as specified in the payment plan or takes no action toward repayment, the fiscal agent contractor shall recoup the amount due from future payments. If a provider has insufficient funds available for recoupment through the

fiscal agent contractor payment system in the first payment cycle following the due date, payments shall be withheld and the account will be referred to the Department of Law for collection.

(7) If a provider disputes the amount of overpayment due the agency, the provider may submit additional documentation to support its position or request a resolution meeting at which time additional documentation may be submitted.

(a) The department shall:

1. Review additional documentation within thirty (30) days of receipt;

2. Schedule a resolution meeting within thirty (30) days of receipt of the request as necessary.

(b) Within thirty (30) days from the date of receipt of additional documentation or the resolution meeting, the department shall notify the provider of the final determination.

1. If the department determines that no adjustments are required as a result of the additional documentation or the resolution meeting, the initial determination will stand.

2. If it is determined that the amount requested should be reduced, any refund due to the provider shall be refunded to the provider within thirty (30) days.

3. If it is determined that the amount requested should be increased, the additional amount due will be subject to subsection (4) of this section.

(8) Withholding Medicare payments to recover Medicaid overpayments.

(a) The cabinet may request that the Health Care Financing Administration (HCFA) hold Medicare payments to a provider in order to recover Medicaid overpayments to the provider. The requests for holding shall be accomplished in accordance with the terms and conditions specified in federal regulations at 42 USC 1395vv.

(b) Amounts held by HCFA and returned to the cabinet by HCFA (as provided for in 42 USC 1395vv) which are ultimately determined by the cabinet to be in excess of overpayments shall be returned to the provider.

(9) Statutory recovery. The cabinet shall not issue payments otherwise due a provider if withholding is ordered by a state or federal government agency or by a court for recovery of money with the payments to be held in accordance with the provisions of the order issued by the state or federal government agency or the court.

(10) Medicare overpayments. When ordered to do so by HCFA, the department shall recoup the federal share of Medicaid payments otherwise due Medicaid providers as a means to recover Medicare overpayments. The federal share of Medicaid payments is that portion of the payment funded with federal funds.

Section 7. Unacceptable Practice Detection and Investigation. (1) A preliminary investigation of alleged unacceptable practice shall be conducted by the department or its agent if:

(a) A complaint is received by the Medicaid program or other cabinet staff or upon referral from the Office of Attorney General to the cabinet; or

(b) Questionable practices are identified by the Medicaid agency or its contractors.

(2) If the findings of a preliminary investigation indicate that an incident of fraud or abuse has occurred in the Medicaid program, a referral for a full investigation shall be made to the MFCU.

(3) In order to facilitate a full investigation, the department shall, at the request of the MFCU, provide for access to, and free copies of, any records, data, or information kept by the agency, its contractors, or providers if authorized as specified in Section 4 of this administrative regulation.

(4) A full investigation shall continue until:

(a) Appropriate legal action is initiated; or

(b) The investigation is discontinued because of insufficient evidence to support the allegation of unacceptable practice; or

(c) The case is returned to the department for administrative action.

(5) At any time during a preliminary or full investigation, the department may make an administrative determination that a provider has committed an act of unacceptable practice based on receipt of reliable evidence. The commissioner of the department shall issue a written notice of a determination of unacceptable practice to the person whom it intends to exclude or impose sanctions upon, as specified in Section 9 of this administrative regulation. The notice shall be mailed to the person's designated payment or correspondence address or last known address and shall clearly state:

(a) The determination made;

(b) The basis and specific reasons for the determination;

(c) The effect of any action to be taken;

(d) The amount of any overpayment or penalty, if any;

(e) The effective date of the action; and

(f) Information concerning any appeal right of the provider.

Section 8. Withholding of Payments During Investigation of Fraud or Willful Misrepresentation. (1) The department may withhold Medicaid payments as provided for in 42 CFR 455.23 upon receipt of reliable evidence that an incident of fraud or willful misrepresentation has occurred in the Medicaid program.

(2) The department may withhold payments without first notifying the provider of its intention to withhold payments.

(3) The department shall send notice to the provider of its withholding of program payments within five (5) days of taking the action.

(a) The notice shall set forth the general allegations of the nature of the withholding action, but may not disclose any specific information concerning its ongoing investigation.

(b) The notice shall advise the provider:

1. That payments are being withheld in accordance with this administrative regulation;

2. That withholding shall be for a temporary period;

3. Of the circumstances under which withholding shall be discontinued;

4. Of the type of Medicaid claim, as appropriate, to which withholding shall apply; and

5. Of his right to submit written evidence for consideration by the agency.

(4) The department shall not be obligated to grant a hearing request concerning any withholding of payment action under this section.

(5) Any withholding of payment action under this section shall be temporary and shall not continue after:

(a) The investigation has been discontinued due to insufficient evidence of unacceptable practice by the provider; or

(b) Legal proceedings related to the provider's alleged unacceptable practice are completed; or

(c) The matter is resolved between the agency and the provider through an administrative determination of unacceptable practice, as specified in Section 7 of this administrative regulation, which has not been appealed and which is no longer applicable due to expiration of time limits for appeals.

Section 9. Sanctions. (1) The cabinet shall impose sanctions as provided for in 1994 Ky. Acts ch. 316, sec. 9(1)(a) - (e), p. 653, and 1994 Ky. Acts ch. 96, sec. 9(1)(a) - (e), p. 185, and as provided for in Section 8 of this administrative regulation when legal proceedings against a provider have established that the provider has engaged in fraud or abuse or when an administrative determination as provided for in Section 7 of this administrative regulation establishes that the provider has engaged in an unacceptable practice.

(2) If the department sanctions a person, it may also sanction any affiliate of the person. However, the determination to sanction the affiliate shall be made during the process leading to the administrative determination of unacceptable practice, on a case-by-case basis, after

full review and consideration of all relevant facts and circumstances leading to the sanction of the primary person. The affiliate shall have the same notification and due process rights as any sanctioned person.

(3) The department may hold a person responsible for the conduct of another person in the administrative determination of unacceptable practice. However, conduct may only be imputed to another if:

(a) The persons are affiliates of each other; and

(b) The conduct was accomplished within the course of the duties of the person to be sanctioned; and

1. The other person knew or should have known of the conduct; or

2. The conduct was effected with the knowledge and consent of the other.

(4) The sanction process shall include the termination of the provider from the Medicaid program and shall specify a period of exclusion. In determining the duration of exclusion, the department shall consider:

(a) The number and nature of the unacceptable practice incidents;

(b) The nature and extent of any adverse impact the violations had on recipients;

(c) The amount of damages to the program;

(d) Any mitigating circumstances;

(e) Other facts related to the nature and seriousness of the unacceptable practice; and

(f) The previous record of the person under Medicare, Medicaid and any program administered by the Cabinet for Human Resources.

(5) The sanction process shall include liability for civil payments, restitution of overpayments and agency costs as specified in 1994 Ky. Acts ch. 316, sec. 9(1)(a)-(e), p. 653, and 1994 Ky. Acts ch. 96, sec. 9(1) (a)-(e), p. 185.

(6) The cabinet shall use a lien, as specified in 1994 Ky. Acts ch. 316, sec. 11, p. 653, and 1994 Ky. Acts ch. 96, sec. 11, p. 186, to assure payment of restitution and monetary penalties imposed under the administrative determination of fraud.

Section 10. Provider Participation Termination. (1) Except as provided for in subsection (6) of this section, a provider's participation may be terminated by either the provider or the department upon thirty (30) days written notice to the other without cause.

(2) Except as provided for in subsection (6) of this section, a provider's participation shall be terminated and a period of exclusion imposed if an administrative determination is made, as set forth in Section 7 of this administrative regulation, that the provider engaged in an unacceptable practice.

(3) A provider shall provide up-to-date information in accordance with Section 3 of this administrative regulation. Except as provided for in subsection (6) of this section, failure to maintain up-to-date information, or to submit such information within thirty-five (35) days of a request by the department (except as provided for in Section 2 of this administrative regulation) shall result in automatic termination of the provider's participation.

(4) Except as provided for in subsection (6) of this section, a provider's participation shall be terminated immediately if it is found that the information provided at the time of application was incorrect, inaccurate or incomplete and where provision of correct, accurate and complete information would have resulted in the denial of the application based upon one (1) or more of the factors set forth in Section 2 of this administrative regulation.

(5) Except as provided for in subsection (6) of this section, a provider's participation shall be terminated if the provider fails or refuses to pay or enter into an agreement to pay the amount of any penalty imposed, including interest, in accordance with 1994 Ky. Acts ch. 316, sec. 9(1) (a)-(d), p. 653, and 1994 Ky. Acts ch. 96, sec. 9(1) (a)-(d), p. 185, within sixty (60) days from the date of the department's notice or the date of a hearing decision (if any).

(6) Before the participation of a nursing facility, as defined in 42 USC 1396r(a), or an intermediate care facility for the mentally retarded, as defined in 42 USC 1396d(d), is terminated, it shall have the right to receive a hearing in accordance with Section 13 of this administrative regulation and 42 CFR 431.153. A hearing conducted subsequent to this subsection shall be completed within 120 days from the notice sent to the provider.

(7) Except as provided in subsection (6) of this section, a provider's participation in Medicaid shall be terminated if the provider fails to submit a completed and signed application within sixty (60) days from the date of the notice to provide such application.

(8) Except as provided in subsection (6) of this section, a provider's participation in Medicaid shall be terminated and a period of exclusion imposed if it is found through the judicial process that the provider engaged in an unacceptable practice.

(9) A provider's participation in Medicaid shall be automatically terminated on the date of termination or suspension from Medicare.

(10) Except as provided for in subsection (6) of this section, a provider's participation in Medicaid shall be automatically terminated as of the date of any termination, revocation or suspension of any registration, certification or license to practice a medical profession, or as required to provide medical care, services or supplies under Medicaid.

(11) Except as provided for in subsection (6) of this section, a provider's participation:

(a) Shall be terminated and a new application required if the ownership or control of the provider has substantially changed, since acceptance of its enrollment application, as follows:

1. The addition or elimination of one (1) or more partners in a provider organized as a partnership; or

2. The sale of the business or assets of any provider;

(b) May be terminated and a new application required if ownership or control of the provider has substantially changed since the acceptance of its enrollment application due to the sale or exchange of capital stock in a provider organized as a corporation; and

(c) A notice advising of the termination and of the requirements to make a new application for enrollment shall be sent to the provider thirty (30) days prior to its termination from the program.

(12) Notice of termination.

(a) A notice of termination shall be in writing and contain the following information:

1. The reason for the termination, if any; and

2. The effective date of the termination.

(b) A notice provided under subsections (8), (9), (10), and (11) of this section shall also contain the date the former provider may submit an application for reenrollment.

(c) A notice provided under subsections (1), (2), (3), (4), (5), (6), and (7) of this section shall also contain the provider's hearing rights in accordance with Section 13 of this administrative regulation.

Section 11. Terminated Provider Reinstatement. (1) A provider whose participation has been terminated under the provisions of this administrative regulation may request reinstatement in accordance with the provisions set forth in the written notice from the department as provided for in Sections 10 and 13 of this administrative regulation.

(2) A request for reinstatement shall be subject to the enrollment requirements in Section 2 of this administrative regulation. An application for enrollment under this section shall be identified by the provider as a reinstatement application.

(3) The department may only grant reinstatement for a program violation when the provider can demonstrate and assure the department that the violation which led to the sanction shall not be repeated.

(4) If the department approves the request for reinstatement, after imposition of a sanction, the department shall provide written notice to the provider and to all others who were informed of the sanction, specifying the date on which program participation may resume.

Section 12. Informal Resolution of Provider Disputes. When providers disagree with Medicaid determinations with regard to claims payment, sanctions, participation or other matters covered in this administrative regulation the provider may provide to the agency any information which the provider wishes considered in relation to the agency determination. The agency may rescind, modify or take no action with regard to the disputed issue with no written notice to the provider required. Information submitted for the purpose of informally resolving a provider dispute shall not be considered a request for an administrative appeal.

Section 13. Administrative Hearing Process. (1) The administrative hearing process shall be conducted by an impartial hearing officer appointed by the cabinet secretary.

(2) This process shall be used in the following situations:

(a) If the provider's participation is terminated with or without cause as specified in Section 10 (1), (2), (3), (4), (5), (6), and (7) of this administrative regulation; or

(b) If the agency imposes a fiscal sanction; or

(c) If the agency requires the repayment of an overpayment or restitution.

(3) An administrative hearing shall not be conducted when the provider is terminated in accordance with Section 10 (8), (9), (10), and (11) of this administrative regulation.

(4) A written request for a hearing must be received by the department within thirty (30) days of the department's notice of adverse determination. This request must be sent to the Commissioner, Department for Medicaid Services, Cabinet for Human Resources, 275 East Main Street, Frankfort, Kentucky 40621.

(5) At least fifteen (15) calendar days prior to the date of the hearing, written notice shall be sent by the hearing officer to the parties and their representatives. The notice shall inform them of:

(a) The date, time and place of the hearing and the parties' right to request a postponement;

(b) The manner and means by which a postponement may be requested and granted;

(c) The issues which are to be the subject of the hearing;

(d) The manner in which the hearing will be conducted;

(e) The right of each party to be represented or to represent himself, to testify, to produce witnesses, to present documentary evidence and to examine opposing witnesses; and

(f) The date of the prehearing exchange between the appellant and department.

(6) A prehearing exchange of information and documents may be requested by the appellant or the department.

(7) A prehearing conference may be held at least seven (7) days in advance of the hearing date at which time each party shall disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses.

(8) A request for a hearing shall be considered to be abandoned if the appellant does not appear at the hearing on the scheduled date and the hearing has not been rescheduled. A hearing request may be withdrawn only under the following circumstances:

(a) The hearing officer receives a written statement from the appellant stating that the request is withdrawn; or

(b) The appellant makes a statement on the record at the hearing withdrawing the request.

(9) If copies of the documentary evidence which the department plans to use at the hearing have not been provided to the appellant, or the appellant's representative, an opportunity to examine the documents shall be afforded the appellant upon his request. Information relating to the selection of the person for audit, investigation notes or other material which may reveal auditor investigation techniques, material prepared for submission to a law enforcement or prosecutorial agency, information concerning law enforcement investigations, or judicial proceedings or confidential sources or confidential information shall not be revealed.

(10) The hearing officer, appointed by the secretary, shall preside over the hearing and have all the powers conferred by law to require attendance of witnesses and the production of books and records, and to administer oaths and to take testimony.

(11) The appellant or representative, counsel or other representative of the department, an interpreter if the appellant is deaf or hard of hearing and an interpreter has been requested, witnesses for both parties, persons who may be called as witnesses by the hearing officer and other persons or members of the public as the hearing officer in his discretion may admit, are entitled to be present at the hearing. Staff of the department shall be entitled to observe or to assist the official representative of the department.

(12) The issues and documentation considered at the hearing shall be limited to issues directly relating to the adverse determination.

(a) Formal rules of evidence shall not apply.

(b) Irrelevant and unduly repetitious testimony and cross-examination shall be excluded.

(c) The appellant has the burden of showing that the determination of the department was incorrect.

(d) If the determination is based upon an alleged failure of the provider to comply with generally accepted business, accounting, professional or medical practices or standards of health care, the department shall establish the existence of such practice or standard.

(13) Witnesses shall testify under oath or affirmation and shall be subject to cross-examination.

(14) The hearing proceedings shall be recorded but not transcribed unless requested by either party. The cost of the court reporter, if utilized, and the transcription shall be the responsibility of the party making the request. If a third party requests a copy of the original transcript, the party requesting the copy shall be responsible for the cost of the copy.

(15) The hearing officer shall prepare an official report containing findings of fact based on the substance of what transpired at the hearing, and prepare a recommended decision to be forwarded to the Secretary, Cabinet for Human Resources and Commissioner, Department for Medicaid Services. The Commissioner, Department for Medicaid Services shall make the final decision based upon the findings of fact and recommendation of the hearing officer and policies of the department.

(a) A written final decision shall be issued within 120 days of the conclusion of the hearing or the closing of the record and sent to each of the parties.

(b) The decision shall determine the issues, state reasons for the determinations, and when appropriate, direct specific action.

(c) The decision is the final cabinet action and is binding upon the parties subject to appeal to the court of appropriate jurisdiction.

(d) In the letter transmitting the decision, clear reference shall be made to the availability of judicial review by either party.

Section 14. 907 KAR 1:007, Documentation of medical assistance services, 907 KAR 1:074, Claims processing, 907 KAR 1:110, Recoupment of overpayments, 907 KAR 1:220, Terms and conditions of provider participation, provider appeals, and 907 KAR 1:300, Withholding the federal share of payments to recover Medicare or Medicaid overpayments, are hereby repealed.

MASTEN CHILDERS II, Commissioner and Secretary
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 15, 1994 at 10 a.m.

ADMINISTRATIVE REGULATIONS AS AMENDED BY PROMULGATING AGENCY AND REVIEWING SUBCOMMITTEE

COMPILER'S NOTE: The following administrative regulations were amended by the promulgating agency and the Administrative Regulation Review Subcommittee on July 1, 1994, unless otherwise noted.

SECRETARY OF STATE
(As Amended)

30 KAR 3:010. Application for registration of trademarks and service marks.

RELATES TO: 1994 Acts Ch. 468
STATUTORY AUTHORITY: 1994 Acts Ch. 468
NECESSITY AND FUNCTION: 1994 Ky. Acts ch. 468 requires the Secretary of State to promulgate an administrative regulation setting forth the manner of applying for registration of trademarks and service marks.

Section 1. **Requirements for Application for Registration of a Trademark or Service Mark. (1) Application for registration of a trademark or service mark shall be made to the Secretary of State, pursuant to 1994 Ky. Acts ch. 468, by submitting:**
(a) A completed "Trademark/Service Mark Application";
(b) The registration fee required by 1994 Ky. Acts ch. 468; and
(c) The mark specimens required by 1994 Ky. Acts ch. 468.
(2) The application shall not be accepted for filing until the requirements of subsection (1) of this section have been met.
(3) The application shall be in English.
(4)(a) The "Trademark/Service Mark Application" (July 15, 1994) is incorporated by reference.
(b) The registration application may be inspected or obtained at the Secretary of State's Office, 700 Capitol Avenue, The Capitol, Room 79, Frankfort, Kentucky, between 8 a.m. to 4:30 p.m., Monday through Friday. [~~Requirements for Application. The application for registration of a trademark or service mark must be on a form prescribed by the Secretary of State. The application for registration of a trademark or service mark must be in English.~~

~~Section 2. Requirements for Filing. An application for registration of a mark submitted to the Secretary of State will not be accepted for filing until the application form is completely filled out, the correct filing fee is tendered and three (3) specimens of the mark are sent.~~]

Section **2.** [~~3.~~] Application Which Includes Multiple Classes. An application may be filed which includes goods or services falling into multiple classes provided that the goods or services are specifically identified, an application fee of ten (10) dollars for each classification is submitted, and the application includes the dates of use and three (3) specimens for each class.

Section **3.** [~~4.~~] Specimens. An application for registration shall include three (3) specimens of the trademark or service mark as used on or in connection with the goods or services. Trademark specimens may be duplicates of the labels, tags or containers bearing the trademark. If the nature of the goods or the nature of the mark makes the use of **the** [~~such~~] specimens impracticable, then the specimen may include documents associated with the goods or services such as stationery, business cards or brochures. Names typed, printed or written on plain paper **shall not be** [~~are not~~] acceptable as specimens of the mark. Specimens **shall** [~~must~~] be made of suitable flat material and a size not to exceed eight and one-half (8 1/2) inches wide and eleven (11) inches long.

Section **4.** [~~5.~~] Facsimiles. When, due to the mode of applying or affixing the mark to the goods, or to the manner of using the mark, or to the nature of the mark, specimens cannot be provided, three (3) copies of a photograph or other reproduction showing the mark acceptable to the Secretary of State shall be furnished.

Section 5. Period of Response. (1) Within thirty (30) days of notice of the secretary's determination that an applicant is not entitled to registration, an applicant shall submit:
(a) A reply to the secretary's determination; or
(b) An amended application conforming to the secretary's determination.
(2) After review of an applicant's reply or amended application, the secretary shall:
(a) Make a final determination on the application; or
(b) Permit the applicant to submit another amended application.

[~~Section 6. Period of Response. The Secretary of State may require the applicant to furnish additional information or make amendments to the application as may be reasonably requested. The Secretary of State shall examine the application and advise the applicant if he is not entitled to registration and the reasons therefor. The applicant shall have thirty (30) days in which to reply or to amend the application, in which event the application shall be reexamined. This procedure may be repeated until the Secretary of State finally refuses registration or the applicant fails to reply or amend the application within the specified period.~~]

Section **6.** [~~7.~~] Classifications. The system of classification of goods and services set out in 30 KAR 3:030 applies for all purposes to trademark and service mark applications filed with the Secretary of State on or after July 15, 1994, and to registrations issued on the basis of **the** [~~such~~] applications. It shall not apply to applications filed on or before July 14, 1994, nor to registrations issued on the basis of **the** [~~such~~] applications. Renewals filed on registrations issued under a prior classification system **shall** [~~will~~] be processed on the basis of that system.

BOB BABBAGE, Secretary of State
APPROVED BY AGENCY: May 12, 1994
FILED WITH LRC: May 13, 1994 at 10 a.m.

SECRETARY OF STATE
(As Amended)

30 KAR 3:020. Application for renewal of registration.

RELATES TO: 1994 Acts Ch. 468
STATUTORY AUTHORITY: 1994 Acts Ch. 468
NECESSITY AND FUNCTION: 1994 Ky. Acts Ch. 468 requires the Secretary of State to promulgate an administrative regulation setting forth the manner of renewing registrations of trademarks or service marks.

Section 1. **Requirements for Application for Renewal of Registration of a Trademark or Service Mark. (1) Application for renewal of registration of a trademark or service mark shall be**

made to the Secretary of State, pursuant to 1994 Ky. Acts ch. 468, by submitting:

(a) A completed "Trademark/Service Mark Renewal Application"; and

(b) The renewal fee required by 1994 Ky. Acts ch. 468.

(2)(a) The "Trademark/Service Mark Renewal Application" (July 15, 1994) is incorporated by reference.

(b) The renewal application may be inspected or obtained at the Secretary of State's Office, 700 Capitol Avenue, The Capitol, Room 79, Frankfort, Kentucky, between 8 a.m. to 4:30 p.m., Monday through Friday.

(3) The application for renewal shall:

(a) Include the required fee for each class for which renewal is sought in the registration; and

(b) Specifically identify the particular class or classes for which renewal is sought if the registration is for multiple classes of goods or services. [~~Requirements for Application for Renewal of Registration. The application for renewal of a trademark or service mark registration shall be on a form prescribed by the Secretary of State which shall include a verified statement that the mark has been and is still in use, and include a specimen showing actual use of the mark on or in connection with the goods or services. The application for renewal shall include the required fee for each class for which renewal is sought in the registration and specifically identify the particular class or classes for which renewal is sought if the registration is for multiple classes of goods or services.~~]

BOB BABBAGE, Secretary of State
APPROVED BY AGENCY: May 12, 1994
FILED WITH LRC: May 13, 1994 at 10 a.m.

GENERAL GOVERNMENT
State Board of Accountancy
(As Amended)

201 KAR 1:081. Firm permits to practice.

RELATES TO: KRS 325.220, 325.380, 1994 Acts Ch. 248, Sec. 1

STATUTORY AUTHORITY: KRS 325.240

NECESSITY AND FUNCTION: Firm permit to practice, renewal, and procedure for changes.

Section 1. Definitions. (1) A "certified public accountant owner" means a certified public accountant with a current permit to practice issued by a state board of accountancy and may be a shareholder in a professional service corporation or corporation; a partner in a partnership or registered limited liability partnership, or a member of a limited liability company.

(2) "Member" means an individual holding an ownership interest in a limited liability company.

Section 2. A firm seeking to practice public accounting, except a sole proprietorship, shall initially apply for a permit to practice by submitting:

(1) A completed "Initial Firm Registration"; and

(2) A check made payable to the "Kentucky State Board of Accountancy" in the amount of $100 for the initial firm registration fee.

Section 3. (1) A certified public accountant seeking to practice public accounting as a sole proprietor shall register the firm by writing a letter to the board stating the firm office address, phone number, and indicating whether he is practicing public accounting on a full-time or part-time basis; or

(2) If he is establishing the firm within thirty (30) days of his individual permit renewal date, he may submit this information when he renews his individual permit to practice.

(3) **A fee shall not** [~~No fee shall~~] be assessed for this registration.

Section 4. In May of the firm's renewal year, the board shall send the firm a computer generated notice containing current firm registration information. The firm CPA manager shall renew the firm permit to practice by submitting:

(1) The notice with corrections, deletions, or additions to the filed information; and

(2) A check made payable to the "Kentucky State Board of Accountancy" in the amount of $100 for the firm permit to practice renewal fee.

(3) A sole proprietor shall renew by providing this information when he renews his individual permit to practice. **A fee shall not** ~~No fee shall~~] be charged for this firm permit to practice renewal.

(4) Failure to receive a notice to renew shall not constitute an adequate excuse for failing to renew the firm permit to practice.

Section 5. If any of the information on the firm permit to practice filing changes, the firm certified public accountant manager shall notify the board by submitting the "Firm Registration Changes".

Section 6. (1) Upon the death or retirement of a firm member which is composed of only two (2) certified public accountant owners, the board shall authorize the continuation of the use of the firm name by the surviving certified public accountant owner for a period of time not to exceed two (2) years from the date of the certified public accountant owner's death or retirement.

(2) The remaining certified public accountant owner shall advise the board in writing of this change within thirty (30) days of its occurrence.

Section 7. The firm name registered with the board shall be the firm name used in all circumstances.

Section 8. (1) The following documents are incorporated by reference:

(a) "Initial Firm Registration (1994)"; and

(b) "Firm Registration Changes (1994)".

(2) These documents may be inspected, copied, or obtained from the board office, 332 W. Broadway, Suite 310, Louisville, Kentucky 40202, between 8:30 a.m. and 4:30 p.m., Monday through Friday.

JOHN N. CRAFT, CPA, President
APPROVED BY AGENCY: May 13, 1994
FILED WITH LRC: May 13, 1994 at noon

TOURISM CABINET
Department of Fish and Wildlife Resources
(As Amended)

301 KAR 1:085. Mussel shell harvesting.

RELATES TO: KRS 150.025, 150.110, 150.170, 150.175, 150.190, 150.510, 150.520

STATUTORY AUTHORITY: KRS 13A.150, 150.025, 150.170, 150.175, 150.520

NECESSITY AND FUNCTION: It is necessary to regulate the manner of taking mussels because of their value and their susceptibility to overharvest. This amendment is necessary to allow the sale of additional musseling licenses and to establish improved reporting requirements. [~~licensed musselers to employ a helper, to require that mussel buyers only purchase shells from licensed musselers or other mussel buyers, to require that no person shall possess more than six (6) mussel shells without an appropriate mussel license, to restrict~~

~~brailing on certain weekends and holidays, to prohibit possession of illegal gear while musseling, to establish one (1) new sanctuary and expand two (2) existing sanctuaries for the protection of certain endangered mussels, and to incorporate by reference the musseling waters maps of Barkley and Kentucky Lakes.~~]

Section 1. All persons except helpers and those specified in Section 4 of this administrative regulation, who actively participate in the harvesting and sale of mussels or mussel shells, whether or not they own or possess the gear being used in the harvest of mussels or mussel shells, shall have an appropriate license. Each licensed musseler may employ one (1) helper to assist in the harvesting, transporting and sale of mussels. [~~Each helper shall be accompanied by~~] A licensed musseler shall accompany each helper when brailing, transporting or selling shells.

Section 2. Only [~~those~~] persons having a valid musseling license or mussel buyers license may [~~are authorized to~~] sell mussels or mussel shells. Mussel buyers shall purchase mussels or mussel shells only from [~~those~~] individuals possessing a valid musseling license or mussel buyers license.

Section 3. All musselers shall paint or affix [~~have~~] their department issued identification number [~~clearly painted or affixed~~] to their brail boat so as to be clearly visible to aerial observation. [~~from the air. No~~] Boats [~~shall be~~] used in musseling operations shall have [~~without~~] a licensed musseler in the boat.

Section 4. A [~~No~~] person shall not possess more than six (6) mussels without having an appropriate musseling license or mussel buyers license. Mussels shall be legal size according to Section 9 of this administrative regulation.

Section 5. Mussel License Application Procedure. (1) The department shall not issue more than 500 mussel licenses per calendar year.

(2) Persons wishing to purchase musseling licenses shall apply during the November before the year they wish to mussel.

(3) Applicants shall complete a musseling license application provided by the department.

(4) If the number of applications exceeds 500, the department shall first grant new licenses to current mussel license holders, then select the remaining applicants by a random drawing.

(5) If the number of applications is less than 500, the department shall grant licenses to all applicants, and shall grant licenses to persons applying after November 31 on a first-come, first-served basis until 500 licenses have been issued.

(6) The appropriate resident or nonresident mussel license fee shall accompany each application. The department shall return the fees of those not drawn. [~~Only those individuals who purchased a valid musseling license in either 1990 or prior to December 1 in 1991 shall be allowed to purchase a 1992 license. In 1993 only those individuals who purchased a musseling license in 1991 or 1992 will be eligible with the same two (2) year eligibility criterion being applied in succeeding years.~~]

Section 6. Except as specified in Sections 7 and 8 of this regulation, the musseling season is open year around only on the following waters:

(1) Kentucky Lake;
(2) Barkley Lake;
(3) Tennessee River from Kentucky Lake dam to the mouth;
(4) Cumberland River from Barkley Lake dam to the mouth;
(5) Ohio River;
(6) Green River from Green River Lake dam to the mouth;
(7) Barren River from Barren River Lake dam to the mouth;
(8) Kentucky River from Beattyville downstream to the mouth;
(9) Rough River from Rough River Lake dam to the mouth;
(10) Rolling Fork River.

Section 7. Musseling is prohibited in the following designated areas which are established as mussel sanctuaries:

(1) The Tennessee River from Kentucky Dam downstream to river mile seventeen and eight-tenths (17.8).

(2) The stream segments 200 yards below any dam on any stream.

(3) The Cumberland River from Barkley Dam downstream to U.S Highway 62 bridge.

(4) All embayments on Barkley and Kentucky Lakes as defined by the Kentucky Lake Musseling Waters Map and the Lake Barkley Musseling Waters Map, both of which are hereby incorporated by reference. Maps shall be available for inspection or purchase by contacting the Division of Fiscal Control, Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m. on Monday through Friday, except holidays. The effective date of the maps shall be August 15, 1993.

(5) The Ohio River between river mile 418 and river mile 419 and between river mile 965.0 and river mile 974.1.

(6) The Green River from lock and dam #5 downstream four and eight-tenths (4.8) miles to the confluence of Ivy Creek and from the eastern boundary of Mammoth Cave National Park upstream twenty-nine and six-tenths (29.6) miles to the US Highway 31E bridge.

(7) The Barren River from lock and dam #1 downstream three and five-tenths (3.5) miles to the confluence with Mortar Branch.

Section 8. Musseling is permitted during the hours of 6 a.m. and 6 p.m. daily except in Barkley and Kentucky Lakes where the hours shall be as follows:

(1) West side of each lake as marked by the red navigation buoys or fifty-five (55) feet of water depth.

(a) December - February - 8:30 a.m to 3:30 p.m.

(b) March - November - 8 a.m. to 6 p.m.

(2) East side of each lake as marked by the red navigation buoys on both lakes.

(a) December - February - 9:30 a.m. to 3 p.m.

(b) March - November - 9:30 a.m. to 5 p.m.

(3) Exception: The brailing hours for the entire canal area connecting Kentucky and Barkley lakes and all of Barkley Lake from Barkley Dam south to Cumberland River mile 36.2 (Big Horse Ford light and day marker) shall be as follows:

(a) December - February - 8:30 a.m. to 3:30 p.m.

(b) March - November - 8 a.m. to 6 p.m.

(4) Saturday and Sunday brailing on Kentucky Lake is prohibited during the month of March and during the period beginning on the Saturday preceding Memorial Day and extending through Labor Day.

(5) Saturday and Sunday brailing on Barkley Lake is prohibited beginning on the Saturday preceding Memorial Day and extending through the 30th day of September. Brailing is further prohibited on Kentucky and Barkley Lakes on Memorial Day, July 4th and Labor Day.

Section 9. The statewide size limits for taking of mussels shall be as follows. All mussels smaller than these minimum sizes shall immediately be returned to the bed from which taken.

(1) Washboard mussels, Megalonaias nervosa, shall be large enough so as not to be able to pass through a circular ring or opening having a diameter of three and three-fourths (3 3/4) inches.

(2) Three (3) ridge mussels, Amblema plicata, shall be large enough so as not to be able to pass through a circular ring or opening having a diameter of two and three-fourths (2 3/4) inches.

(3) All other mussels, except the Asiatic clam, Corbicula sp. shall be large enough so as not to be able to pass through a circular ring or opening having a diameter of two and one-half (2 1/2) inches.

(4) The Asiatic clam, Corbicula sp., may be taken at any size.

Section 10. Method of Harvest. (1) Mussel harvesting, except as provided in Section 11 of this regulation, shall be by brail only.

(2) No more than two (2) brails each sixteen (16) feet or less in length shall be simultaneously operated from any boat.

(3) More than two (2) brails may be carried aboard the boat.

(4) Mussel brail hooks shall be constructed of wire of at least fourteen (14) gauge; smaller wire is prohibited.

(5) Prongs of hooks shall be no longer than one and one-fourth (1 1/4) inch as measured from the tip of point to place on hook where the prongs are joined.

(6) [~~No~~] Persons shall not possess dredges or compressed air tanks while on a licensed brail boat.

Section 11. Mussel Harvesters' Reporting Requirements. (1) Mussel license holders shall submit annual written reports to the department by December 31 of each year.

(2) Musselers shall **provide the department with the following information:** [~~use forms supplied by the department and shall provide the following information requested on the form:~~]

(a) Name, address and mussel license number;

(b) Dates of brailing activity;

(c) Waters brailed;

(d) Name or category of mussels taken;

(e) Weight of each type or category;

(f) Price received per pound of each type or category;

(g) Total value of mussels sold;

(h) Name and license number of buyer who bought mussels.

(3) The department shall not renew the license of a musseler who fails to submit a report or does not provide the required information until the complete report is submitted.

Section 12. Mussel Buyers' Reporting Requirements. (1) Mussel buyers shall complete a mussel transaction report each time shells are acquired.

(2)**(a) Mussel buyers shall use the Mussel Transaction Report form (July 1994) which is incorporated by reference; and**

(b) copies of the form may be inspected, copied, or obtained from the offices of the Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday except holidays. [~~Mussel buyers shall use forms furnished by the department and shall provide the following information required on the form:~~

~~(a) The name of the business;~~

~~(b) The date and location where the transaction took place;~~

~~(c) The name of the body of water where mussels were harvested;~~

~~(d) The name or category name of the mussels purchased;~~

~~(e) The number of pounds and the price per pound;~~

~~(f) The amount paid for each species or category;~~

~~(g) The total amount of the transaction;~~

~~(h) The mussel buyer and the musseler shall sign the report and provide their respective license number including the state in which the musseler is licensed.~~]

(3) Mussel buyers shall use forms in sequential order.

(4) Mussel buyers shall submit voided forms to the department. They shall write "void," their license number, date and signature on voided forms.

(5) Mussel buyers shall submit reports on each month's activity. Reports are due by the 15th of the month following the reported transaction.

(6) Mussel buyers who do not acquire shells during a particular month shall submit a report stating that no business was conducted.

(7) The department shall not renew the license of a mussel buyer who fails to submit monthly reports or who does not provide the required information until all completed reports for the year are received.

Section 13. [~~11.~~] The commissioner may designate as disaster areas waters in which all live mussels have been killed, and may issue a special permit allowing the use of various harvest methods.

Section 14. [~~12.~~] No mussels designated as endangered shall be taken.

C. THOMAS BENNETT, Commissioner
CRIT LUALLEN, Secretary
DAVID H. GODBY, Chairman
APPROVED BY AGENCY: March 7, 1994
FILED WITH LRC: May 12, 1994 at 2 p.m.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:010. Definitions for Title 401 Chapter 8.

RELATES TO: KRS Chapter 223, 224, 40 CFR 141.2

STATUTORY AUTHORITY: KRS Chapter 223, 224.10-100, 224.10-110, 40 CFR 141.2 (1993), [~~as amended at 54 FR 27,526 and 27,562 (1989),~~] 42 USCA 300f, 300g, 300j

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce statutes [~~rules~~] and administrative regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. The Safe Drinking Water Act, as amended by the Safe Drinking Water Act Amendments of 1986, provides for primary enforcement responsibility by states that have adopted regulations "no less stringent than the national primary drinking water regulations", as well as meeting other criteria stipulated by the Act. The Commonwealth of Kentucky has accepted and is currently exercising such primary enforcement responsibility. The purpose of this administrative regulation is to define terms used by the cabinet in regulation of public and semipublic drinking water supplies pursuant to KRS Chapter 224 and PL 93-523, as amended, as well as to regulate certification of public water system operators pursuant to KRS Chapter 223.

Section 1. The following definitions shall apply to 401 KAR Chapter 8:

(1) "Action level" means the concentration of lead or copper in water specified in 401 KAR 8:300, Section 3, which determines, in some cases, the treatment requirements contained in 401 KAR 8:300 that a water system is required to complete.

(2) "Approved source" means the source of the water whether it be from a spring, well, public water system, or other source that has been sampled and the water analyzed, and found to be of a safe and sanitary quality and quantity in accordance with 401 KAR 8:010 through 401 KAR 8:700, inclusive.

(3) [~~(2)~~] "Auxiliary intake" means a piping connection or other device whereby raw water may be secured for treatment from a location or source other than the intake which is normally used.

(4) [~~(3)~~] "Best available technology" or "BAT" means the best technology, treatment techniques, or other means which the cabinet finds, after examination for efficacy under field conditions, and not solely under laboratory conditions, are available to the public water system (taking cost into consideration). For the purposes of setting maximum contaminant levels for synthetic organic chemicals, BAT shall be at least as effective as granular activated carbon.

(5) [~~(4)~~] "Blood lead level or PbB level" means the concentration of lead in the blood as measured in micrograms of lead per deciliter

of blood (mg/d1).

(6) [(5)] "Board" means the Kentucky Board of Certification of Water Treatment Plant and Water Distribution System Operators.

(7) [(6)] "Boil water advisory" or "consumer advisory" means a notice to the consuming public through radio, television, direct mail, posting, newspaper or other media to convey to the consuming public in the quickest manner possible information that water provided by a system may cause adverse human health effects if consumed. The advisory shall include information concerning all actions which by the affected public is advised to take.

(8) [(7)] "Boil water notice" means a notice to the consuming public through radio, television, direct mail, posting, newspaper or other media to convey to the consuming public in the quickest manner possible information that water provided by a system is unfit for human consumption unless first boiled for two (2) minutes at a rolling boil.

(9) [(8)] "Bottled water" means water that is from an approved bottled water treatment plant and is placed in a sealed container or package and is offered for human consumption or other consumer uses.

(10) [(9)] "Bottled water system" means a water system which provides bottled drinking water. The term includes, but is not limited to, the sources of water, and treatment, storage, bottling, manufacturing, or distribution facilities. The term excludes a public water system which provides only a source of water supply for a bottled water system and excludes an entity providing only transportation, distribution or sale of bottled water in sealed bottles or other sealed containers. Bottled water systems shall be designated as community public water systems.

(11) [(10)] "Bottled water treatment plant" means a facility which provides the product water used for bottled water by processing water from an approved source.

(12) [(11)] "Bypass" means a physical arrangement whereby water may be diverted around any feature of the purification process of a public or semipublic water supply.

(13) [(12)] "Cabinet" means the Natural Resources and Environmental Protection Cabinet, Department for Environmental Protection, Division of Water, or its successor.

(14) [(13)] "Certificate" means a certificate of competency issued by the secretary or his designated agent stating that the operator has met all requirements for the specified operator classification as set by these administrative regulations.

(15) [(14)] "Certified laboratory" means a laboratory where the physical, instrumental, procedural, and personnel capabilities have been approved by either the U.S. Environmental Protection Agency or the cabinet. A laboratory may be certified for one (1) or more types of the contaminants listed in these administrative regulations or for one (1) or more of the specific constituents or combinations of constituents listed.

(16) [(15)] "Check samples" means chemical and radiological samples taken subsequent to a routine compliance sample and at the same location to determine if results of the routine sample are valid.

(17) [(16)] "Coagulation" means a process using coagulant chemicals and mixing by which colloidal and suspended materials are destabilized and agglomerated into flocs.

(18) "Commercial facility" means a building or other place at which commerce or trade takes place.

COMPILER'S NOTE: THE REMAINDER OF THE SUBSECTIONS HAVE BEEN RENUMBERED TO CONFORM TO THE ADDITION OF A NEW SUBSECTION (18).

(19) "Compliance cycle" means the nine (9) year calendar year cycle during which public water systems shall monitor. Each compliance cycle shall consist of three (3) three (3) year compliance periods. The first calendar year cycle begins January 1, 1993 and ends December 31, 2001; the second begins January 1, 2002 and ends December 31, 2010; and the third begins January 1, 2011 and ends December 31, 2019.

(20) "Compliance period" means a three (3) year calendar year period within a compliance cycle. Each compliance cycle has three (3) three (3) year compliance periods. Within the first compliance cycle, the first compliance period runs from January 1, 1993 to December 31, 1995; the second from January 1, 1996 to December 31, 1998; the third from January 1, 1999 to December 31, 2001.

(21) [(17)] "Confluent growth" means a continuous bacterial growth covering the entire filtration area of a membrane filter, or a portion of the filter, in which bacterial colonies are not discrete.

(22) "Consecutive public water systems" means two (2) or more public water systems with interconnected distribution systems, the effect of which is to distribute water from one (1) system to the next.

(23) [(18)] "Contaminant" means a physical, chemical, biological, or radiological substance or other matter found in water.

(24) [(19)] "Contaminant group" means all of the constituent members that collectively comprise the individual bacteriological, inorganic chemical, organic chemical, radiological, volatile organic chemical, synthetic organic chemical, and secondary contaminant groups regulated under these administrative regulations.

(25) [(20)] "Conventional filtration treatment" means a series of processes including coagulation, flocculation, sedimentation, and filtration resulting in substantial particulate removal.

(26) [(21)] "Corrosion" means the dissolution or erosion of pipe or other plumbing material by water.

(27) "Corrosion inhibitor" means a substance capable of reducing the corrosivity of water toward metal plumbing materials, especially lead and copper, by forming a protective film on the interior surface of those materials.

(28) [(22)] "Corrosivity" means the tendency of water to form or dissolve calcium carbonate as a film or scale.

(29) [(23)] "Cross connection" means a physical connection or arrangement between two (2) otherwise separate systems, one (1) of which contains potable water and the other being either water of unknown or questionable safety, or steam, gas or chemicals, whereby there may be flow from one (1) system to the other, the direction of flow depending on the pressure differential between the two (2) systems.

(30) [(24)] "CT or CT calc" means the product of "residual disinfectant concentration" (C) in mg/1 determined before or at the first customer and the corresponding "disinfectant contact time" (T) in minutes, i.e., "C" x "T". If a public water system applies disinfectants at more than one (1) point prior to the first customer, it shall determine the CT of each disinfectant sequence before or at the first customer to determine the total percent inactivation or "total inactivation ratio". In determining the total inactivation ratio, the public water system shall determine the residual disinfectant concentration of each disinfection sequence and corresponding contact time before subsequent disinfection application points. "$CT_{99.9}$" means the CT value required for 99.9 percent (3-log) inactivation of Giardia lamblia cysts.

$$\frac{\text{CT calc}}{CT_{99.9}}$$

is the inactivation ratio. The sum of the inactivation ratios, or total inactivation ratio shown as

$$\sum \frac{\text{(CT calc)}}{(CT_{99.9})}$$

is calculated by adding together the inactivation ratio for each disinfection sequence. A total inactivation ratio equal to or greater than one and zero-tenths (1.0) is assumed to provide a 3-log inactivation of Giardia lamblia cysts.

(31) [(25)] "Department" means the Kentucky Department for Environmental Protection.

(32) [(26)] "Diatomaceous earth filtration" means a process resulting in substantial particulate removal in which a precoat cake of

diatomaceous earth filter media is deposited on a support membrane (septum), and while the water is filtered by passing through the cake on the septum, additional filter media known as body feed is continuously added to the feed water to maintain the permeability of the filter cake.

(33) [~~(27)~~] "Direct filtration" means a series of processes including coagulation and filtration but excluding sedimentation resulting in substantial particulate removal.

(34) [~~(28)~~] "Direct responsible charge" means personal, first hand responsibility, control or supervision of the operation of a public water system.

(35) [~~(29)~~] "Disinfectant contact time" ("T" in CT calculations) means the time in minutes that it takes for water to move from the point of disinfectant application or the previous point of disinfectant residual measurement to a point before or at the point where residual disinfectant concentration ("C") is measured. If only one (1) "C" is measured, "T" means the time in minutes that it takes for water to move from the point of disinfectant application to a point before or at where residual disinfectant concentration ("C") is measured. If more than one (1) "C" is measured, "T" means for the first measurement of "C", the time in minutes that it takes for water to move from the first or only point of disinfectant application to a point before or at the point where the first "C" is measured and for subsequent measurements of "C", the time in minutes that it takes for water to move from the previous "C" measurement point to the "C" measurement point for which the particular "T" is being calculated. Disinfectant contact time in pipelines must be calculated based on "plug flow" by dividing the internal volume of the pipe by the maximum hourly flow rate through that pipe. Disinfectant contact time within mixing basins and storage reservoirs shall be determined by tracer studies or an equivalent demonstration.

(36) [~~(30)~~] "Disinfection" means a process which inactivates pathogenic organisms in water by chemical oxidants or equivalent agents.

(37) [~~(31)~~] "Distributed water" means water leaving the water treatment facility and entering the distribution system.

(38) [~~(32)~~] "Division" means the Division of Water.

(39) [~~(33)~~] "Domestic or other nondistribution system plumbing problem" means a coliform contamination problem in a public water system with more than one (1) service connection that is limited to the specific service connection from which the coliform-positive sample was taken.

(40) [~~(34)~~] "Dose equivalent" means the product of the absorbed dose from ionizing radiation and the factors that account for differences in biological effectiveness due to the type of radiation and its distribution in the body as specified by the International Commission on Radiological Units and Measurements (ICRU).

(41) "Effective corrosion inhibitor residual", for the purpose of 401 KAR 8:300 only, means a concentration sufficient to form a passivating film on the interior walls of a pipe.

(42) [~~(35)~~] "Fee" means a monetary charge to be assessed by the cabinet.

(43) [~~(36)~~] "Filtration" means a process for removing particulate matter from water by passage through porous media.

(44) "First draw sample" means a one (1) liter sample of tap water, collected in accordance with 401 KAR 8:300, Section 9(2)(b), that has been standing in plumbing pipes at least six (6) hours and is collected without flushing the tap.

(45) [~~(37)~~] "Flocculation" means a process to enhance agglomeration or collection of smaller floc particles into larger, more easily settleable particles through gentle stirring by hydraulic or mechanical means.

(46) [~~(38)~~] "Free flowing tap or outlet" means a tap or outlet that when turned on is flowing freely. It does not mean a continuously operating tap.

(47) [~~(39)~~] "Gross alpha particle activity" means the total radioactivity due to alpha particle emission as inferred from measurements on a dry sample.

(48) [~~(40)~~] "Groundwater source" means a source of water for a public or semipublic water supply that does not have a free water surface exposed to the atmosphere or a turbidity content which exceeds acceptable levels for potable water as specified in 401 KAR 8:010 through 8:700 inclusive, and is not under the direct influence of surface water.

(49) [~~(41)~~] "Groundwater under the direct influence of surface water" means water beneath the surface of the ground with significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as Giardia lamblia, or significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions. Direct influence shall be determined for individual sources in accordance with criteria established by the cabinet. The cabinet's determination of direct influence may be based on site-specific measurements of water quality as well as documentation of well construction characteristics and geology with field evaluation.

(50) "Initial compliance period" means the first full three (3) year compliance period: January 1993 to December 1995 for systems serving more than 150 service connections and January 1996 to December 1998 for systems having fewer than 150 service connections.

(51) "Large water system", for the purpose of 401 KAR 8:300 only, means a water system that serves more than 50,000 persons.

(52) "Lead service line" means a service line made of lead which connects the water main to the building inlet and any lead pigtail, gooseneck or other fitting which is connected to the lead line.

(53) [~~(42)~~] "Legionella" means a genus of bacteria, some species of which have caused a type of pneumonia called Legionnaires Disease.

(54) [~~(43)~~] "Manmade beta particle and photon emitters" means all radionuclides emitting beta particles and photons listed in "Maximum Permissible Body Burdens and Maximum Permissible Concentration of Radionuclides in Air or Water for Occupational Exposure," NBS Handbook 69, except the daughter products of thorium-232, uranium-235 and uranium-238.

(55) [~~(44)~~] "Maximum contaminant level" (MCL) means the maximum permissible level of a contaminant in water which is delivered to a user of a public water system as measured at points specified in 401 KAR 8:010 through 8:700 inclusive.

(56) [~~(45)~~] "Maximum total trihalomethane potential (MTP)" means the maximum concentration of total trihalomethanes (TTHMs) produced in a given water containing excess free chlorine residuals after seven (7) days retention at a temperature of twenty-five (25) degrees Centigrade (seventy-seven (77) degrees Fahrenheit) or above.

(57) "Medium-size water system", for the purpose of 401 KAR 8:300 only, means a water system that serves greater than 3,300 and less than or equal to 50,000 persons.

(58) [~~(46)~~] "Mineral water" means bottled water that contains no less than 500 parts per million total dissolved solids.

(59) [~~(47)~~] "Near the first service connection" means at one (1) of the twenty (20) percent of service connections in the entire system that are nearest the water supply treatment facility, as measured by water transport time within the distribution system.

(60) [~~(48)~~] "Operator" means a person who has on-site responsibility and authority to conduct the procedures and practices necessary to ensure that the water supply system or a portion thereof is operated in accordance with the laws and administrative regulations of the Commonwealth; or to supervise others in conducting the procedures and practices. Maintenance personnel and others who do not participate directly in the production or distribution of potable water are not included in the term "operator".

(61) "Optimal corrosion control treatment", for the purpose of 401 KAR 8:300 only, means the corrosion control treatment that minimizes the lead and copper concentrations at users' taps while ensuring that

the treatment does not cause the water system to violate any national primary drinking water regulations.

(62) [~~(49)~~] "Person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, federal agency, state agency, city, commission, political subdivision of the Commonwealth or any interstate body.

(63) [~~(50)~~] "Picocurie (pCi)" means that quantity of radioactive material producing 2.22 nuclear transformations per minute.

(64) [~~(51)~~] "Point of disinfectant application" means the point where the disinfectant is applied and water downstream of that point is not subject to recontamination by surface water runoff.

(65) [~~(52)~~] "Point-of-entry treatment device" means a treatment device applied to the drinking water entering a house or building for the purpose of reducing contaminants in the drinking water distributed throughout the house or building.

(66) [~~(53)~~] "Point-of-use treatment device" means a treatment device applied to a single tap used for the purpose of reducing contaminants in drinking water at that one tap.

(67) [~~(54)~~] "Potable water" means water which meets the provisions of 401 KAR 8:010 through 401 KAR 8:700, inclusive,, the quality of which is approved by the cabinet for human consumption.

(68) [~~(55)~~] "Private water supply" means a residential water supply located on private property for the use of residents, and not qualifying as a public or semipublic water system.

(69) [~~(56)~~] "Product water" means the water processed by a bottled water treatment plant that is used for bottled drinking water.

(70) [~~(57)~~] "Professional engineer" means an engineer with current registration as a professional engineer in Kentucky.

(71) [~~(58)~~] "Public water system" means a water system [~~owned by a person,~~] for the provision to the public of water for human consumption, if the system has at least fifteen (15) service connections or regularly serves an average of at least twenty- five (25) individuals daily at least sixty (60) days of the year, and includes [a] collection, treatment, storage and [~~or~~] distribution facilities under control of the operator of the system and [~~facility~~] used primarily in connection with the system and collection and pretreatment storage facilities not under control of the operator of the water system which are used primarily in connection with the water system. [~~For the purposes of 401 KAR 8:020, 401 KAR 8:150, 401 KAR 8:200, "public water system" shall also include a commercial facility which serves food or drink to the public and is not using water purchased from a public water system. However, if a facility serving food to the public uses exclusively bottled water as defined by this section for the preparation of food and the cleaning of food preparation utensils and dishes to serve food, and the facility establishes [may establish], to the cabinet's satisfaction, that only potable water shall be received by the public, [and] the facility shall be exempt from this definition. A public water system is [either] a "community water system" or a "noncommunity water system" or, for the purposes of 401 KAR 8:020, 8:150 and 8:200, a "public water system", is a commercial facility which serves food or drink to the public regardless of the number served.~~]

(a) "Community water system" means a public water system which serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-five (25) year-round residents.

(b) "Noncommunity water system" means a public water system which serves at least fifteen (15) service connections used by persons for a period less than year-round or which serves an average of at least twenty-five (25) individuals daily at least sixty (60) days of the year but less than year-round. Noncommunity water systems are either transient or nontransient.

1. "Transient noncommunity water system" means a water system which serves a transient group of people and does not meet the definition for nontransient noncommunity water system set forth below.

2. "Nontransient noncommunity water system" means a system which serves at least twenty-five (25) of the same persons over six (6) months of the year.

(72) [~~(59)~~] "Rem" means the unit of dose equivalent from ionizing radiation to the total body or an internal organ or organ system.

(73) "Repeat compliance period" means any subsequent compliance period after the initial compliance period.

(74) [~~(60)~~] "Residual disinfectant concentration" ("C" in CT calculations) means the concentration of disinfectant measured in mg/1 in a representative sample of water.

(75) [~~(61)~~] "Sanitary survey" means an on-site review of the water source, facilities, equipment, operation and maintenance of a public water system for the purpose of evaluating the adequacy of source, facilities, equipment, operation and maintenance for producing and distributing safe drinking water.

(76) [~~(62)~~] "Secondary contaminants" means contaminants which do not, in general, have a direct impact on the health of consumers but whose presence in excessive quantities may discourage the utilization of drinking water and discredit the supplier.

(77) [~~(63)~~] "Secondary standards" means the maximum contaminant levels for secondary contaminants.

(78) [~~(64)~~] "Secretary" means the secretary for the Natural Resources and Environmental Protection Cabinet.

(79) [~~(65)~~] "Sedimentation" means a process for removal of solids before filtration by gravity or separation.

(80) [~~(66)~~] "Semipublic water system" means a water system made available for drinking or domestic use which serves more than three (3) families but does not qualify as a public water system. **Semipublic water systems which are commerical facilities which serve food or drink to the public shall meet the requirements of 401 KAR 8:020.**

(81) "Service line sample" means a one (1) liter sample of water, collected in accordance with 401 KAR 8:300, Section 9(2)(c), that has been standing for at least six (6) hours in a service line.

(82) "Single family structure", for the purpose of 401 KAR 8:300 only, means a building constructed as a single-family residence that is currently used as either a residence or a place of business.

(83) [~~(67)~~] "Slow sand filtration" means a process involving passage of raw water through a bed of sand at low velocity (generally less than four-tenths (0.4) m/h) resulting in substantial particulate removal by physical and biological mechanisms.

(84) "Small water system", for the purpose of 401 KAR 8:300 only, means a water system that serves 3,300 persons or fewer.

(85) [~~(68)~~] "Specific analysis" means a laboratory analysis or procedure acceptable to the cabinet for determining the amount of a specific constituent of a type of contaminant regulated under these regulations.

(86) [~~(69)~~] "Standard Methods" means the 16th Edition of "Standard Methods for the Examination of Water and Wastewater," prepared and jointly published by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation.

(87) [~~(70)~~] "Standard sample" means the aliquot of finished drinking water that is examined for the presence of coliform bacteria.

(88) [~~(71)~~] "Supplier of water" means a person who owns or operates a public water system.

(89) [~~(72)~~] "Surface water" means water which is open to the atmosphere and subject to surface runoff, or groundwater under the direct influence of surface water.

(90) [~~(73)~~] "Surface water source" includes, but is not limited to, ponds, reservoirs, streams of all sizes, free-flowing springs, wells with variable turbidity due to the characteristics of the raw water, or a source of water supply for a public water system that has a free water surface exposed to the atmosphere, or groundwater under the influence of surface water.

(91) "System" means a public water system.

(92) [~~(74)~~] "System with a single service connection" means a system which supplies drinking water to consumers via a single

service line.

(93) [~~(75)~~] "Total trihalomethanes (TTHMs)" means the arithmetic sum of the concentrations in milligrams per liter of the trihalomethane (THM) compounds (trichloromethane, dibromochloromethane, bromodichloromethane, and tribromomethane) rounded to two (2) significant figures.

(94) [~~(76)~~] "Too numerous to count" means that the total number of bacterial colonies exceeds 200 on a forty-seven millimeter (47-mm) diameter membrane filter used for coliform detection.

(95) [~~(77)~~] "Trihalomethane (THM)" means one (1) family of organic halogen compounds resulting from the displacement of three (3) of the four (4) hydrogen atoms in methane with chlorine, bromine, or iodine atoms in the molecular structure.

(96) [~~(78)~~] "Turbidity" means the presence of suspended particulates, including, but not limited to, sand, silt, clay, finely divided organic or inorganic matter, plankton or other microscopic organisms or elements which optically interfere with the clarity of liquids.

(97) [~~(79)~~] "Virus" means a virus of fecal origin which is infectious to humans by waterborne transmission.

(98) [~~(80)~~] "Waterborne disease outbreak" means the significant occurrence of acute infectious illness, epidemiologically associated with the ingestion of water from a public water system which is deficient in treatment as determined by the cabinet.

(99) [~~(81)~~] "Water distribution system" means the portion of the water supply system in which water is conveyed from the water treatment plant or other supply point to the premises of a consumer or a system of piping and ancillary equipment which is owned and operated by an established water system independent of the water supply system from which potable water is purchased.

(100) [~~(82)~~] "Water supply reservoir" and "lake primarily used for drinking water" means, for the purpose of 401 KAR 8:020, Section 2(18), a lake or reservoir so designated by its developer, a public water system drawing raw water from the lake, a local government, and a property owner having an interest in the lake and the watershed upstream of the dam or downstream outlet of the lake.

(101) [~~(83)~~] "Water supply system" means the source of supply and all structures and appurtenances used for the collection, treatment, storage and distribution of water for a public or semipublic water supply.

(102) [~~(84)~~] "Water treatment plant" or "purification plant" means that portion of the water supply system which is designed to alter either the physical, chemical or bacteriological quality of the water.

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: April 14, 1994
FILED WITH LRC: April 15, 1994 at 11 am.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:020. Public and semipublic water supplies - general provisions.

RELATES TO: KRS Chapters 223, 224, 40 CFR 141.3, 141.74, 141.75, 142.14, 142.15

STATUTORY AUTHORITY: KRS Chapter 223, 224.10-100, 224.10-110, 40 CFR 141.3, 141.74, 141.75, 142.14, 142.15 (1993), [~~as amended at 54 FR 27,530 (1989),~~] 42 USCA 300f, 300g, 300j

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce statutes and administrative [~~rules and~~] regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. The Safe Drinking Water Act, as amended by the Safe Drinking Water Act Amendments of 1986, provides for primary enforcement responsibility by states that have adopted regulations "no less stringent than the national primary drinking water regulations", as well as meeting other criteria stipulated by the Act. The Commonwealth of Kentucky has accepted and is currently exercising such primary enforcement responsibility. The purpose of this administrative regulation is to stipulate general provisions for public and semipublic water supplies to enable the supplies to comply with KRS 224.10-110 [~~224.032~~], as well as the Safe Drinking Water Act, as amended. [~~The amendments to this regulation are to add certain new recordkeeping and reporting requirements which have become necessary as a result of new federal requirements.~~]

Section 1. Applicability. (1) Inclusions. All public and semipublic water systems are subject to the requirements of 401 KAR 8:010 through 8:700, inclusive except those noted in subsection (2) of this section. A **semipublic water system which is a** commercial facility which uses water from its own premises to prepare food to be served to the public is subject to the requirements of 401 KAR 8:020, 401 KAR 8:150, and 401 KAR 8:200 unless bottled water is used exclusively for food preparation and dish washing, and the facility has demonstrated to the cabinet's satisfaction that no contaminated water may reach the public.

(2) Exclusions. Except as stated above, this chapter does not apply to water systems in the following two (2) categories:

(a) Water systems which consist only of distribution and storage facilities, which do not have collection or treatment facilities, which obtain all of their water from, but are not owned or operated by, public water systems covered by these administrative regulations, and which do not sell water to any person; or

(b) Water systems which are carriers which convey passengers in interstate commerce.

Section 2. Operation, Maintenance and Safety Requirements. (1) Public and semipublic water systems. No person shall operate or commence operation of a public or semipublic water system except in compliance with the provisions of 401 KAR 8:010 through 8:700, inclusive. Water supply systems constructed prior to November 11, 1990 [~~the effective date of these regulations~~] may be continued in use, if the operation, maintenance, bacteriological, chemical, physical, and radiological standards comply with 401 KAR 8:010 through 401 KAR 8:700 inclusive, or the system obtains a variance or exemption as set forth in 401 KAR 8:060 from those standards with which they do not comply.

(2) Cross-connections prohibited. All cross-connections are prohibited. The use of automatic devices, such as reduced pressure zone back flow preventers and vacuum breakers, may be approved by the cabinet in lieu of proper air gap separation. A combination of air gap separation and automatic devices shall be required if determined by the cabinet to be necessary due to the degree of hazard to public health. [~~It shall be the responsibility of~~] Every public water system shall [~~to~~] determine if [~~whether~~] or where cross-connections exist and shall [~~to~~] immediately eliminate them.

(3) Bypasses. No bypass shall be created or maintained without the prior written approval of the cabinet stating the approved circumstances for establishment of a bypass, its design, and the exact conditions which shall [~~must~~] exist for its use.

(4) Auxiliary intakes. No auxiliary intake shall be used in direct connection with a public or semipublic water system except with prior written approval from the cabinet stating the emergency conditions which necessitate the intake.

(5) Water and sewer connections. The sewer system serving the purification plant and auxiliary facilities, including all plumbing fixtures, toilets, showers, drinking fountains, and floor drains, shall discharge to the sewer system where available. If no such sewer is available, the connection shall be made to an approved sewage disposal facility.

There shall be no connections between the sewer system and a filter backwash, filter-to-waste drains or clearwell overflow lines, unless an approved air gap is provided between such drains and overflow lines and the approved sanitary, storm sewer, or natural drainage system, so as to preclude the possibility of back-up of sewage or waste into the drain or overflow lines.

(6) Proper operation and maintenance. The owner or operator of a public water system shall [~~at all times~~] properly operate and maintain all facilities and systems of treatment, intake and distribution to achieve compliance with the provisions of 401 KAR 8:010 through 8:700 inclusive. Proper operation and maintenance includes effective performance, preventive maintenance, adequate operator staffing and training, adequate representative sample points, and adequate process controls for testing, including appropriate quality assurance procedures.

(7) Reports to the cabinet.

(a) Monthly operating reports. The supplier of water shall file complete monthly operating reports with the cabinet. The reports shall be provided in a manner [~~on forms provided or~~] approved by the cabinet and shall be received at the Division of Water, Frankfort Office Park, 14 [~~18~~] Reilly Road, Frankfort, Kentucky 40601, no later than ten (10) days after the end of the month for which the report is filed. Completed reports shall include volume of water treated, type and amount of chemicals added, and test results appropriate to be reported by the plant. Completed reports shall also include the dated original signature of the owner or authorized agent. [~~Beginning with the month of July 1992 for subparagraph 1 of this paragraph, and January 1993 for subparagraph 2 of this paragraph,~~] The supplier of water shall submit the following reports to the cabinet no later than ten (10) days after the end of each month the public water system serves water to the public:

1. Turbidity measurements with maximum contaminant levels [~~as required by 401 KAR 8:200, Section 4(4) and (5)~~] and monitoring in accordance with [~~that section and~~] 401 KAR 8:150[~~, Section 3(2)(a) until June 29, 1993. After June 29, 1993, turbidity monitoring shall be in accordance with 401 KAR 8:150, Section 3(2)(a), with measurements in accordance with 401 KAR 8:150, Section 3(1)(d) and (2)(a), and maximum contaminant levels in accordance with 401 KAR 8:150, Section 2~~]. The supplier of water shall include the following turbidity information in the monthly operating report:

a. The total number of filtered water turbidity measurements taken during the month.

b. The number and percentage of filtered water turbidity measurements taken during the month which are less than or equal to the turbidity limits specified in 401 KAR 8:150, Section 2, for the filtration technology being used.

c. The date and value of any turbidity measurements taken during the month which exceed five (5) NTU.

2. Disinfection information specified in 401 KAR 8:150, Section 3(2)(b). The supplier of water shall include the following disinfection information in the monthly operating report:

a. For each day, the lowest measurement of residual disinfectant concentration in mg/1 in water entering the distribution system.

b. The date and duration of each period when the residual disinfectant concentration in water entering the distribution system fell below the residual requirements as specified in 401 KAR 8:150, Section 1(1), and when the cabinet was notified as of the occurrence.

c. The following information on the samples taken in the distribution system in conjunction with total coliform monitoring pursuant to 401 KAR 8:150, Sections 1 and 3(2)(c):

(i) Number of instances where the residual disinfectant concentration is measured.

(ii) Number of instances where the residual disinfectant concentration is not measured but heterotrophic bacteria plate count (HPC) is measured.

(iii) Number of instances where the residual disinfectant concentration is measured but does not measure at least two-tenths (0.2) milligrams per liter or ppm or the equivalent [~~not detected~~] and no HPC is measured.

(iv) Number of instances where [~~no~~] residual disinfectant concentration is less than two-tenths (0.2) milligrams per liter [~~detected~~] and where HPC is greater than 500/ml.

(v) Number of instances where the residual disinfectant concentration is not measured and HPC is greater than 500/ml.

(vi) For the current and previous month the system serves water to the public the value of "V" in the following formula:

$$V = \frac{c+d+e}{a+b} \times 100$$

where

a = the value in subclause (i) of this clause
b = the value in subclause (ii) of this clause
c = the value in subclause (iii) of this clause
d = the value in subclause (iv) of this clause
e = the value in subclause (v) of this clause

(vii) If the cabinet determines, based on site-specific considerations, that a system has no means for having a sample transported and analyzed for HPC by a certified laboratory within the requisite time and temperature conditions specified by 401 KAR 8:150, Section 3(1)(c), and that the system is providing adequate disinfection in the distribution system, the requirements of paragraph (a)2c(i) through (vi) of this subsection do not apply.

d. A system need not report the data [~~date~~] listed in clause a. of this subparagraph if all data listed in clauses a. through c. of this subparagraph remain on file at the system and the cabinet determines that the system has submitted all the information required by clauses a. through c. of this subparagraph for at least twelve (12) months.

3. Each system, upon discovering that a waterborne disease outbreak potentially attributable to that water system has occurred, shall report that occurrence to the cabinet in accordance with paragraph (c) of this subsection. If the turbidity exceeds five (5) NTU, the system shall inform the cabinet as soon as possible in accordance with paragraph (c) of this subsection. If the residual falls below the requirements specified in 401 KAR 8:150, Section 1(1), in the water entering the distribution system, the system shall notify the cabinet as soon as possible in accordance with paragraph (c) of this subsection. The system also shall notify the cabinet by the end of the next business day whether or not the residual was restored to the residual required by 401 KAR 8:150, Section 1(1), within four (4) hours.

(b) Reports of failure to comply. Public water systems shall report to the cabinet, within forty-eight (48) hours, by phone or in writing, the failure to comply with any provision of 401 KAR 8:010 through 8:700, inclusive, including the failure to comply with monitoring requirements.

(c) Emergency reports. When a public water system experiences a line break as described in 401 KAR 8:150, Section 4(3), loss of pressure, loss of disinfection, or other event which may result in contamination of the water, the public water system shall immediately report to the cabinet by calling the drinking water branch of the division of water in Frankfort at (502) 564-3410 or the appropriate regional field office of the division of water. If a report required by paragraph (c) of this subsection is made at a time other than normal business hours, it shall be made through the twenty-four (24) hour environmental emergency telephone number, (502) 564-2380.

(8) Records to be maintained. All owners or operators of public water and semipublic water systems shall keep on or near the premises the records set forth in this subsection.

(a) Data summaries. Either actual laboratory reports shall be kept or data shall be transferred to tabular summaries. The following information shall be included:

1. The date, place and time of sampling, and the name of the person who collected the sample;

2. Whether the sample was a routine distribution system sample, check sample, raw or processed water sample or other special purpose sample;

3. The date of analysis;

4. The laboratory and person responsible for performing analysis;

5. The analytical technique or method used; and

6. The results of the analysis.

(b) Bacteriological analysis records shall be kept at least five (5) years.

(c) Chemical analysis records shall be kept at least [~~for a period of~~] ten (10) years.

(d) Turbidity analysis records shall be kept [~~for a period of~~] at least one (1) year.

(e) Records of violations and the actions taken by the system to correct violation of primary drinking water regulations shall be kept no less than ten (10) years after the last action taken with respect to the particular violation involved.

(f) Records of sanitary surveys, copies of written reports, summaries of communications relating to sanitary surveys of the system, conducted by the system, a private consultant, or a local, state or federal agency, shall be kept no less than ten (10) years after completion of the sanitary survey involved, at which time they may be transferred to the cabinet.

(g) Records concerning a variance or exemption granted to the system shall be kept no less then five (5) years following the expiration of the variance or exemption.

(9) Boil water notices and consumer advisories.

(a) Boil water notices and advisories. Public water systems and semipublic water systems may issue boil water notices or boil water advisories if the system believes [~~feels~~] a notice or advisory is warranted. The cabinet may direct that a boil water notice be issued when positive bacteriological sample results have been confirmed by an analysis or analyses made in a certified laboratory. The cabinet may direct that a boil water advisory be issued when conditions within a public water system indicate a possible adverse health effect from microbiological contamination may result from consumption of the water distributed by a system. The cabinet may, when it determines circumstances warrant, issue a boil water notice or boil water advisory directly, rather than rely on a public or semipublic water system to issue the notice. All boil water notices or advisories shall remain in effect until the cabinet determines or approves the notice or advisory may be lifted.

(b) Consumer advisory. The cabinet may issue a consumer advisory if conditions within a public water system or semipublic water system indicate a possible adverse health effect from consumption of the water distributed by the system or when other information of interest to the consumer exists. The advisory will notify affected persons of a required or recommended action that should be taken.

(10) How to issue notice or advisory. Boil water notices, boil water advisories, and consumer advisories shall be issued through newspapers, radio, television, or other media having an immediate public impact. As a health and safety measure, the water system shall repeat the notification during the period of imminent danger at intervals which maintain public awareness. The notice or advisory shall be readily understandable and shall include instructions for the public, as well as an explanation of the steps being taken to correct the problem. Boiling instructions shall caution to only boil drinking water for short range use by boiling water for at least three (3) [~~two (2)~~] minutes at a rolling boil.

(11) Other notices. Other public notifications shall be issued by public water systems as required by 401 KAR 8:010 through 8:700 inclusive.

(12) Maps. Within twelve (12) months of November 15, 1990, public and semipublic water systems shall have on the premises, or conveniently located to the premises, an up-to-date map of the distribution system. The map shall, at a minimum, show line size, cutoff valves, fire hydrants, flush hydrants, tanks, booster pumps, chlorination stations, connection to emergency or alternative sources, and wholesale customer master meters. The type of piping material in the distribution system and its location shall also be provided. If a public water system, due to age, improper documentation, lost documentation or other valid reason cannot comply with this requirement, the system may petition the cabinet to modify this requirement to the extent that compliance is not feasible. The petition for modification shall state specifically what portion of this requirement is not practical and why.

(13) Operation and maintenance manual. Each public water system shall develop and keep on the premises, for operators and employees of the system, an operation and maintenance manual that includes a detailed design of the plant, daily operating procedures, a schedule of testing requirements designating who is responsible for the tests, and safety procedures for operation of the facility, including storage and inventory requirements for materials and supplies used by the facility. The operation and maintenance manual shall be updated as necessary and no less than annually and shall be available by November 16, 1991. Public water systems serving fewer than 100 people or thirty (30) service connections may request that the cabinet waive this requirement. The request shall be in writing and any waiver granted by the cabinet shall be in writing and be retained by the public water system for examination by cabinet personnel.

(14) Flushing recommended. It is recommended that all distribution systems be thoroughly flushed at least twice a year, usually in the spring and fall. The purpose of systematic flushing is to reduce turbidity created from the scouring of accumulated sediment within the water lines. Flushing should start at the hydrants nearest the source of supply and proceed in an outward direction to the end of each main. Flushing should continue at each hydrant until all traces of turbidity and color are gone. Hydrants should be opened and shut slowly to prevent damage from water hammer. In addition to the regularly scheduled flushing, the following conditions indicate a need to flush the entire system: turbidity within the distribution system greater than five (5) nephelometric turbidity units (NTU); an inability to maintain an adequate residual of a disinfection agent in any part of the system or a heterotrophic plate count (HPC) in excess of 500. Other indicators that flushing may be called for are taste and odor complaints, color of water, contaminated water samples, or line repairs.

(15) No person shall introduce a substance which may have a deleterious physiological effect, or for which physiological effects may not be known, to the water supply system.

(16) Certified lab analysis required. For the purpose of determining compliance with the sampling requirements of 401 KAR 8:010 through 8:700 inclusive, samples shall be analyzed by a laboratory certified by the cabinet as prescribed in 401 KAR 8:040, except that measurements for turbidity and disinfectant residuals may be performed by a person approved by the cabinet.

(17) Right of entry. The cabinet may enter[~~, during normal business hours,~~] an establishment, facility or other property of public and semipublic water supplies in order to determine whether the supplies have acted or are acting in compliance with applicable laws or regulations which the cabinet has the authority to enforce. Entry may include collection of water samples for laboratory analyses, inspection of records, files, papers, processes, controls and facilities required to be kept, installed or used under the provisions of 401 KAR 8:010 through 8:700, inclusive. The cabinet or its authorized agent may cause to be tested a feature of a public water system, including its raw water source, to determine compliance with applicable legal requirements.

(18) Recommended practices for water supply reservoirs to be used for drinking water. The following practices are recommended to be employed by water systems which have a lake primarily used as a source of raw drinking water:

(a) Prohibition of swimming, water skiing and other contact sports.

(b) Prohibition of large motor-driven craft or any craft with toilets.

(c) An area at least 100 feet wide from the upper pool elevation shall be kept clear of all sources of potential contamination such as septic tanks, drain fields, livestock, barns, etc.

(d) No effluent from sewage treatment plants shall be discharged into the lake.

(e) Picnicking may be permitted around the lake if plans for the development of any picnic area meet regulatory requirements of the cabinet.

(f) A nonpoint source pollution control plan shall be implemented.

(19) Water treatment chemicals and system components. Chemical additives and protective materials (such as paints and linings) used by a water system shall be acceptable to the cabinet for use in contact with potable water.

(20) Disposal of chlorinated water. Chlorinated water resulting from disinfection of treatment facilities and new, repaired or extended distribution systems shall be disposed in a manner which will not violate 401 KAR 5:031.

(21) Water loading stations. Public water systems which provide water loading stations for the purpose of providing water to water hauling trucks or other bulk water devices shall construct such stations to conform to the standards in the Great Lakes Upper Mississippi River Board of State Public Health & Environmental Managers' "Recommended Standards for Water Works," incorporated by reference in Section 4(1) of this administrative regulation.

Section 3. Records and Reports Maintained by the Cabinet. The cabinet shall maintain and report records and reports as governed by 40 CFR 142.14 and 142.15, as amended at 54 Federal Register 27,557, 27,567, and 27,579 (1989), 56 Federal Register 3595 (1991) and 56 Federal Register 26562 (1991); hereby adopted without change.

Section 4. Incorporation by Reference. The following materials are hereby incorporated by reference and are available for public inspection and copying, subject to copyright laws, between 8 a.m. and 4:30 p.m., Monday through Friday, excluding state holidays, at the Division of Water, Frankfort Office Park, 14 [18] Reilly Road, Frankfort, Ky. 40601:

(1) Great Lakes Upper Mississippi River Board of State Public Health & Environmental Managers' "Recommended Standards for Water Works," 1992 [1987], published by the Health Research Inc., Health Education Services Division, P.O. Box 7126, Albany, New York 12224.

(2) "General Design Criteria for Surface and Ground Water Supplies", 1984, published by the Kentucky Division of Water, Frankfort Office Park, 14 [18] Reilly Road, Frankfort, Kentucky 40601.

(3) "Guidelines for Conducting Stream Studies for Wastewater Discharges Proposed Within Five Miles Upstream from Public Water Supply Sources or From the Location of Public Water Supply Intakes Within Five Miles Downstream from Wastewater Discharges" 1983, published by the Kentucky Division of Water, Frankfort Office Park, 14 [18] Reilly Road, Frankfort, Kentucky 40601.

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: April 14, 1994
FILED WITH LRC: April 15, 1994 at 11 a.m.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:100. Design, construction and approval of [new or modified] facilities.

RELATES TO: KRS Chapter 224; 40 CFR Part 141 (1993)

STATUTORY AUTHORITY: KRS 224.10-100, 224.10-110, PL 93-523, The Safe Drinking Water Act, as amended in 1986 and by the Lead Contamination and Control Act of 1988, PL 100-572, 42 USCA 300f, 300g, 300j

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce administrative [rules and] regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. The Safe Drinking Water Act, as amended by the Safe Drinking Water Act Amendments of 1986, provides for primary enforcement responsibility by states that have adopted regulations "no less stringent than the national primary drinking water regulations", as well as meeting other criteria stipulated by the Act. The Commonwealth of Kentucky has accepted and is currently exercising this [such] primary enforcement responsibility. This administrative regulation sets out design plan requirements for the construction of new and expanded facilities that deliver pure water for public or semipublic use, as well as stipulating certain reporting requirements and requiring modifications to existing facilities for certain line replacements, and feeding [granular] activated carbon.

Section 1. Plans and Specifications. (1) Plans to be submitted. Before a supplier or potential supplier of water may enter into a financial commitment for or initiate construction of a new public water system, or increase the capacity of an existing public water system, he shall submit the preliminary plans to the cabinet. An applicant shall demonstrate to the cabinet evidence of efforts to avoid locating part or all of the new or expanded facility at a site which is subject to a significant risk from earthquakes, floods, fires or other disasters which could cause a breakdown of the public water system or a portion thereof. Except for the intake structure, the facility shall be out of the 100-year flood plain.

(2) Preliminary information. The following information shall be submitted to the cabinet by a professional engineer on behalf of the applicant along with the fee required by 401 KAR 8:050, Section 1(1):

(a) The names of the applicant and the owner of the plant;

(b) A United States Geological Survey quadrangle map which shows the location of the proposed facility;

(c) The proposed source of water and quantity available, with the location of the intake or wellhead identified by latitude and longitude in degrees, minutes and seconds;

(d) An analysis of the water from the proposed source, which covers all regulated parameters, performed by a laboratory certified by the cabinet or its authorized agent;

(e) A description of the proposed facility, including size, flow rate through filters, settling basin size, and other general criteria; and

(f) An operation plan, including anticipated load, hours of operation, area served and the name of the plant operator.

(3) Preliminary plans approval. Upon receipt and review of the preliminary plans, as set forth in subsection (1) of this section, the cabinet shall either approve the preliminary plans or return them to the supplier of water for revision. Approval of the preliminary plans signifies approval only of the concept described in the preliminary plans and does not alter in any way the responsibility of the supplier of water to submit complete plans and specifications to the cabinet for final approval. The facility shall comply with the approved preliminary plans. Any change in the final design from the concept set forth in the preliminary plans shall be approved prior to its incorporation in the

final plans and specifications.

(4) Preliminary plans for semipublic treatment facilities or distribution systems. Preliminary plans are not required by the cabinet for semipublic treatment facilities or for distribution system construction, extensions or improvements.

(5) Final plans and specifications for water treatment plants and distribution facilities.

(a) Plans for the construction or modification of public water systems shall be submitted by the water system or shall be accompanied by a letter from the water system confirming that it has reviewed the plans, accepts the design and can and will provide water service to the project. Public water systems which purchase water from another public water system, shall also submit a letter from the seller of water for all construction or modification projects if: such project will result in exceeding eighty-five (85) percent of the purchasers current purchase contract; or such project could result in a pressure reduction below thirty-five (35) pounds per square inch in either the purchaser's or the seller's system; or, such project will result in a demand for water by the purchaser in excess of a 10,000 gallon per day increase. This requirement may be waived by the cabinet if the purchaser shows that a reasonable attempt to obtain the letter has been made and the seller of water fails to provide the required letter. In no event will this provision be the sole justification for rejection of the proposed project. The intent is to alert the seller and the purchaser that they are approaching their water purchase contract limitations and the state standards on minimum water pressure.

(b) Plans and specifications for all public water systems shall be prepared and submitted to the cabinet by a professional engineer registered in Kentucky, and shall bear the engineer's [~~his~~] seal. The seal of a professional engineer is not required on plans and specifications for semipublic water supplies, or for public water supply projects in which the expenditure for the completed project shall not exceed $2,000. The construction or installation of any new facilities or works or the alteration or reconstruction of any existing facilities or works, in any public or semipublic water system, shall not begin until four (4) copies of the plans and specifications, or any changes thereto, together with design data as may be required for proper review of the plans, have been submitted to the cabinet and have been approved by the cabinet in writing. A complete package, including plans, specifications, necessary fees, letters and other information, shall be submitted in such form and content as may be specified by the cabinet, and shall be submitted at least thirty (30) days prior to the date on which action is requested of the cabinet. The front page of the plans shall contain the name of the water supply, its ownership, location by city and county, and the name of the person preparing the plans.

(c) The cabinet's review of plans shall be limited to sanitary features of design and other features of public health significance and shall not include an examination of structural, mechanical or electrical design or economic factors.

(d) The plans shall be drawn to scale and accompanied by proper specifications, so as to permit a comprehensive engineering review, and shall include, but not be limited to, the following:

1. If treatment facilities are involved, chemical analyses of the proposed raw water source or sources shall be performed and evaluated before final approval is granted;

2. A plan and sectional view with all necessary dimensions of the water treatment facilities;

3. A piping diagram showing all appurtenances, including treatment facilities, in sufficient detail, as well as pertinent elevation data, to permit a hydraulic analysis of the system; and

4. Specifications containing details on all treatment equipment, including catalog identification of pumps, chlorinators, chemical feeders and related equipment.

5. A capacity to feed activated carbon shall be a part of the design for a new community or nontransient noncommunity surface water system.

6. A plan for a water line that would propose a section of line be laid within a 200 foot radius of an underground storage tank as defined in KRS 224.60-100 or a petroleum storage tank as defined in KRS 224.60-115, shall provide that all water lines within the 200 foot radius shall be ductile iron pipe or other metal pipe approved by the cabinet. Any future replacement of an existing water line within a 200 foot radius of a storage tank, whether or not plans are submitted to the cabinet, shall also meet this requirement.

(6) Approval of final plans. If approved, one (1) set of plans and specifications stamped "approved" will be returned to the engineer or person who prepared them and one set will be returned to the water supply.

(7) Construction.

(a) During construction, a set of approved plans and specifications shall be available at the job site at all times. All work shall be performed in accordance with the approved plans and specifications.

(b) If the cabinet's representative observes work being performed in a manner which does not conform to the approved plans and specifications, the cabinet shall notify the owner in writing.

(8) Final approval of facility. Upon completion of construction, the person who presented the plans shall certify in writing that the project has been completed in accordance with the "approved" plans and specifications. The public water supply shall operate the facility consistent with the approved plans and specifications. Any proposed change to the approved plan shall be submitted to the cabinet for approval. The public water supply shall not implement any change to the approved plan without the prior written approval of the cabinet.

(9) Expiration of approval. Unless construction is begun within one (1) year from date of approval, the approval shall expire. Extension of approval may be granted upon written request to the cabinet.

(10) Modifications and extension of service. The cabinet may refuse to approve modifications of a public water system or an extension of service to one (1) or more customers where such modification or extension of service may result in the water system's inability to supply consistent water service in compliance with 401 KAR 8:010 through 8:060 inclusive.

(11) [~~(10)~~] All plans and specifications submitted pursuant to this regulation shall be consistent with "Recommended Standards for Water Works", "General Design Criteria for Surface and Groundwater Supplies", and "Water Policy Memorandum Number 84-02, General Guidelines for Conducting Stream Studies for Wastewater Discharges Proposed Within Five Miles Upstream from Public Water Supply Sources, or for the Location of Public Water Supply Intakes Within Five Miles Downstream from Wastewater Discharges", which are incorporated by reference in Section 4 [~~2~~] of this regulation.

Section 2. Treatment Techniques for New and Existing Systems. (1) General requirements. The requirements of this section constitute primary drinking water regulations. These administrative regulations establish treatment techniques in lieu of maximum contaminant levels for specified contaminants.

(2) Treatment techniques for acrylamide and epichlorohydrin. Each public water system shall certify annually in writing to the cabinet, using third party or manufacturer's certification, that when acrylamide and epichlorohydrin are used in drinking water systems, the combination or product of dose and monomer level does not exceed the levels specified as follows:

Acrylamide = 0.05% dosed at one (1) ppm (or equivalent);

Epichlorohydrin = 0.01% dosed at twenty (20) ppm (or equivalent).

Certifications may rely on manufacturers or third parties, as approved by the cabinet.

Section 3. All existing community and nontransient noncommunity water systems using surface water as a source shall, by January 1, 1995, submit to the cabinet for approval plans to establish the

capacity to feed activated carbon to the treatment system. Within twelve (12) months of the approval of the plans, the water system shall certify in writing to the cabinet that the approved plan has been implemented.

Section 4. [2.] The following documents are hereby incorporated by reference and are available for public inspection and copying, subject to copyright laws, between 8 a.m. and 4:30 p.m., Monday through Friday, except for state holidays, at the Division of Water, 14 [18] Reilly Road, Frankfort Office Park, Frankfort, Kentucky 40601:

(1) Great Lakes Upper Mississippi River Board of State Public Health & Environmental Managers "Recommended Standards for Water Works," 1992 [1987], published by and available from Health Research Inc., Health Education Services Division, P.O. Box 7126, Albany, New York 12224.

(2) "General Design Criteria for Surface and Ground Water Supplies", July 1990, which is published by and may be obtained from the Division of Water; and

(3) "Water Policy Memorandum number 84-02, General Guidelines for Conducting Stream Studies for Wastewater Discharges Proposed within Five Miles Upstream from Public Water Supply Sources, or for the Location of Public Water Supply Intakes within Five Miles Downstream from Wastewater Discharges", 1984, which is published by and may be obtained from the Division of Water.

[Section 3. Severability. If any provision of this regulation is set aside by a court of competent jurisdiction, the remainder of this regulation remains in effect.]

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: April 14, 1994
FILED WITH LRC: April 15, 1994 at 11 a.m.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:150. Disinfection and filtration.

RELATES TO: KRS Chapter 224, 40 CFR Parts 141, 142 (1993)
STATUTORY AUTHORITY: KRS 224.10-100, 224.10-110, 40 CFR Parts 141 and 142 (1993), [as amended at 54 Federal Register 27,526 (1989),] 42 USCA 300f, 300g, 300j

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce administrative [rules and] regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. The Safe Drinking Water Act, as amended by the Safe Drinking Water Act Amendments of 1986, provides for primary enforcement responsibility by states that have adopted regulations "no less stringent than the national primary drinking water regulations", as well as meeting other criteria stipulated by the Act. The Commonwealth of Kentucky has accepted and is currently exercising this [such] primary enforcement responsibility. This administrative regulation sets out requirements for the disinfection and filtration of drinking water in public water systems using surface water or groundwater under the direct influence of surface water. These requirements shall serve as treatment techniques in lieu of maximum contaminant levels for the following contaminants: Giardia lamblia, viruses, heterotrophic plate count bacteria, Legionella, as well as an MCL for turbidity.

Section 1. Disinfection. All public and semipublic water systems shall provide disinfection, except as provided in this section. Semipublic water systems [and water systems which are public water systems only for the purposes of this administrative regulation, 401 KAR 8:020 and 8:200 because they are a commercial facility and serve food or drink to the public,] may satisfy this requirement either by complying with the requirements of this section for public water systems or by meeting the requirements of Section 2(5) of this administrative regulation.

(1) Public water systems using groundwater or surface water as a source. Supplies which use chlorine shall use continuous automatic disinfection by chlorination and shall provide a minimum free chlorine residual of two-tenths (0.2) milligrams per liter (or ppm) [at all points] throughout the distribution system measured as described in subsection (2) of this section. A contact period of at least thirty (30) minutes shall be provided between the chlorine and the water to allow adequate time for disinfection. For those supplies using chlorine, free chlorine residuals shall be checked daily at representative points throughout the system and shall be reported monthly pursuant to 401 KAR 8:020, Section 2(7)(a). Disinfecting agents other than chlorine, such as chloramines and chlorine dioxide, may be acceptable to the cabinet but shall be specifically approved by the cabinet on a case-by-case basis. If chloramination is used, a minimum combined residual of five-tenths (0.5) milligrams per liter (or ppm) shall be provided throughout the distribution system. If chlorine dioxide is used, the concentration of combined oxidants (chlorine dioxide, chlorate and chlorite) shall not exceed one and zero-tenths (1.0) milligrams per liter (or ppm) in the water delivered to the distribution system.

(2) All public water systems using surface water as a source, or groundwater under the direct influence of surface water, shall provide disinfection treatment as follows:

(a) The disinfection treatment shall be sufficient to ensure that the total treatment processes of that system achieve at least ninety-nine and nine-tenths (99.9) percent (3-log) inactivation or removal of Giardia lamblia cysts and at least 99.99 percent (4-log) inactivation or removal of viruses as determined by the cabinet, consistent with the "Guidance Manual for Compliance with the Filtration and Disinfection Requirements for Public Water Systems using Surface Water Sources" incorporated by reference in Section 5 of this administrative regulation.

(b) The residual disinfectant concentration in the water entering the distribution system measured as specified in Section 3(1)(e) of this administrative regulation shall not be less than required by subsection (1) of this section for more than four (4) hours.

(c) The residual disinfectant concentration in the distribution system measured as free chlorine, total chlorine, combined chlorine, or chlorine dioxide as specified in Section 3(1)(e) of this administrative regulation, shall not be less than two-tenths (0.2) milligrams per liter (or ppm) in more than five (5) percent of the samples each month, for two (2) consecutive months that the system serves water to the public. Water in the distribution system with a heterotrophic bacteria concentration less than or equal to 500/ml, measured as heterotrophic plate count (HPC), as specified in Section 3(1)(c) of this regulation, is deemed to have an adequate disinfectant residual for purposes of determining compliance with this requirement. Thus the value "V" in the following formula shall not exceed five (5) percent in one (1) month for two (2) consecutive months.

$$V = \frac{c+d+e}{a+b} \times 100$$

where:
a = number of instances that the residual disinfectant concentration is measured;
b = number of instances that the residual disinfectant concentration is not measured but heterotrophic bacteria plate count (HPC) is measured;
c = number of instances that the residual disinfectant concentration

is measured but does not measure at least two-tenths (0.2) milligrams per liter or ppm or the equivalent [~~not detected~~] and no HPC is measured;
d = number of instances that [~~no~~] residual disinfectant concentration is below two-tenths (0.2) milligrams per liter [~~detected~~] and where the HPC is greater than 500/ml; and
e = number of instances that the residual disinfectant concentration is not measured and HPC is greater than 500/ml.

(d) If the cabinet determines, based on site-specific considerations, that a system has no means for having a sample transported and analyzed for HPC by a certified laboratory under the requisite time and temperature conditions specified in Section 3(1)(c) of this administrative regulation and that the system is providing adequate disinfection in the distribution system, the requirements of paragraph (c) of this subsection shall not apply.

(e) The cabinet may, through its own or independent testing, determine that residual disinfection is not present throughout the distribution system, take action necessary to correct the problem and, if necessary, notify the public in accordance with 401 KAR 8:020, Section 2(9).

(3) Variances or exemptions shall not be granted for subsection (2) of this section.

Section 2. Filtration. All public water systems using a surface water source and all ground water systems under the direct influence of surface water shall establish filtration systems. The design for such systems shall be submitted to the cabinet in accordance with 401 KAR 8:100, and shall comply with the following [~~by June 29, 1993~~]:

(1) Conventional filtration treatment or direct filtration:

(a) If a public water system uses conventional filtration or direct filtration, the turbidity level of representative samples of the system's filtered water shall be less than or equal to five-tenths (0.5) NTU in at least ninety-five (95) percent of the measurements taken each month, measured as specified in Section 3(1)(d) of this administrative regulation, except that if the cabinet determines that the system is capable of achieving at least ninety-nine and nine-tenths (99.9) percent removal or inactivation of Giardia lamblia cysts at some turbidity level higher than five-tenths (0.5) NTU in at least ninety-five (95) percent of the measurements taken each month, the cabinet may substitute this higher turbidity limit for that system. However, the cabinet shall not approve a turbidity limit that allows more than one (1) NTU in more than five (5) percent of the samples taken each month measured as specified in Section 3(1)(d) of this administrative regulation.

(b) The turbidity level of representative samples of a system's filtered water shall not exceed five (5) NTU, measured as specified in Section 3(1)(d) of this administrative regulation.

(2) Slow sand filtration.

(a) If a public water system uses slow sand filtration, the turbidity level of representative samples of the system's filtered water shall be less than or equal to one (1) NTU in at least ninety-five (95) percent of the measurements taken each month, measured as specified in Section 3(1)(d) of this administrative regulation, except that if the cabinet determines there is no significant interference with disinfection at a higher turbidity level, the cabinet may substitute this higher turbidity limit for that system.

(b) The turbidity level of representative samples of a system's filtered water shall not exceed five (5) NTU, measured as specified in Section 3(1)(d) of this administrative regulation.

(3) Diatomaceous earth filtration.

(a) If a public water system uses diatomaceous earth filtration, the turbidity level of representative samples of the system's filtered water shall be less than or equal to one (1) NTU in at least ninety-five (95) percent of the measurements taken each month, measured as specified in Section 3(1)(d) of this administrative regulation.

(b) The turbidity level of representative samples of a system's filtered water shall not exceed five (5) NTU measured as specified in Section 3(1)(d) of this administrative regulation.

(4) Other filtration technologies. A public water system may use a filtration technology not listed in subsections (1) through (3) of this section if it demonstrates to the cabinet, using pilot plant studies or other means, that the alternative filtration technology, in combination with disinfection treatment that meets the requirements of this administrative regulation, consistently achieves ninety-nine and nine-tenths (99.9) percent removal or inactivation of Giardia lamblia cysts and 99.99 percent removal or inactivation of viruses. If a system makes this demonstration, the requirements of subsection (2) of this section shall apply.

(5) Semipublic water systems [~~and water systems which are public water systems only for the purposes of this administrative regulation, 401 KAR 8:020 and 8:200 because they are a commercial facility and serve food or drink to the public;~~] may enter into a protocol with the cabinet whereby the filtration and disinfection requirements of this administrative regulation are achieved using filtration technology, disinfection technology, or a combination of both, if the technology will achieve a ninety-nine and nine-tenths (99.9) percent removal or inactivation of Giardia lamblia cysts and 99.99 percent removal or inactivation of viruses. The protocol shall contain a schedule for maintenance and testing of the filtration and disinfection equipment to assure that the requirements of this subsection are met. Intensive bacteriological testing may be included in the protocol. If surface water is a source of water, filtration shall be an element of the protocol. If groundwater is the only source of water, the semipublic and public water systems eligible under this subsection may enter into a protocol with the cabinet to demonstrate through a regular schedule of bacteriological testing, that filtration or disinfection is not needed. The protocol shall stipulate that any positive bacteriological test shall require disinfection of the water, unless the cabinet has reason to believe that the positive result was due to error.

(6) Variances or exemptions shall not be granted for this section.

Section 3. Analytical and Monitoring Requirements. (1) Analytical requirements. The analytical methods specified in this subsection, or otherwise approved by the cabinet, shall be used to demonstrate compliance with this administrative regulation. Measurements for pH, temperature, turbidity, and residual disinfectant concentrations shall be conducted by a party approved by the cabinet. Measurements for total coliforms, fecal coliforms, and HPC shall be conducted by a laboratory certified by the cabinet or EPA to do the analyses. Until laboratory certification criteria are developed for the analysis of HPC and fecal coliforms, a laboratory certified for total coliform analysis by EPA or the cabinet shall be deemed certified for HPC and fecal coliform analysis. The following procedures shall be performed in accordance with the respective methods set forth below:

(a) Fecal coliform concentration - Method 908C (Fecal Coliform MPN Procedures), pp. 878-880, Method 908D (Estimation of Bacterial Density), pp. 880-882, or Method 909C (Fecal Coliform Membrane Filter Procedure), pp. 896-898, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition.

(b) Total coliform concentration - Method 908A (Standard Total Coliform Multiple - Tube (MPN) Tests), pp. 872-876, Method 908B (Application of Tests to Routine Examinations), pp. 876-878, Method 908D (Estimation of Bacterial Density), pp. 880-882, Method 909A (Standard Total Coliform Membrane Filter Procedure), pp. 887-894, or Method 909B (Delayed - Incubation Total Coliform Procedure), pp. 894-896, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition; Minimal Medium ONPG-MUG Test, as set forth in the article "National Field Evaluation of a Defined Substrate Method for the Simultaneous Enumeration of Total Coliforms and Escherichia coli from Drinking Water; Comparison with the Standard Multiple Tube Fermentation Method" (Edberg et al). Applied and Environmental Microbiology, Volume 54, pp. 1595-1601, June 1988 (as amended

under Erratum, Volume 54, p. 3197, December 1988). (Note: the Minimal Medium ONPG- MUG Test is sometimes referred to as the Autoanalysis Colilert System). Systems may use a five (5) tube test or a ten (10) tube test.

(c) Heterotrophic Plate Count - Method 907A (Pour Plate Method), pp. 864-866, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition.

(d) Turbidity - Method 214A (Nephelometric Method - Nephelometric Turbidity Units), pp. 134-136, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985 American Public Health Association et al, 16th edition.

(e) Residual disinfectant concentration - residual disinfectant concentrations for free chlorine and combined chlorine (chloramines) shall be measured by Method 408C (Amperometric Titration Method), pp. 303-306, Method 408D (DPD Ferrous Titrimetric Method), pp. 306-309, Method 408E (DPD Colorimetric Method), pp. 309-310, or Method 408F (Leuco Crystal Violet Method), pp. 310-313, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition. Residual disinfectant concentrations for free chlorine and combined chlorine may also be measured by DPD colorimetric test kits if approved by the cabinet. Residual disinfectant concentrations for ozone shall be measured by the Indigo Method published in the 17th edition of Standard Methods for the Examination of Water and Wastewater, American Public Health Association et al; the Iodometric Method in the 16th edition shall not be used. Other automated methods which are calibrated in reference to the results obtained by the Indigo method on a regular basis may be approved by the cabinet. Residual disinfectant concentrations for chlorine dioxide shall be measured by Method 410B (Amperometric Method) or Method 410C (DPD Method), pp. 322-324, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition.

(f) Temperature - Method 212 (Temperature) pp. 126-127, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition.

(g) pH - Method 423 (pH Value), pp. 429-437, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association, 16th edition.

(2) Monitoring requirements. A public water system that uses a surface water source or a groundwater source under the influence of surface water shall monitor in accordance with paragraph (a) of this subsection beginning July 1, 1992, and with paragraph (b) of this subsection beginning January 1, 1993, or when filtration is installed, whichever is later.

(a) Turbidity measurements shall be performed by public water systems on representative samples of the system's filtered water at least every four (4) hours that the system serves water to the public. A public water system may substitute continuous turbidity monitoring for grab sample monitoring if it validates the continuous measurement for accuracy on a regular basis using a protocol approved by the cabinet. In addition, a system using continuous monitoring shall submit to the cabinet a schedule of times when the monitoring will be recorded. The schedule shall reflect monitoring at least every four (4) hours the system serves water to the public. If a system uses slow sand filtration or filtration treatment other than conventional treatment, direct filtration, or diatomaceous earth filtration, the cabinet may reduce the sampling frequency to once per day if it determines in writing, that less frequent monitoring is sufficient to indicate effective filtration performance. If a system serves 500 or fewer persons, the cabinet may reduce the turbidity sampling frequency to once per day, regardless of the type of filtration treatment used, if the cabinet determines, in writing, that less frequent monitoring is sufficient to indicate effective filtration performance.

(b) The residual disinfectant concentration of the water entering the distribution system shall be monitored by public water systems continuously, and the lowest value shall be recorded each day, except that if there is a failure in the continuous monitoring equipment, grab sampling every four (4) hours may be conducted in lieu of continuous monitoring, but for no more than five (5) working days following the failure of the equipment, and systems serving 3,300 or fewer persons may take grab samples in lieu of providing continuous monitoring on an ongoing basis at the frequencies each day prescribed below:

System Size by Population	Samples/Day
less than 500	1
501 to 1,000	2
1,001 to 2,500	3
2,501 to 3,300	4

The day's samples shall not be taken at the same time. The sampling intervals shall be subject to cabinet review and approval. If the residual disinfectant concentration falls below the requirements of Section 1(1) of this regulation in a system using grab sampling in lieu of continuous monitoring, the system shall take a grab sample every four (4) hours until the residual disinfectant concentration meets the requirements of Section 1(1) of this administrative regulation.

(c) The residual disinfectant concentration shall be measured at least at the same points in the distribution system and at the same time as total coliforms are sampled, as specified in 401 KAR 8:200, except that the cabinet may allow a public water system which uses both a surface water source, or a groundwater source under direct influence of surface water, and a groundwater source to take disinfectant residual samples at points other than the total coliform sampling points if the cabinet determines in writing that such points are more representative of treated (disinfected) water quality within the distribution system. Heterotrophic bacteria, measured as heterotrophic plate count (HPC) as specified in subsection (1)(c) of this section, may be measured in lieu of residual disinfectant concentration.

(d) If the cabinet determines in writing, based on site-specific considerations, that a system has no means for having a sample transported and analyzed for HPC by a certified laboratory under the requisite time and temperature conditions specified by subsection (1)(c) of this section and that the system is providing adequate disinfection in the distribution system, the requirements of paragraph (c) of this subsection shall not apply to that system.

Section 4. Disinfection of New and Repaired Water Lines. (1) Disinfection of water lines. A water distribution system, including storage distribution tanks, repaired portions of existing systems or all extensions to existing systems, shall be thoroughly disinfected before being placed in service. A water distribution system shall disinfect with chlorine or chlorine compounds, in amounts as to produce a concentration of at least fifty (50) ppm and a residual of at least twenty-five (25) ppm at the end of twenty-four (24) hours, and the disinfection shall be followed by a thorough flushing. New water distribution lines shall not be placed into service until bacteriological samples taken at the points specified in subsection (2) of this section are examined and are shown to be negative following disinfection. Other methods of disinfection may be used with the written permission of the cabinet.

(2) Water distribution systems shall submit to the cabinet results of bacteriological samples for each new construction project, routine repair (which includes restoration of pressure to lines where pressure is lost), replacement, or extension to existing systems, after the disinfection and flushing. A core zone, which includes up to the first one-half (1/2) mile, shall be established. Two (2) samples shall be taken from the core zone. Additionally, one (1) sample taken from each mile of new distribution line shall be submitted to the cabinet. A new or routine replacement line shall not be placed in service until

negative laboratory results are obtained on the bacteriological analyses. Sample bottles shall be clearly identified as "special" construction tests. Notification of analytical results shall be given to the cabinet by the most expedient method. Other disinfection methods and testing procedures may be used if the cabinet grants prior written approval.

(3) If emergency repairs due to breaks or ruptures in distribution system lines are required, public water systems may suspend bacteriological sampling, if appropriate and thorough flushing safeguards, with a chlorine residual present, are taken. If a public water system suspends bacteriological sampling, it shall maintain records of flushing and chlorine residuals for one (1) year, and conduct bacteriological tests immediately after normal disinfectant residuals are detected after returning the line to service. Records of results shall be submitted to the cabinet and shall be maintained for one (1) year. In cases of loss of pressure below twenty (20) pounds per square inch or breaks or ruptures requiring more than eight (8) hours to repair, the public water system shall notify the cabinet immediately pursuant to 401 KAR 8:020, Section 2(7)(c) **or according to a schedule approved by the cabinet**. These emergency reports are not required for a loss of pressure, break or rupture occurring in service lines serving only one (1) single family residence. Community and nontransient noncommunity public water systems shall maintain [~~provide~~] a log of all breaks or ruptures which includes the date and location of the break or rupture, the time it was discovered, the population affected, the length of time required to repair the break or rupture, the date and time disinfectant residuals are detected and the date and time bacteriological samples are taken. The log shall be available for inspection by [~~submitted to~~] the cabinet [~~monthly with the monthly operating report required by 401 KAR 8:020, Section 2(7)(a)~~].

Section 5. Incorporation by Reference. The following items are incorporated by reference and are available for public inspection and copying, subject to copyright law, between the hours of 8 a.m. and 4:30 p.m. eastern standard time, Monday through Friday, at the Division of Water, 14 [~~18~~] Reilly Road, Frankfort Office Park, Frankfort, Kentucky 40601:

(1) Standard Methods for the Examination of Water and Wastewater, 16th edition 1985, and for the purposes of 401 KAR 8:150, Section 3(1)(e), the 17th edition, 1989, prepared and jointly published by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation. This publication may be obtained by contacting the Publication Office, American Public Health Association, 1015 15th Street NW, Washington, D.C. 20005.

(2) "National Field Evaluation of a Defined Substrate Method for the Simultaneous Enumeration of Total Coliforms and Escherichia Coli from Drinking Water: Comparison with the Standard Multiple Tube Fermentation Method" (Minimal Medium ONPG-MUG Method) (Edgerg et al), Applied and Environmental Microbiology, Volume 54, pp. 1595-1601, June 1988 (as amended under Erratum, Applied and Environmental Microbiology, Volume 54, p. 3197, December, 1988), which may be obtained from the American Water Works Association Research Foundation, 6666 West Quincy Avenue, Denver, Colorado 80235.

(3) "Guidance Manual for Compliance with the Filtration and Disinfection Requirements for Public Water Systems using Surface Water Sources" October, 1989, as published by the United States Environmental Protection Agency, Science and Technology Branch, Criteria and Standards Division, Office of Drinking Water, Washington, D.C., and available from the American Water Works Association, Management Services, 6666 West Quincy Avenue, Denver, Colorado 80235, (303) 794-7711.

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: April 14, 1994
FILED WITH LRC: April 15, 1994 at 11 a.m.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:200. Microbiological [~~and turbidity~~] monitoring.

RELATES TO: KRS Chapter 224, 40 CFR Part 141 (1993)

STATUTORY AUTHORITY: KRS 224.10-100, 224.10-110, 40 CFR Part 141 (1993), [~~as amended at 54 FR 27,562 (1989), 56 FR 642 (1991),~~] 56 FR 1557 (1991), 42 USCA 300f, 300g, 300h, 300j

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce administrative [~~the rules and~~] regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. This administrative regulation sets out a schedule and method for sampling drinking water to test for bacteriological contaminants and establishes maximum contaminant levels for bacteria. This administrative regulation also specifies requirements if tests show maximum contaminant levels have been exceeded[~~, as well as requirements for monitoring turbidity~~].

Section 1. All suppliers of water operating a public or semipublic water system, including suppliers operating those systems which provide water purchased from another system, shall meet the requirements of this administrative regulation.

(1) Routine monitoring for total coliform bacteria. A public water system shall collect total coliform samples at sites which are representative of water throughout the distribution system according to a written sample siting plan. A public water system shall submit the written sample siting plan to the cabinet in a manner prescribed by the cabinet and obtain the cabinet's approval of the plan. The plan shall contain the following elements:

(a) A complete name, address, city and zip code for each sample site. If a post office box number or rural route number is used, the highway number, rural route number or other information adequate to locate the sampling site shall be included.

(b) The site shall be identified as residential, commercial, industrial, educational, or some other specific type of sampling location.

(c) A map shall be submitted with the siting plan showing the public water system's distribution system and the location of all proposed sites. A duplicate map shall be maintained by the public water system. These maps shall be prepared on Kentucky county maps, scale: 1:62,500 (1 inch = 1 mile) or on city maps. These maps may be obtained from the Kentucky Transportation Cabinet, Map Sales, 419 Ann Street, Frankfort, Kentucky 40622. The cabinet may waive this requirement in writing for systems with less than five (5) service connections or which serve a population of less than 500 people.

(2) The monitoring frequency for total coliforms for public water systems shall be based on the population served by the system as follows:

TABLE 1
TOTAL COLIFORM SAMPLING REQUIREMENTS
BASED ON POPULATION SERVED

Population Served	Minimum Number Monthly Samples	Population Served	Minimum Number Monthly Samples
25 - 2,500	2	59,001- 70,000	70
2,501 - 3,300	3	70,001 - 83,000	80
3,301 - 4,100	4	83,001 - 96,000	90
4,101 - 4,900	5	96,001 - 130,000	100
4,901 - 5,800	6	130,001 - 220,000	120
5,801 - 6,700	7	220,001 - 320,000	150
6,701 - 7,600	8	320,001 - 450,000	180
7,601 - 8,500	9	450,001 - 600,000	210
8,501 - 12,900	10	600,001 - 780,000	240
12,901 - 17,200	15	780,001 - 970,000	270
17,201 - 21,500	20	970,001 - 1,230,000	300
21,501 - 25,000	25	1,230,001 - 1,520,000	330
25,001 - 33,000	30	1,520,001 - 1,850,000	360
33,001 - 41,000	40	1,850,001 - 2,270,000	390
41,001 - 50,000	50	2,270,001 - 3,020,000	420
50,001 - 59,000	60	3,020,001 - 3,960,000	450
		3,960,001 or more	480

(3) Population-served calculation. For purposes of determining the population served, the applicable method below shall be used:

(a) When the supplier of water serves an area defined by an official census count or a population projection, the most recent census count or official population projection shall be used; or

(b) When no official figures on population are available on the area served by a supplier of water, the population served shall be considered to be a factor of not less than three and three-tenths (3.3) times the number of residential connections or a factor of not less than three (3) times the total number of all connections, whichever is greater.

(4) Semipublic systems [~~and systems serving fewer than twenty-five (25) people or fifteen (15) service connections~~]. [~~Suppliers of water for~~] Semipublic water systems [~~and systems serving fewer than twenty-five (25) people or fifteen (15) service connections,~~] shall cause samples to be tested, for the purpose of determining the presence or absence coliforms, at least twice per month, or in accordance with a protocol agreed to pursuant to 401 KAR 8:150, Section 2(5). If coliforms are present, appropriate repeat samples shall be taken.

(5) Sampling schedule. Each public and semipublic water system shall take routine samples to determine the presence or absence of coliforms. No more than half of the samples shall be taken in one (1) week. Results of the analyses of the samples shall be submitted to the cabinet no later than ten (10) days after the end of the month for which the samples were taken. If the tenth day falls on a Saturday, Sunday or holiday the results shall be submitted on the following working day. A noncommunity water system shall sample for total coliform bacteria per 100 milliliters twice each month of operation. Seasonally operated facilities shall notify the cabinet in writing in advance as to the opening and closing dates covered by the sampling requirements. This frequency may be changed by the cabinet on the basis of subsequent surveys and conditions.

(6) Forwarding samples. The cabinet shall, upon request, notify a water supplier as to those commercial or state laboratories, certified in accordance with 401 KAR 8:040, to which samples may be sent for determining the presence or absence of coliforms. The samples shall be forwarded to a certified laboratory by the most expeditious or speedy method available to the water supply.

(7) Sample collection. Samples taken by or on behalf of public water systems shall be collected in bottles prepared and sterilized in accordance with "Standard Methods". When the sample is collected, the disinfectant residual shall be determined and recorded on the form provided by the laboratory with the sample container. Bacteriological sampling forms shall be fully and accurately completed or the sample shall be invalid. The disinfecting agent shall be removed from the sample at the time of its collection. [~~A distributor of water collecting bacteriological samples for analysis in its own certified laboratory may use containers other than bottles, if this practice is approved in writing by the cabinet.~~]

(8) Special purpose samples, such as those taken to determine whether disinfection practices are sufficient following pipe placement, replacement, or repair, shall not be used to determine compliance with the MCL for total coliforms set forth in Section 2 of this administrative regulation. Repeat samples taken pursuant to subsection (9)(a) of this section are not special purpose samples, and shall be used to determine compliance with the MCL for total coliforms set forth in Section 2 of this administrative regulation.

(9) Repeat monitoring.

(a) If a routine sample is total coliform- positive, the public water system shall collect a set of repeat samples within twenty-four (24) hours of being notified of the positive result. The system shall collect at least three (3) repeat samples for each total coliform-positive sample found. The cabinet may extend the twenty-four (24) hour limit on a case-by-case basis if the system demonstrates that it has a logistical problem in collecting the repeat samples within twenty-four (24) hours that is beyond its control. If an extension is granted, the cabinet shall specify how much time the system has to collect the repeat samples.

(b) The public water system shall collect at least one (1) repeat sample from the sampling tap where the original total coliform-positive sample was taken, and at least one (1) repeat sample at a tap within five (5) service connections upstream and at least one (1) repeat sample at a tap within five (5) service connections downstream of the original sampling site. If a total coliform-positive sample is at the end of the distribution system, or one (1) away from the end of the distribution system, the cabinet may waive the requirement to collect a repeat sample upstream or downstream of the original sampling site, but a total of three (3) repeat samples shall be collected.

(c) The public water system shall collect all repeat samples on the same day.

(d) If one (1) or more repeat samples in the set is total coliform-positive, the public water system shall collect an additional set of repeat samples in a manner specified in paragraphs (a), (b), and (c) of this subsection. The public water system shall collect the additional samples within twenty-four (24) hours of being notified of the positive result, unless the cabinet extends the limit as provided in paragraph (a) of this subsection. The public water system shall repeat this process until either total coliforms are not detected in one (1) complete set of repeat samples or the system determines that the MCL for total coliforms set forth in Section 2 of this administrative regulation has been exceeded and notifies the cabinet, and the public, pursuant to 401 KAR 8:070. The cabinet may require further testing until all samples are total coliform-negative.

(10) If a system collecting fewer than five (5) routine samples per month has one (1) or more total coliform-positive samples and the cabinet does not invalidate the sample pursuant to subsection (13) of this section, the public water system shall collect at least five (5) routine samples during the next month the system provides water to the public.

(11) After a system collects a routine sample and before it learns the results of the analysis of that sample, if it collects another routine sample from within five (5) adjacent service connections of the initial sample, and the initial sample, after analysis, is found to contain total coliforms, then the system may count the subsequent sample as a repeat sample instead of a routine sample.

(12) Results of routine and repeat samples not invalidated by the

cabinet shall be included in determining compliance with the MCL for total coliforms set forth in Section 2 of this administrative regulation.

(13) Invalidation of total coliform samples. A total coliform-positive sample invalidated under this subsection shall not count towards meeting the minimum monitoring requirements of this section.

(a) The cabinet may invalidate a total coliform-positive sample only if the conditions of clause 1, 2, or 3 of this subparagraph are met.

1. The laboratory establishes to the satisfaction of the cabinet that improper sample analysis caused the total coliform- positive result.

2. The cabinet, on the basis of the results of repeat samples collected as required by subsection (9) of this section, determines in writing that the total coliform-positive sample resulted from a domestic or other nondistribution system plumbing problem. The cabinet shall not invalidate a sample on the basis of repeat sample results unless every repeat sample collected at the same tap as the original total coliform-positive sample is total coliform-positive and every repeat sample collected within five (5) service connections of the original tap is total coliform- negative. The cabinet shall not invalidate a total coliform-positive sample on the basis of repeat samples if every repeat sample is total coliform-negative, or if the public water system has only one (1) service connection.

3. The cabinet has substantial grounds to believe that a total coliform-positive result is due to a circumstance or condition which does not reflect water quality in the distribution system. A decision made by the cabinet to this effect shall be in writing and signed by the Director of the Division of Water upon the written recommendation of the Manager of the Drinking Water Branch. The written decision shall be submitted to the U.S. Environmental Protection Agency and shall be available to the public. The written decision shall state the specific cause of the total coliform-positive sample and shall state what action the public water system has taken, or will take, to correct the problem. The public water system shall, regardless of the cabinet action taken under this clause, take the repeat samples required under subsection (9) of this section. The cabinet shall not invalidate a total coliform-positive sample solely on the grounds that each repeat sample is total coliform- negative.

(b) A laboratory shall invalidate a total coliform sample (unless total coliforms are detected) if the sample produces a turbid culture in the absence of gas production using an analytical method where gas formation is examined (e.g., the Multiple-Tube Fermentation Technique), produces a turbid culture in the absence of an acid reaction in the Presence- Absence (P-A) Coliform Test, or exhibits confluent growth or produces colonies too numerous to count with an analytical method using a membrane filter (e.g., Membrane Filter Technique). If a laboratory invalidates a sample because of the interference, the public water system shall collect another sample from the same location as the original sample, within twenty-four (24) hours of being notified of the interference problem, and have it analyzed for the presence of total coliforms. The system shall continue to resample within twenty-four (24) hours and have the samples analyzed until it obtains a valid result. The cabinet may waive the twenty-four (24) hour time limit on a case-by-case basis.

(14) Sanitary surveys.

(a) A public water system which does not collect five (5) or more routine samples per month shall undergo an initial sanitary survey by June 29, 1994, if it is a community public water system, and June 29, 1999, if it is a noncommunity water system. Thereafter, the system shall undergo a sanitary survey at least once every five (5) years except that a noncommunity water system using only disinfected groundwater not under the influence of surface water, shall undergo a sanitary survey at least once every ten (10) years. The cabinet shall review the results of each sanitary survey to determine whether the existing monitoring frequency is adequate and what additional measures, if any, the system needs to undertake to improve drinking water quality.

(b) Information relating to a source of contamination within a delineated wellhead protection area, which is collected in the course of developing and implementing a U.S. Environmental Protection Agency approved wellhead protection program, may be considered in conducting a sanitary survey of a public water system using groundwater if the information was collected since the last time the public water system was subject to a sanitary survey.

(c) Sanitary surveys shall be performed by the cabinet or an agent approved by the cabinet. Public water systems are responsible for ensuring that required sanitary surveys take place.

(15) Fecal-coliforms - Escherichia coli (E. coli) testing.

(a) If a routine or repeat sample is total coliform-positive, the public water system shall analyze that total coliform-positive culture medium to determine if fecal coliforms are present, except that the public water system may test for E. coli in lieu of fecal coliforms. If fecal coliforms or E. coli are present, the system shall notify the cabinet by the end of the day the system is notified of the test result pursuant to 401 KAR 8:020, Section 2(7)(c).

(b) The cabinet may allow a public water system, on a case-by-case basis, to forego fecal coliform or E. coli testing on a total coliform-positive sample if that system assumes that the total coliform-positive sample is fecal coliform-positive or E. coli-positive and notifies the cabinet as specified in paragraph (a) of this subsection and the provisions of Section 2(2) of this administrative regulation apply.

(16) Analytical methodology. The analysis for the presence or absence of total coliforms shall commence within thirty (30) hours of the sample being collected, unless the cabinet waives this requirement in writing.

(a) The standard sample volume required for total coliform analysis, regardless of analytical method used, is 100 ml.

(b) Public water systems shall determine the presence or absence of total coliforms; a determination of total coliform density is not required.

(c) Public water systems shall conduct total coliform analyses in accordance with one (1) of the following analytical methods:

1. Multiple-Tube Fermentation (MTF) Technique, as set forth in Standard Methods for the Examination of Water and Waste water, 1985, American Public Health Association et al, 16th edition, Method 908, 908A, and 908B-pp. 870-887, except that ten (10) fermentation tubes shall be used; or Microbiological Methods for Monitoring the Environment, Water and Wastes, U.S. EPA, Environmental Monitoring and Support Laboratory, Cincinnati, Ohio 45268 (EPA-600/8-78-017, December 1978, available from ORD Publications, CERI U.S. EPA, Cincinnati, Ohio 45268), Part III, Section B.4.1-4.6.4, pp. 114-118 (Most Probable Number Method), except that ten (10) fermentation tubes shall be used; [~~or~~]

2. Membrane Filter (MF) Technique, as set forth in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition, Method 909, 909A and 909B-pp. 886-896; or Microbiological Methods for Monitoring the Environment, Water and Wastes, U.S. EPA, Environmental Monitoring and Support Laboratory, Cincinnati, Ohio 45268 (EPA-600/8-78-017, December 1978, available from ORD Publications, CERI, U.S. EPA, Cincinnati, Ohio 45268), Part III, Section B.2.1-2.6, pp. 108-112; [~~or~~]

3. Presence-Absence (P-A) Coliform Test, as set forth in Standard Methods for the Examination of Water and Waste water, 1985, American Public Health Association et al, 16th edition, Method 908E-pp. 882-886; or

4. Minimal Medium ONPG-MUG (MMO-MUG) Test, as set forth in the article "National Field Evaluation of a Defined Substrate Method for the Simultaneous Detection of Total Coliforms and Escherichia coli from Drinking Water: Comparison with Presence-Absence Techniques" (Edberg et al), Applied and Environmental Microbiology, Volume 55, pp. 1003-1008, April 1989. (The MMO-MUG Test is sometimes referred to as the Autoanalysis Colilert System.) The MMO-MUG Test with hepes buffer in lieu of phosphate buffer is an

acceptable minor revision.

(d) In lieu of the ten (10) tube MTF Technique specified in paragraph (c)1 of this subsection, a public water system may use the MTF Technique using either five (5) tubes (twenty (20) ml sample portions) or a single culture bottle containing the culture medium for the MTF Technique, I.E., lauryl tryptose broth (formulated as described in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition, Method 908A-pp. 872), as long as a 100 ml water sample is used in the analysis;

(e) A public water system shall conduct fecal coliform analysis in accordance with the following procedure: If the MTF Technique or Presence-Absence (P-A) Coliform Test is used to test for total coliforms, shake the lactose-positive presumptive tube or P-A bottle vigorously and transfer the growth with a sterile three (3) millimeter loop or sterile applicator stick into brilliant green lactose bile broth and EC medium to determine the presence of total and fecal coliforms, respectively. For EPA approved analytical methods which use a membrane filter, transfer the total coliform-positive culture by one (1) of the following methods: remove the membrane containing the total coliform colonies from the substrate with a sterile forceps and carefully curl and insert the membrane into a tube of EC medium (the laboratory may first remove a small portion of selected colonies for verification), swab the entire membrane filter surface with a sterile cotton swab and transfer the inoculum to EC medium (do not leave the cotton swab in the EC medium), or inoculate individual total coliform-positive colonies into EC medium. Gently shake the inoculated tubes of EC medium to insure adequate mixing and incubate in a waterbath at forty-four and five-tenths (44.5) plus or minus two-tenths (0.2) degrees Celsius for twenty-four (24) plus or minus two (2) hours. The production of gas in the inner fermentation tube of the EC medium indicates positive fecal coliform test. The preparation of EC medium is described in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association, 16th edition. Method 908C-p. 879, paragraph 1a. Public water systems shall determine the presence or absence of fecal coliforms; a determination of fecal coliform density is not required.

(f) A public water system shall conduct analysis of Escherichia coli in accordance with one (1) of the following analytical methods:

1. EC medium supplemented with fifty (50) micrograms/ml of 4-methylumbelliferyl-beta-D- glucuronide (MUG) final concentration). EC medium is described in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition, p. 879. MUG may be added to EC medium before autoclaving. EC medium supplemented with fifty (50) micrograms/ml of MUG is commercially available. At least ten (10) ml of EC medium supplemented with MUG shall be used. The inner inverted fermentation tube may be omitted. The procedure for transferring a total coliform- positive culture to EC medium supplemented with MUG shall be as specified in paragraph (e) of this subsection for transferring a total coliform-positive culture to EC medium. Observe fluorescence with an ultraviolet light (366nm) in the dark after incubating tube at forty-four and five-tenths (44.5) plus or minus two-tenths (0.2) degrees Celsius for twenty-four (24) plus or minus two (2) hours; or

2. Nutrient agar supplemented with 100 micrograms/ml 4-methyl-umbelliferyl-beta-D- glucuronide (MUG) (final concentration). Nutrient agar is described in Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association et al, 16th edition, p. 874. This test is used to determine if a total coliform-positive sample, as determined by the Membrane Filter Technique or any other method in which a membrane filter is used, contains E. coli. Transfer the membrane filter containing one (1) or more total coliform colonies to nutrient agar supplemented with 100 micrograms per milliliter (final concentration) of MUG. After incubating the agar plate at thirty-five (35) degrees Celsius for four (4) hours, observe the colonies under ultraviolet light (366 nm) in the dark for fluorescence. If fluorescence is visible, E. coli are present.

3. Minimal Medium ONPG-MUG (MMO-MUG) Test, as set forth in the article "National Field Evaluation of a Defined Substrate Method for the Simultaneous Detection of Total Coliforms and Escherichia coli from Drinking Water: Comparison with Presence-Absence Techniques" (Edberg et al.), Applied and Environmental Microbiology, Volume 55, pp. 1003-1008, April 1989. (The Autoanalysis Colilert System is an MMO-MUG test). If the MMO-MUG test is total coliform-positive after a twenty-four (24) hour incubation, test the medium for fluorescence with a 366-nm ultraviolet light (preferably with a six (6) watt lamp) in the dark. If fluorescence is observed, the sample is E. coli-positive. If fluorescence is questionable (cannot be definitively read) after twenty-four (24) hours incubation, incubate the culture for an additional four (4) hours (but not to exceed twenty-eight (28) hours total), and again test the medium for fluorescence. The MMO-MUG Test with hepes buffer in lieu of phosphate buffer is the only approved formulation for the detection of E. coli.

4. As an option to subparagraph 3 of this paragraph, a system with a total coliform-positive, MUG-negative, MMO-MUG test may further analyze the culture for the presence of E. coli by transferring a one-tenth (0.1) ml, twenty-eight (28) hour MMO-MUG culture to EC Medium + MUG with a pipet. The formulation and incubation conditions of EC Medium + MUG, and observation of the results are described in subparagraph 1 of this paragraph.

(17) Response to violation.

(a) If a public water system exceeds the MCL for total coliforms set forth in Section 2 of this administrative regulation, it shall report the violation to the cabinet no later than the end of the next business day after it learns of the violation, and notify the public in accordance with 401 KAR 8:070.

(b) If a public water system fails to comply with a coliform monitoring requirement, including the sanitary survey requirement, it shall report the monitoring violation to the cabinet within ten (10) days after the system discovers the violation, and notify the public in accordance with 401 KAR 8:070.

Section 2. Maximum Contaminant Levels (MCLs) for Microbiological Contaminants. (1) The MCL is based on the presence or absence of total coliforms in a sample.

(a) If a public water system collects at least forty (40) samples per month and no more than five and zero-tenths (5.0) percent of the samples collected during a month are total coliform-positive, the system is in compliance with the MCL for total coliforms.

(b) If a public water system collects fewer than forty (40) samples per month, and no more than one (1) sample collected during a month is total coliform-positive, the system is in compliance with the MCL for total coliforms.

(2) A fecal coliform-positive repeat sample or E. coli-positive repeat sample, or a total coliform-positive repeat sample following a fecal coliform-positive or E. coli-positive routine sample constitutes a violation of the MCL for total coliforms. For purposes of the public notification requirements in 401 KAR 8:070, this violation may pose an acute risk to health.

(3) A public water system shall determine compliance with the maximum contaminant level for total coliforms set forth in subsections (1) and (2) of this section for each month in which it is required to monitor for total coliforms.

(4) The following technologies are the best technology, treatment techniques, or other means available for achieving compliance with the maximum contaminant level for total coliforms set forth in subsections (1) and (2) of this section:

(a) Protection of wells from contamination by coliforms by appropriate placement and construction;

(b) Maintenance of a disinfectant residual throughout the distribution system;

(c) Proper maintenance of the distribution system including appropriate pipe replacement and repair procedures, main flushing programs, proper operation and maintenance of storage tanks and

reservoirs, and continual maintenance of positive water pressure in all parts of the distribution system;

(d) Filtration or disinfection of surface water, as described in 401 KAR 8:150, or disinfection of groundwater using strong oxidants such as chlorine, chlorine dioxide, or ozone; or

(e) The development and implementation of an EPA -approved State Wellhead Protection Program under 42 USCA 300h-7, state programs to establish wellhead protection areas.

Section 3. Variances and Exemptions. Variances or exemptions from the maximum contaminant level for total coliform set forth in Section 2 of this administrative regulation shall not be permitted unless the public water system demonstrates to the cabinet's satisfaction that the violation of the total coliform maximum contaminant level is due to a persistent growth of total coliforms in the distribution system rather than fecal or pathogenic contamination, a treatment lapse or deficiency, or a problem in the operation or maintenance of the distribution system. In making the demonstration, the public water system shall meet all the requirements of 401 KAR 8:060, including submission of a compliance schedule acceptable to the cabinet. In addition, the public water system shall demonstrate to the cabinet's satisfaction that the following criteria have been met before the cabinet may consider a variance:

(1) Over the past thirty (30) days, water entering the distribution system:

(a) Is free from fecal coliform or E. coli occurrence based on at least daily sampling;

(b) Contains less than one (1) total coliform per 100 milliliters of influent water in at least ninety-five (95) percent of all samples based on at least daily sampling;

(c) Complies with the total turbidity requirements of 401 KAR 8:150, Section 2; and

(d) Contains a continuous disinfection residual consistent with 401 KAR 8:150, Section 1;

(2) The public water system has had no waterborne disease outbreak while being operated in its present configuration;

(3) The public water system maintains biweekly contact with the cabinet and local health departments to assess illness possibly attributable to microbial occurrence in the public drinking water system;

(4) The public water system has evaluated, on a monthly basis, at least the number of samples specified in Section 1(2) of this administrative regulation and has not had an E. coli-positive compliance sample within the last six (6) months, unless the system demonstrates to the cabinet that the occurrence is not due to contamination entering the distribution system;

(5) The public water system has undergone a sanitary survey conducted by a party approved by the cabinet within the past twelve (12) months;

(6) The public water system has a cross connection control program acceptable to the cabinet and performs an audit of the effectiveness of the program;

(7) The public water system agrees to submit a biofilm control plan to the cabinet within twelve (12) months of the granting of the first request for a variance;

(8) The public water system monitors general distribution system bacterial quality by conducting heterotrophic bacteria plate counts on at least a weekly basis at a minimum of ten (10) percent of the number of total coliform sites specified for that system's size in Section 1(2) of this administrative regulation preferably using the R2A medium in Method 907A, 907B, or 907C, as set forth in the 16th edition of Standard Methods for the Examination of Water and Wastewater, 1985, American Public Health Association, et al; and

(9) The public water system conducts daily monitoring at distribution system sites approved by the cabinet and maintains a detectable disinfectant residual (measured as specified in 401 KAR 8:150, Section 3(1)(e)) at a minimum of ninety-five (95) percent of those points and a heterotrophic plate count of less than 500 colonies per ml (measured as specified in 401 KAR 8:150, Section 3(1)(c)) at sites without a disinfectant residual.

~~[Section 4. Turbidity Sampling, Analytical Techniques and Maximum Contaminant Levels. Beginning on July 1, 1992, public water systems shall monitor in accordance with 401 KAR 8:150, Section 3(2)(a), and report in accordance with 401 KAR 8:020, Section 2(7)(a)1, although maximum turbidity limits and measurement techniques contained in subsections (4) and (5) of this section shall remain in effect until June 29, 1993, when the requirements of 401 KAR 8:150, Sections 2 and 3 shall be met.~~

~~(1) Who shall sample. Producers of water for public water systems who use surface water sources, in whole or in part, and those groundwater sources which demonstrate a variable turbidity, shall comply with this section. Semipublic systems and systems that purchase water from other systems or obtain their water from turbidity free groundwater sources are not subject to this section.~~

~~(2) Sampling frequency. At least one (1) sample per day for the determination of turbidity shall be taken at the producing facility. Turbidity level determinations shall be made within one (1) hour after sample collection.~~

~~(3) Sampling point. Samples for the determination of turbidity shall be taken at a representative entry point to the distribution system. Where water is produced by more than one (1) treatment plant for a single system, each plant shall be considered a separate sampling point.~~

~~(4) Maximum turbidity limit. The maximum contaminant level for turbidity is one (1) turbidity unit (TU), as determined by a monthly average of daily samples, and no more than five (5) turbidity units, based on an average for two (2) consecutive days.~~

~~(5) Measurement technique. The measurement for turbidity shall be by the Nephelometric Method, as set forth in "Standard Methods," or by an alternate method approved in writing by the cabinet.~~

~~(6) Excessive turbidity. If the result of a turbidity analysis indicates that the maximum allowable limit has been exceeded, the sampling and measurement shall be confirmed by resampling as soon as practicable and no later than one (1) hour thereafter. If the repeat sample exceeds the maximum allowable limit, the supplier shall report the excess to the cabinet within twenty four (24) hours. The repeat sample shall be the sample used for the purpose of calculating the monthly average. If the monthly average of the daily samples exceeds the maximum allowable limit, or if the average of two (2) samples taken on consecutive days exceeds five (5) TU, the supplier of water shall report the excess to the cabinet within twenty four (24) hours and notify the public pursuant to 401 KAR 8:070.~~

~~(7) Exceptions. Up to five (5) turbidity units may be allowed, if the supplier of water demonstrates to the cabinet that the higher turbidity does not:~~

~~(a) Interfere with disinfection;~~

~~(b) Prevent the maintenance of an effective disinfectant agent throughout the distribution system; or~~

~~(c) Interfere with microbiological determinations.]~~

Section 4. ~~[5.]~~ Analysis for microbiological contamination and turbidity shall be in accordance with methods approved for drinking water by the U.S. Environmental Protection Agency or by the cabinet. The following documents are hereby incorporated by reference and are available for public inspection and copying subject to copyright laws, between 8 a.m. and 4:30 p.m., Monday through Friday, except state holidays, at the Division of Water, 14 ~~[18]~~ Reilly Road, Frankfort Office Park, Frankfort, Kentucky 40601:

(1) Standard Methods for the Examination of Water and Wastewater, 16th edition, 1985, prepared and jointly published by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation. This publication is printed, distributed and may be obtained by contacting

the Publication Office, American Public Health Association, 1015 15th Street NW, Washington, D.C. 20005.

(2) "Manual for the Certification of Laboratories Analyzing Drinking Water," EPA 814B-92-002, September 1992, [~~570/9-90/008, April 1990,~~] may be obtained by contacting U.S. EPA, Office of Drinking Water, Washington, D.C., 20460.

(3) Microbiological Methods for Monitoring the Environment, Water and Wastes may be obtained from ORD Publications, December 1978, U.S. EPA, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268.

(4) Copies of the MMO-MUG Test as set forth in the article "National Field Evaluation of a Defined Substrate Method for the Simultaneous Enumeration of Total Coliforms and Escherichia coli from Drinking Water: Comparison with the Standard Multiple-Tube Fermentation Method: (Edberg, et al), June 1988 may be obtained from the American Water Works Association Research Foundation, 6666 West Quincy Avenue, Denver, CO 80235.

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: April 14, 1994
FILED WITH LRC: April 15, 1994 at 11 a.m.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:250. Inorganic chemical sampling, analytical techniques and maximum contaminant levels.

RELATES TO: KRS Chapter 224, 40 CFR Part 141 (1993)

STATUTORY AUTHORITY: KRS 224.10-100, 224.10-110, [~~PL 93-523, The Safe Drinking Water Act, as amended in 1986, and by the Lead Contamination and Control Act of 1988,~~] 42 USCA f, 300g, 300j, 40 CFR 141.23[~~(f)~~], 141.41[~~(d)~~]

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce administrative [~~rules and~~] regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. The Safe Drinking Water Act, as amended by the Safe Drinking Water Act Amendments of 1986, provides for primary enforcement responsibility by states that have adopted regulations "no less stringent than the national primary drinking water regulations", as well as meeting other criteria stipulated by the Act. The Commonwealth of Kentucky has accepted and is currently exercising this [~~such~~] primary enforcement responsibility. This administrative regulation lists sampling and analytical requirements for certain inorganic chemicals and sets maximum contaminant levels for those chemicals which, if exceeded, could affect public health.

Section 1. Community water systems and nontransient, noncommunity water systems shall conduct monitoring to determine compliance with the maximum contaminant levels specified in Section 12 of this administrative regulation in accordance with this section. Transient, noncommunity water systems shall conduct monitoring to determine compliance with the nitrate and nitrite maximum contaminant levels in Section 12 of this administrative regulation. Monitoring shall be conducted as follows:

(1) Groundwater systems shall take a minimum of one (1) sample at every entry point to the distribution system which is representative of each well after treatment (hereafter called a sampling point) beginning in the compliance period starting January 1, 1993. The system shall take each sample at the same sampling point unless conditions make another sampling point more representative of each source or treatment plant.

(2) Surface water systems, including systems using a combination of surface and groundwater, shall take a minimum of one (1) sample at every entry point to the distribution system after any application of treatment or in the distribution system at a point which is representative of each source after treatment (hereafter called a sampling point) beginning in the compliance period beginning January 1, 1993. The system shall take each sample at the same sampling point unless conditions make another sampling point more representative of each source or treatment plant.

(3) If a system draws water from more than one (1) source and the sources are combined before distribution, the system may sample at an entry point to the distribution system during periods of normal operating conditions (i.e., when water is representative of all sources being used).

(4) The cabinet may reduce the total number of samples which must be analyzed by allowing the use of compositing. Composite samples from a maximum of five (5) sampling points are allowed, if the detection limit of the method used for analysis is less than one fifth (1/5) of the MCL. Compositing of samples shall be done in the laboratory.

(a) If the concentration in the composite sample is greater than or equal to one-fifth (1/5) of the MCL of any inorganic chemical, then a follow-up sample shall be taken within fourteen (14) days at each sampling point included in the composite. These samples shall be analyzed for the contaminants which exceeded one-fifth (1/5) of the MCL in the composite sample. Detection limits for each analytical method and MCLs for each inorganic contaminant are the following:

DETECTION LIMITS FOR INORGANIC CONTAMINANTS

Contaminant	MCL (mg/l)	Methodology	Detection Limit (mg/l)
Antimony	0.006	Atomic Absorption; Furnace	0.003
			0.0008[6]
		ICP-Mass Spectrometry	0.0004
		Hydride-Atomic Absorption	0.001
Asbestos	7 MFL[2]	Transmission Electron Microscopy	0.01 MFL
Barium	2	Atomic Absorption; furnace technique	0.002
		Atomic Absorption; direct aspiration	0.1
		Inductively Coupled Plasma	0.002(0.001)[1]
Beryllium	0.004	Atomic Absorption; Furnace	0.0002
			0.00002[6]
		Inductively Coupled Plasma[3]	0.0003
		ICP-Mass Spectrometry	0.0003
Cadmium	0.005	Atomic Absorption; furnace technique	0.0001

		Inductively Coupled Plasma	0.001[1]
Chromium	0.1	Atomic Absorption; furnace technique	0.001
		Inductively Coupled Plasma	0.007(0.001)[1]
Cyanide	0.2	Distillation, Spectrophotometric[4]	0.02
		Distillation, Automated, Spectrophotometric[4]	0.005
		Distillation, Selective Electrode[4]	0.05
		Distillation, Amenable, Spectrophotometric[5]	0.02
Mercury	0.002	Manual Cold Vapor Technique	0.0002
		Automated Cold Vapor Technique	0.0002
Nickel	0.1	Atomic Absorption; Furnace	0.001
			0.0006[6]
		Inductively Coupled Plasma[3]	0.005
		ICP-Mass Spectrometry	0.0005
Nitrate	10 (as N)	Manual Cadmium Reduction	0.01
		Automated Hydrazine Reduction	0.01
		Automated Cadmium Reduction	0.05
		Ion Selective Electrode	1
		Ion Chromatography	0.01
Nitrite	1 (as N)	Spectrophotometric	0.01
		Automated Cadmium Reduction	0.05
		Manual Cadmium Reduction	0.01
		Ion Chromatography	0.004
Selenium	0.05	Atomic Absorption; furnace	0.002
		Atomic Absorption; gaseous hydride	0.002
Thallium	0.002	Atomic Absorption; Furnace	0.001
			0.0007[6]
		ICP-Mass Spectrometry	0.0003

[1]Using concentration technique in Appendix A to EPA Method 200.7.
[2]MFL = million fibers per liter greater than ten (10) µm.
[3]Using a 2X preconcentration step as noted in Method 200.7. Lower MDLs may be achieved when using a 4X preconcentration.
[4]Screening method for total cyanides.
[5]Measures "free" cyanides.
[6]Lower MDLs are reported using stabilized temperature graphite furnace atomic absorption.

(b) If the population served by the system is greater than 3,300 persons, then compositing may only be permitted at sampling points within a single system. In systems serving less than 3,300 persons, the cabinet may permit compositing among different systems if the five (5) sample limit is maintained.

(c) If duplicates of the original sample taken from each sampling point used in the composite are available, the system may use these instead of resampling. The duplicates shall be analyzed by certified laboratories and the results reported to the cabinet within fourteen (14) days of collection.

(5) The frequency of monitoring for asbestos shall be in accordance with Section 2 of this administrative regulation; the frequency of monitoring for barium, cadmium, chromium, fluoride, mercury, and selenium shall be in accordance with Section 3 of this administrative regulation; the frequency of monitoring for nitrate shall be in accordance with Section 4 of this administrative regulation; and the frequency of monitoring for nitrite shall be in accordance with Section 5 of this administrative regulation.

Section 2. The frequency of monitoring to determine compliance with the maximum contaminant level for asbestos specified in Section 1 of this administrative regulation shall be as follows:

(1) Each community and nontransient, noncommunity water system is required to monitor for asbestos during the first three (3) year compliance period of each nine (9) year compliance cycle beginning in the compliance period starting January 1, 1993.

(2) If the system believes it is not vulnerable to either asbestos contamination in its source water or due to corrosion of asbestos-cement pipe, or both, it may apply to the cabinet for a waiver of the monitoring requirement in subsection (1) of this section. If the cabinet grants the waiver, the system is not required to monitor for asbestos pursuant to subsection (1) of this section.

(3) The cabinet may grant a waiver of the monitoring requirement in subsection (1) of this section based on a consideration of the following factors:

(a) Potential asbestos contamination of the water source; and

(b) The use of asbestos-cement pipe for finished water distribution and the corrosive nature of the water.

(4) A waiver remains in effect until the completion of the three (3) year compliance period. Systems not receiving a waiver shall monitor in accordance with the provisions of subsection (1) of this section.

(5) A system vulnerable to asbestos contamination due solely to corrosion of asbestos-cement pipe shall take one (1) sample at a tap served by asbestos-cement pipe and under conditions where asbestos contamination is most likely to occur.

(6) A system vulnerable to asbestos contamination due solely to source water shall monitor in accordance with the provision of Section 1 of this administrative regulation.

(7) A system vulnerable to asbestos contamination due both to its source water supply and corrosion of asbestos-cement pipe shall take one (1) sample at a tap served by asbestos-cement pipe and under conditions where asbestos contamination is most likely to occur.

(8) A system which exceeds the maximum contaminant levels as determined in Section 9 of this administrative regulation shall monitor quarterly beginning in the next quarter after the violation occurred.

(9) The cabinet may decrease the quarterly monitoring requirement to the frequency specified in subsection (1) of this section if the cabinet has determined that the system is reliably and consistently below the maximum contaminant level. This determination by the cabinet shall not be made unless a groundwater system takes a minimum of two (2) quarterly samples and a surface (or combined surface and ground) water system takes a minimum of four (4) quarterly samples.

(10) If monitoring data collected after January 1, 1990 are generally consistent with the requirements of this section, then the

cabinet may allow systems to use that data to satisfy the monitoring requirement for the initial compliance period beginning January 1, 1993.

Section 3. The frequency of monitoring conducted to determine compliance with the maximum contaminant levels in Section 1 of this administrative regulation for antimony, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, nickel, selenium, and thallium shall be as follows: Groundwater systems shall take one (1) sample at each sampling point once every three (3) years. Surface water systems (or combined surface and ground) shall take one (1) sample annually at each sampling point.

(1) Groundwater systems shall take one (1) sample at each sampling point during each compliance period beginning in the compliance period starting January 1, 1993. Surface water systems, or combined surface and groundwater systems, shall take one (1) sample annually at each sampling point beginning January 1, 1993.

(2) The system may apply to the cabinet for a waiver from the monitoring frequencies specified in subsection (1) of this section.

(3) Public water systems shall take a minimum of one (1) sample while a waiver is effective. A waiver shall not be effective for more than one (1) compliance cycle (i.e., nine (9) years).

(4) A waiver may be granted if surface water systems have monitored annually for at least three (3) years and groundwater systems have conducted a minimum of three (3) rounds of monitoring. At least one (1) sample shall have been taken since January 1, 1990. Both surface and groundwater systems shall demonstrate that all previous analytical results were less than the maximum contaminant level. Systems that use a new water source are not eligible for a waiver until three (3) rounds of monitoring from the new source have been completed.

(5) In determining the appropriate reduced monitoring frequency, the cabinet shall consider:

(a) Reported concentrations from all previous monitoring;

(b) The degree of variation in reported concentrations; and

(c) Other factors which may affect contaminant concentrations such as changes in groundwater pumping rates, changes in the system's configuration, changes in the system's operating procedures, or changes in stream flows or characteristics.

(6) A decision by the cabinet to grant a waiver shall be made in writing and shall set forth the basis for the determination. The determination may be initiated upon an application by the public water system. The public water system shall specify the basis for its request. The cabinet shall review and, where appropriate, revise its determination of the appropriate monitoring frequency when the system submits new monitoring data or when other data relevant to the system's appropriate monitoring frequency become available.

(7) Systems which exceed the maximum contaminant levels as calculated in Section 9 of this administrative regulation shall monitor quarterly beginning in the next quarter after the violation occurred.

(8) The cabinet may decrease the quarterly monitoring requirement to the frequencies specified in subsections (1) and (2) of this section if it has determined that the system is reliably and consistently below the maximum contaminant level. This determination may only be made when a groundwater system takes a minimum of two (2) quarterly samples and a surface water system takes a minimum of four (4) quarterly samples.

Section 4. All public water systems (community; nontransient, noncommunity; and transient, noncommunity systems) shall monitor to determine compliance with the maximum contaminant level for nitrate in Section 12 of this administrative regulation.

(1) Community and nontransient, noncommunity water systems served by groundwater systems shall monitor annually beginning January 1, 1993; systems served by surface water shall monitor quarterly beginning January 1, 1993.

(2) For community and nontransient, noncommunity water systems, the repeat monitoring frequency for groundwater systems shall be quarterly for at least one (1) year following any one (1) sample in which the concentration is greater than or equal to fifty (50) percent of the maximum contaminant level. The cabinet may allow a groundwater system to reduce the sampling frequency to annually after four (4) consecutive quarterly samples are reliably and consistently less than the maximum contaminant level.

(3) For community and nontransient, noncommunity water systems, the cabinet may allow a surface water system to reduce the sampling frequency to annually if all analytical results from four (4) consecutive quarters are less than fifty (50) percent of the maximum contaminant level. A surface water system shall return to quarterly monitoring if any one (1) sample is greater than or equal to fifty (50) percent of the maximum contaminant level (MCL).

(4) Each transient noncommunity water system shall monitor annually beginning January 1, 1993.

(5) After the initial round of quarterly sampling is completed, each community and nontransient, noncommunity system which is monitoring annually shall take subsequent samples during the quarters which previously resulted in the highest analytical result.

Section 5. All public water systems (community; nontransient, noncommunity; and transient, noncommunity systems) shall monitor to determine compliance with the maximum contaminant level for nitrite in Section 12 of this administrative regulation.

(1) All public water systems shall take one (1) sample at each sampling point in the compliance period beginning January 1, 1993 and ending December 31, 1995.

(2) After the initial sample, systems where an analytical result for nitrite is less than fifty (50) percent of the MCL shall monitor at the frequency specified by the cabinet.

(3) For community, nontransient, noncommunity, and transient noncommunity water systems, the repeat monitoring frequency for a water system shall be quarterly for at least one (1) year following any one (1) sample in which the concentration is greater than or equal to fifty (50) percent of the maximum contaminant level. The cabinet may allow a system to reduce the sampling frequency to annually after determining the system is reliably and consistently less than the maximum contaminant level.

(4) Systems which are monitoring annually shall take each subsequent sample during the quarters which previously resulted in the highest analytical result.

Section 6. Confirmation Sampling. (1) If the results of sampling for asbestos, barium, cadmium, chromium, fluoride, mercury, or selenium indicate an exceedance of the maximum contaminant level, the cabinet may require that one (1) additional sample be collected within two (2) weeks after the initial sample was taken at the same sampling point.

(2) If nitrate or nitrite sampling results indicate an exceedance of the maximum contaminant level, the system shall take a confirmation sample within twenty-four (24) hours of the system's receipt of notification of the analytical results of the first sample. Public water systems unable to comply with the twenty-four (24) hour sampling requirement shall immediately notify the consumers served by the area served by the public water system in accordance with 401 KAR 8:070. Systems exercising this option shall take and analyze a confirmation sample within two (2) weeks of notification of the analytical results of the first sample.

(3) If a confirmation sample is taken for any contaminant, then the results of the initial and confirmation sample shall be averaged. The resulting average shall be used to determine the system's compliance in accordance with Section 9 of this administrative regulation. The cabinet may delete results of obvious sampling errors.

Section 7. The cabinet may require more frequent monitoring than specified in Sections 2 to 5 of this administrative regulation or may

require confirmation samples for positive and negative results.

Section 8. Public water systems may apply to the cabinet to conduct more frequent monitoring than the minimum monitoring frequencies specified in this administrative regulation.

Section 9. Compliance with Section 1 of this administrative regulation shall be determined based on the analytical result obtained at each sampling point.

(1) For systems which are conducting monitoring at a frequency greater than annual, compliance with the maximum contaminant levels for antimony, asbestos, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, nickel, selenium and thallium shall be determined by a running annual average at any sampling point. If the average at any sampling point is greater than the maximum contaminant level, then the system shall be deemed to be out of compliance. If any one (1) sample would cause the annual average to be exceeded, then the system shall be deemed to be out of compliance immediately. Any sample below the method detection limit shall be calculated at zero for the purpose of determining the annual average.

(2) For systems which are monitoring annually, or less frequently, the system shall be deemed to be out of compliance with the maximum contaminant levels for asbestos, barium, cadmium, chromium, fluoride, mercury and selenium if the level of a contaminant at any sampling point is greater than the maximum contaminant level. If a confirmation sample is required by the cabinet, the determination of compliance will be based on the average of the two (2) samples.

(3) Compliance with the maximum contaminant levels for nitrate and nitrite is determined based on one (1) sample if the levels of these contaminants is below the maximum contaminant levels. If the levels of nitrate or nitrite exceed the maximum contaminant levels in the initial sample, a confirmation sample is required in accordance with Section 6(2) of this administrative regulation, and compliance shall be determined based on the average of the initial and confirmation samples.

(4) If a public water system has a distribution system separable from other parts of the distribution system with no inter- connections, the cabinet may allow the system to give public notice to only the area served by that portion of the system which is out of compliance.

Section 10. Each public water system shall monitor at the time designated by the cabinet during each compliance period, as specified in writing to the public water system.

Section 11. Inorganic Analysis. (1) Analytical methods for inorganic chemicals. Analyses for asbestos, barium, cadmium, chromium, mercury, nitrate, nitrite, and selenium shall be conducted in accordance with 40 CFR 141.23(k)(1) 1993, hereby adopted without change.

(2) Analytical methods for arsenic: Analyses for arsenic shall be conducted in accordance with 40 CFR 141.23(k)(2)1993, hereby adopted without change.

(3) Analytical methods for fluoride: Analyses for fluoride shall be conducted in accordance with 40 CFR 141.23(k)(3)1993, hereby adopted without change.

(4) Analysis and sample collection methods for the inorganic contaminants listed at 40 CFR 141.23(k)(4), and (5), 1993 shall be conducted in accordance with the methods described by those sections of federal regulation which are hereby adopted without change.

(5) Analysis under this administrative regulation shall only be conducted by laboratories that have been certified by EPA or the cabinet. Laboratories may conduct sample analysis under provisional certification until January 1, 1996. To receive certification to conduct analyses of antimony, asbestos, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, nickel, nitrate, nitrite, selenium, and thallium, the laboratory shall:

(a) Analyze Performance Evaluation samples which include those substances provided by the Environmental Protection Agency's Environmental Monitoring Systems Laboratory or equivalent samples provided by the cabinet.

(b) Achieve quantitative results on the analyses that are within the following acceptance limits:

Contaminant	Acceptance Limit
Antimony	plus or minus 30% at greater than or equal to 0.006 mg/l
Asbestos	2 standard deviations based on study statistics
Barium	plus or minus 15% at greater than or equal to 0.15 mg/l
Beryllium	plus or minus 15% at greater than or equal to 0.001 mg/l
Cadmium	plus or minus 20% at greater than or equal to 0.002 mg/l
Chromium	plus or minus 15% at greater than or equal to 0.01 mg/l
Cyanide	plus or minus 25% at greater than or equal to 0.1 mg/l
Fluoride	plus or minus 10% at greater than or equal to 1 to 10 mg/l
Mercury	plus or minus 30% at greater than or equal to 0.0005 mg/l
Nickel	plus or minus 15% at greater than or equal to 0.01 mg/l
Nitrate	plus or minus 10% at greater than or equal to 0.4 mg/l
Nitrite	plus or minus 15% at greater than or equal to 0.4 mg/l
Selenium	plus or minus 20% at greater than or equal to 0.01 mg/l
Thallium	plus or minus 30% at greater than 0.002 mg/l

Section 12. The maximum contaminant levels for inorganic contaminants specified in subsections (2) to (6), (10), and (11) to **(16)** ~~[(15)]~~ of this section shall apply to community water systems and nontransient, noncommunity water systems. The maximum contaminant level specified in subsection (1) of this section shall apply only to community water systems. The maximum contaminant levels specified in subsections (7), (8), and (9) of this section shall apply to community water systems; nontransient, noncommunity water systems; and transient noncommunity water systems.

CONTAMINANT	MAXIMUM CONTAMINANT LEVEL (mg/l)
(1) Fluoride	4.0
(2) Asbestos	7 Million Fibers/liter (longer than 10 micrometers)
(3) Barium	2
(4) Cadmium	0.005
(5) Chromium	0.1
(6) Mercury	0.002
(7) Nitrate	10 (as Nitrogen)
(8) Nitrite	1 (as Nitrogen)
(9) Total Nitrate and Nitrite	10 (as Nitrogen)
(10) Selenium	0.05
(11) Antimony	0.006
(12) Beryllium	0.004
(13) Cyanide (as free Cyanide)	0.2
(14) Nickel	0.1
(15) Thallium	0.002
(16) Arsenic	0.05

Section 13. The following are hereby identified as the best technology, treatment technique, or other means available for

achieving compliance with the maximum contaminant levels for inorganic contaminants identified in Section 12 of this administrative regulation, except fluoride:

BAT FOR INORGANIC COMPOUNDS

CHEMICAL NAME	BAT
Antimony	2,7
Asbestos	2,3,8
Barium	5,6,7,9
Beryllium	1,2,5,6,7
Cadmium	2,5,6,7
Chromium	2,5,6[2],7
Cyanide	5,7,10
Mercury	2[1],4,6[1],7[1]
Nickel	5,6,7
Nitrate	5,7,9
Selenium	1,2[3],6,7,9
Thallium	1,5

[1]BAT only if influent Hg concentrations are greater than or equal to 10 µg/l.
[2]BAT for Chromium III only.
[3]BAT for Selenium IV only.

KEY TO BATS IN TABLE

1 = Activated Alumina	6 = Lime Softening
2 = Coagulation and Filtration	7 = Reverse Osmosis
3 = Direct and Diatomite Filtration	8 = Corrosion Control
4 = Granular Activated Carbon	9 = Electrodialysis
5 = Ion Exchange	10 = Chlorine
	11 = Ultraviolet

~~[Section 1. All producers of water for public water systems shall sample for the presence of inorganic chemicals as listed in Section 4 of this regulation. Semipublic systems and systems that purchase all of their water from another public water system are not required to sample for inorganic chemicals.~~

~~Section 2. Sampling Frequency. (1) Community systems using surface water. All community water systems utilizing surface water sources shall sample for the presence of inorganic chemicals once per year.~~

~~(2) Community systems using groundwater. All community water systems utilizing groundwater sources shall sample for the presence of inorganic chemicals once every three (3) years.~~

~~(3) Noncommunity systems. All noncommunity water systems shall sample for the presence of nitrates once every three (3) years.~~

~~Section 3. Sampling Point. The sampling point for identifying the presence of inorganic chemicals shall be at any free flowing outlet of the distribution system.~~

~~Section 4. Maximum Inorganic Chemical Limits. (1) Maximum contaminant levels. The following are the maximum contaminant levels for inorganic chemicals:~~

~~Contaminant~~	~~Level, milligrams per liter~~
~~Arsenic~~	~~0.05~~
~~Barium~~	~~1.00~~
~~Cadmium~~	~~0.010~~
~~Chromium~~	~~0.05~~
~~Fluoride~~	~~4.00~~
~~Lead~~	~~0.05~~
~~Mercury~~	~~0.002~~
~~Nitrate (as N)~~	~~10.00~~
~~Selenium~~	~~0.01~~
~~Silver~~	~~0.05~~

~~(2) Nitrate. The maximum contaminant level for nitrate is applicable to all public water systems. The levels for the other inorganic chemicals apply only to community water systems.~~

~~(3) Fluoride. The maximum limit for fluoride is applicable to community water systems only. Supplemental fluoridation of public water supplies is covered by 401 KAR 8:650.~~

~~Section 5. Analytical Method. Analyses for inorganic chemicals shall be in accordance with methods approved for drinking water by the U.S. Environmental Protection Agency in accordance with 40 CFR 141.23(f).~~

~~Section 6. Inorganic Chemical Limit Exceeded (Except Nitrate). (1) Reporting. If the level of any contaminant listed in Section 4 (except nitrate) exceeds the maximum contaminant level, the supplier of water shall report to the cabinet within seven (7) days and initiate three (3) additional analyses at the same sampling point within one (1) month.~~

~~(2) Public notification required. When the average of the routine sample that exceeds the maximum limit together with the three (3) additional samples, as set forth above, rounded to the same number of significant figures as the maximum contaminant level for the substance in question, exceeds the maximum contaminant level, the supplier of water shall notify the cabinet and give notice to the public in accordance with 401 KAR 8:070. Monitoring by the supplier after public notification shall be at a frequency designated by the cabinet and shall continue until the maximum contaminant level has not been exceeded in two (2) successive samples or until a monitoring schedule, as a condition to a variance, exemption or enforcement action, becomes effective.~~

~~Section 7. Nitrate Limit Exceeded. The maximum contaminant level for nitrate shall be determined on the basis of the mean of two (2) analyses. When a level exceeding the maximum contaminant level for nitrate is found, a second analysis shall be initiated within twenty four (24) hours, and if the mean average of the two (2) analyses exceeds the maximum contaminant level, the supplier of water shall report this to the cabinet and shall notify the public in accordance with 401 KAR 8:070.~~

~~(1) When MCL for nitrate may be exceeded. Nitrate levels not exceeding twenty (20) mg/l may be allowed in a noncommunity water system if:~~

~~(a) No water from the system is or will be available to children under six (6) months of age; and~~

~~(b) There will be continuous posting of the fact that nitrate levels exceed ten (10) mg/l and the notice lists the potential health effects of exposure;~~

~~(c) Local and state public health authorities are notified annually of nitrate levels that exceed ten (10) mg/l; and~~

~~(d) No adverse health effects result.~~

~~(2) Public notification required. Where the cabinet allows levels of nitrate up to twenty (20) mg/l, public notification shall be required when the MCL exceeds twenty (20) mg/l.]~~

Section 14. [~~8.~~] Special Monitoring for Sodium. (1) Those required to sample. Suppliers of water for community public water systems shall collect and analyze one (1) sample per plant at the entry point of the distribution system for the determination of sodium concentration levels.

(2) Sampling frequency.

(a) Community water systems, surface source. Systems utilizing surface water sources in whole or in part shall collect and analyze

samples semiannually. Samples shall be collected one (1) time during the wet season and one (1) time during the dry season per calendar year.

(b) Community water systems, groundwater sources. Systems utilizing only groundwater sources shall collect and analyze samples annually.

(c) Samples required. The minimum number of samples required to be taken by the system shall be based upon the number of treatment plants used by the system, except the cabinet may consider multiple wells drawing raw water from a single aquifer to be one (1) treatment plant for the purpose of determining the minimum number of samples. The supplier of water may be required to collect and analyze water samples for sodium more frequently in locations where the sodium content is variable.

(d) Analyses for sodium shall be in accordance with methods approved for drinking water by the U.S. Environmental Protection Agency in 40 CFR 141.41(d) (1993), hereby adopted without change. [or by the cabinet.]

(3) Reporting. The supplier of water shall report to the cabinet the results of the analyses for sodium within ten (10) days of the end of the month in which the sample results were received or within ten (10) days following the end of the required monitoring period, as determined by the cabinet, whichever of these is first. If more than annual sampling is required the supplier shall report the average sodium concentration within ten (10) days of the end of the month in which the analytical results of the last sample used for the annual average was received.

(4) Acceptable sodium limits. A level of twenty (20) mg/l of sodium shall be considered an optimum concentration for drinking water. The supplier of water shall notify appropriate local and state public health officials of the sodium levels, by written notice by direct mail, within three (3) months of testing. A copy of each notice required to be provided by this subsection [paragraph] shall be sent to EPA and the cabinet within ten (10) days of its issuance. The supplier of water shall not be required to notify appropriate local and state public health officials of the sodium levels where the state provides such notices in lieu of the supplier.

(5) Public notification. The provisions of 401 KAR 8:070 do not apply to sodium levels unless the water supplier opts to notify the public.

Section 15. [9.] Variance and Exemptions for Fluoride. In addition to the requirements for requesting a variance or exemption provided in 401 KAR 8:060, the following provisions are applicable when a variance or exemption from the maximum contaminant level for fluoride is requested:

(1) Best available technology. The following are the best available technology, treatment techniques or other means generally available for achieving compliance with the maximum contaminant level for fluoride:

(a) Activated alumina absorption, centrally applied; and

(b) Reverse osmosis, centrally applied.

(2) Public water systems shall apply the best available technology, treatment techniques, or other means generally available to the water system and specified in subsection (1)(a) or (b) of this section, prior to the cabinet's consideration of a variance request for fluoride, unless:

(a) Pursuant to 401 KAR 8:060, the public water system submits to the cabinet information, based upon studies of the public water system and other relevant information, that demonstrates that the technology, treatment technique or other available means [method] identified in subsection (1) of this section is not available and effective for the public water system; and

(b) The cabinet determines, based upon the information submitted that the best available technology, treatment technique or other means [method] generally available is not available and effective for the system.

(3) [; (c)] Prior to granting a variance, the cabinet shall issue a compliance schedule which requires the public water system to examine the following treatment techniques to determine the probability that any of these methods will significantly reduce the level of fluoride for that system, and, if so, to determine if those methods are technically feasible and economically reasonable; and to determine if the fluoride reductions obtained are commensurate with the costs incurred with the installation and use of such treatment methods for that system:

(a) [1.] Modification of lime softening;

(b) [2.] Alum coagulation;

(c) [3.] Electrodialysis;

(d) [4.] Anion exchange resins;

(e) [5.] Well field management;

(f) [6.] Alternate source; and

(g) [7.] Regionalization.

(4) [(d)] If the cabinet determines that a treatment technique identified in subsection (3) of this section [paragraph (c) of this subsection] is technically feasible, economically reasonable and will achieve fluoride reductions commensurate with costs incurred with the installation and use of the [such] treatment technique for the public water system, the cabinet shall require the system to install and use that treatment method in connection with a compliance schedule issued pursuant to 401 KAR 8:060.

[Section 10. Severability. If any provision of this regulation is set aside by a court of competent jurisdiction, the remainder of this regulation remains in effect.]

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: April 14, 1994
FILED WITH LRC: April 15, 1994 at 11 a.m.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(As Amended)

401 KAR 8:500. Disinfection by-products.

RELATES TO: KRS Chapter 224, 40 CFR Part 141, 40 CFR 142.60

STATUTORY AUTHORITY: KRS 224.10-10, 224.10-110, [PL 93-523, The Safe Drinking Water Act, as amended in 1986, and by the Lead Contamination and Control Act of 1988,] 42 USCA 300f, 300g, 300j, 40 CFR 141.29, [Section] 141.30[(c)]

NECESSITY AND FUNCTION: KRS 224.10-110 directs the cabinet to enforce administrative [rules and] regulations adopted by the secretary for the regulation and control of the purification of water for public and semipublic use. The Safe Drinking Water Act, as amended by the Safe Drinking Water Act Amendments of 1986, provides for primary enforcement responsibility by states that have adopted regulations "no less stringent than the national primary drinking water regulations", as well as meeting other criteria stipulated by the Act. The Commonwealth of Kentucky has accepted and is currently exercising [such] primary enforcement responsibility. This administrative regulation sets forth the requirements for by-products of disinfectants used to purify drinking water. Such by-products may, when consumed over a long period of time, cause adverse health affects. This administrative regulation stipulates who shall [must] test for the [such] by-products and what actions are to be taken when they are found.

Section 1. Applicability. Each community public water system

serving 10,000 or more persons that adds a disinfectant as part of its treatment process shall monitor for trihalomethanes. The cabinet may provide technical assistance in sampling and sample analysis for trihalomethanes. Consecutive community water systems, where there is a seller and one (1) or more purchasers of water and the combined population of the systems involved exceeds 10,000 or more persons, shall be required to sample for trihalomethanes, pursuant to this administratie regulation, as follows:

(1) Seller responsible. If [~~When~~] a buyer does not practice booster disinfection or alter the water [~~in any way~~], the seller shall be responsible for monitoring. Sampling shall be performed pursuant to this administrative regulation at a point in the buyer's distribution system which reflects the longest period of retention.

(2) Buyer responsible. If a buyer practices booster disinfection or alters the water [~~in any way~~], monitoring shall be the responsibility of the buyer and sampling shall be performed pursuant to this administrative regulation. The raw water sample shall be taken at the point of entry into the system of the buyer and ahead of the booster chlorination point.

(3) Public notification. A public water [~~Any~~] system determined by the cabinet to be the major contributor to violations of maximum contaminant levels for total trihalomethanes shall notify the public in accordance with 401 KAR 8:070.

~~[(4) If the maximum contaminant level for total trihalomethanes, as set forth in Section 4 of this administrative regulation, is exceeded by any system in consecutive public water systems, each public water system contributing to the total trihalomethanes shall be deemed to be in violation of Section 4 of this administrative regulation and shall be responsible for costs of bringing the total trihalomethanes to within regulatory requirements throughout the consecutive public water systems. Each public water system may propose to the cabinet separately or jointly with other consecutive public water systems, how best to apply best available technology to comply with this administrative regulation. The cabinet shall negotiate with each affected public water system to establish a time frame for compliance with this subsection.]~~

Section 2. Sampling Frequency. Public water systems serving more than 10,000 persons shall monitor quarterly for trihalomethanes.

Section 3. Sampling Locations. Samples shall be taken on the following basis:

(1) Raw water. One (1) untreated or raw water sample to determine interference factors.

(2) Normal usage points. Three (3) samples shall be taken from a free-flowing tap at points in the distribution system which reflect normal average daily usage or turnover.

(3) Maximum residence point. One (1) sample shall be taken from a free-flowing tap in the system which reflects the longest time period of retention within the distribution system, but shall not be taken on a dead-end.

(4) Time frame. Each [~~All~~] quarterly sample[s] shall be taken in the same week and at the same designated sample points during each quarter.

(5) Total samples. The minimum number of samples required for each system shall depend upon the number of treatment plants in the system. Each system shall collect four (4) samples from the distribution system per quarter for each treatment plant. One (1) raw water control sample shall be taken from each plant intake per quarter.

(6) Multiple plant operations. In multiple plant operations, sampling shall reflect the distribution from each plant.

Section 4. Maximum Trihalomethane Limits. The maximum contaminant level for total trihalomethanes (TTHMs) is [~~one tenth~~ {]0.10[}] milligrams per liter (mg/l).

(1) How computed. The results of all analyses performed each quarter shall be averaged and reported in a format supplied or approved by the cabinet. All samples collected shall be used in computing the average, unless the analytical results are invalidated by the cabinet.

(2) Running average. Compliance shall [~~will~~] be determined by [~~on~~] a running annual average of the four (4) most recent quarterly samples.

Section 5. Reduction in Sampling Frequency. Upon receipt of a written request[~~, and at the discretion of the cabinet,~~] the requirement of a sampling frequency of four (4) samples-per -quarter per year for each treatment plant used by the system may be reduced by the cabinet to a minimum of one (1) sample for TTHMs per quarter. A [~~Such~~] reduction in frequency shall only be considered if, after one (1) full year of monitoring in accordance with the original schedule, it has been demonstrated that the water delivered to consumers is below the TTHM MCL of [~~one tenth~~ {]0.10[}] mg/l. The minimum single sample for TTHM shall then be taken at a point in the distribution system that reflects maximum residence time. If a minimum single sample per quarter exceeds the MCL for TTHM, and is confirmed by at least one (1) check sample, the system shall comply with the four (4) samples-per-quarter sampling frequency for one (1) year before reduced frequency may again be requested. Significant changes in the water source or treatment program may be grounds for requiring four (4) samples per quarter.

Section 6. Increase in Sampling Frequency. If analytical results from quarterly sampling show a TTHM arithmetic sum above acceptable limits, the cabinet may place the system on a monthly monitoring schedule until acceptable levels are achieved for three (3) consecutive months.

Section 7. Sampling and Analytical Methods. (1) Approved methods. Sampling and analyses conducted pursuant to this administrative regulation [~~section~~] shall be conducted in accordance with 40 CFR 141.30(e) (1993) hereby adopted without change.

(2) Certified laboratories. The cabinet will only accept analytical data from laboratories which have participated in the U.S. Environmental Protection Agency performance evaluation program and which have been certified by the cabinet or the Environmental Protection Agency.

Section 8. Total Trihalomethane Levels Exceeded. If the average annual TTHM level is exceeded, the community water system shall notify the public pursuant to 401 KAR 8:070.

Section 9. Requirements for Making Significant Treatment Modifications. Before a system makes any significant modification in its existing treatment process in order to achieve compliance with this administrative regulation, the system shall obtain written cabinet approval of a detailed plan for the [~~such~~] modification. A [~~Any~~] plan to modify a disinfection practice shall require the system, at a minimum, to:

(1) Evaluate the water system for sanitary defects and evaluate the source water for bacteriological quality;

(2) Evaluate its existing treatment practices, consider improvements that minimize disinfectant demand and optimize finished water quality throughout the distribution system;

(3) Provide baseline data from water quality surveys of the distribution system. The [~~Such~~] data shall include the monitoring results for:

(a) Total coliform and fecal coliform bacteria;

(b) Fecal streptococci;

(c) Standard plate counts at thirty-five (35) degrees Celsius [~~centigrade~~] and twenty (20) degrees Celsius [~~centigrade~~];

(d) Phosphate;

(e) Ammonia nitrogen; and

(f) Total organic carbon;

(4) Provide additional similar monitoring to assure continued maintenance of optimal bacteriological quality in finished water after unit treatment or disinfection modifications;

(5) Demonstrate an active disinfectant residual throughout the distribution system [~~at all times~~] during and after the modification; and

(6) Provide additional monitoring for chlorate, chlorite, and chlorine dioxide, if [~~when~~] chlorine dioxide is used as a disinfectant.

Section 10. Self-monitoring Reporting Requirements. Each laboratory [~~All laboratories~~] performing monitoring and TTHM analyses for drinking water systems shall hold a valid certification pursuant to 401 KAR 8:040. Public water systems shall submit results to the cabinet, [~~on a form provided by the cabinet,~~] within ten (10) days following the end of the compliance period for which the analysis was completed.

Section 11. Variance Procedures for Total Trihalomethanes. (1) When considered. Applications for a variance from the maximum acceptable contaminant level (MCL) of [~~one tenth (~~]0.10[~~)~~] mg/l will be considered by the cabinet if [~~when~~] the public water system making application presents evidence that:

(a) The best treatment technology, treatment techniques or other means generally available for achieving compliance with the MCL are not available;

(b) The best treatment method is not technically appropriate or technically feasible for that system; and

(c) Only marginal reduction in TTHM levels would be realized if the treatment methods specified in subsection (2) of this section were utilized.

(2) Best technology. The following technology, treatment techniques or other generally available means for achieving compliance with the MCL for total trihalomethanes are considered the best available:

(a) The use of chloramines as an alternate or supplemental disinfectant or oxidant;

(b) The use of chlorine dioxide as an alternate or supplemental disinfectant or oxidant;

(c) Improved clarification for THM precursor reduction;

(d) Moving the point of chlorination to reduce TTHM formation and, if [~~where~~] necessary, substituting chloramines, chlorine dioxide or potassium permanganate for the use of chlorine as a preoxidant; and

(e) The use of powdered activated carbon for THM precursor or TTHM reduction seasonally or intermittently, at dosages not to exceed ten (10) mg/l on an annual average basis.

(3) When cabinet will grant variance. The cabinet, upon making a finding that information submitted by the applicant system supports a decision that best treatment technology or techniques are not available and effective, will consider a variance under the following conditions:

(a) Granting the variance will not result in an unreasonable risk to health; and

(b) The public water system proposes a compliance schedule, within one (1) year of the date the variance is granted, which examines the technological, economic and reduction feasibility of one (1) or more of the following treatment methods:

1. Introduction of off-line water storage for THM precursor reduction;

2. Aeration for TTHM reduction, where geographically and environmentally appropriate;

3. Introduction of clarification where not currently practiced;

4. Consideration of alternate sources of raw water; and

5. Use of ozone as an alternate or supplemental disinfectant or oxidant.

(c) The public water system implements [~~such~~] quality control measures [~~as~~] the cabinet may require during the period ending on the date it complies with this administrative regulation.

(d) If the cabinet determines that a treatment method identified in 401 KAR 8:500, Section 11(3)(b) is technically feasible, economically reasonable, and will achieve TTHM reductions commensurate with the costs incurred with the installation and use of the [~~such~~] treatment method, the cabinet shall require the system to install and use that treatment method in connection with a compliance schedule. The cabinet's decision shall be based upon studies performed by the system and other information submitted to the cabinet by the system in accordance with 401 KAR 8:060.

(4) [~~In no event shall~~] The cabinet shall not require a system to install or use a treatment method not described in this section to obtain or maintain a variance from the TTHM regulation or in connection with any variance compliance schedule.

[~~Section 12. Severability. If any provision of this regulation is set aside by a court of competent jurisdiction, the remainder of this regulation remains in effect.~~]

E. DOUGLAS STEPHAN, Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: April 14, 1994
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TRANSPORTATION CABINET
(As Amended)

600 KAR 1:101. Procurement of professional engineering and related services.

RELATES TO: KRS 45A.800 through 45A.835, 23 USC, 23 CFR 172, 48 CFR 1, 49 CFR 18

STATUTORY AUTHORITY: KRS 13A.100(1), 45A.800 through 45A.835, 23 USC, 23 CFR 172, 48 CFR 1, 49 CFR 18

NECESSITY AND FUNCTION: This administrative regulation adopts the procedures to be followed by the Transportation Cabinet when contracting for professional engineering or related services. It implements the provisions of KRS 45A.800 to 45A.835. [~~It has a special emphasis on the procurement of engineering services since KRS Chapter 45A requires the Transportation Cabinet to follow a specific procurement procedure when securing engineering services. For consistency the Transportation Cabinet is also applying these procedures to the procurement of engineering related services.~~]

Section 1. Definitions. (1) "Award" means the presentation of an agreement or contract to a professional.

(2) "Cabinet" means the Kentucky Transportation Cabinet.

(3) "Change order" means as defined in KRS 45A.030(2).

(4) "Competitive negotiation" means as described in KRS 45A.085.

(5) "Contract" means as defined in KRS 45A.030(5).

(6) "Contract modification" means as defined in KRS 45A.030(6).

(7) "Cost per unit of work" means a price based on units when the extent of work cannot be defined but a cost of the work per unit can be determined in advance with reasonable accuracy.

(8) "Cost plus a fixed fee" means a price based on the actual allowable cost of the work plus any preestablished fixed amount for operating margin.

(9) "Direct salary" means the salary of persons directly involved with and chargeable to a specific project, e.g., engineering or draftsman time spent on a project.

(10) "Firm" means a company or individual providing professional engineering or related services under contract to the cabinet as the prime firm in accordance with KRS Chapter 45A.

(11) "Lump sum" means a fixed price, including cost and operating margin, agreed upon between a firm and cabinet for a group of tasks without breakdown of individual values, i.e., a lot price.

(12) "Modification" means a formal revision to the terms of a contract.

(13) "Noncompetitive negotiation" means as described in KRS 45A.095.

(14) "Overhead costs" means the indirect costs, including salaries and other costs, not chargeable to any specific project. These costs normally support the different projects in which a firm is involved, e.g., accounting, general maintenance and repair, building rent, utilities, furniture, etc.

(15) "Proof of necessity" means the justification to employ consulting engineers, architects, appraisers, attorneys, consultants and others.

(16) "Prequalification" means the evaluation of professionals in which the cabinet considers such factors as financial capability, reputation, and management, in order to develop a list of professionals qualified to contract with the cabinet for professional engineering or related services.

(17) "Prequalification category" means a type of project for which professional engineering or related services are contracted.

(18) "Professional engineer" means an individual or firm licensed to practice engineering in the Commonwealth of Kentucky under KRS Chapter 322.

(19) "Professional engineering or related services" means specialized engineering or related professional services performed by individuals or firms of recognized technical competence, education or experience that are involved in the planning, design, construction, maintenance or operation of Kentucky's transportation systems.

(20) "Professional services" means specialized services performed by individuals or firms of recognized technical competence.

(21) "Project" means an undertaking by the Transportation Cabinet as defined in KRS 45A.800(4).

(22) "Project supervisor" means the director of the user division or person designated by the user division director to oversee the performance of a firm to perform contracted services on a project.

(23) "Proposal" means an offer made by a firm to the cabinet as a basis for negotiations for entering into a contract.

(24) "Salary additives" means employer paid fringe benefits including employer portion of FICA, hospitalization, group life insurance, unemployment contributions to the state and other similar benefits.

(25) "Scope of work" means all services and actions required of the firm by the contract.

(26) "Services" means as defined in KRS 45A.030(19).

(27) "Subcontractor" means a second firm contracted to a prime firm for the performance of work contracted by the cabinet to the prime firm.

(28) "Termination clause" means a contract clause which allows the cabinet to terminate, at its own discretion, the performance of work and to make settlement of the firm's claims.

(29) "User division" means as defined in KRS 45A.800(6).

(30) "Work unit" means an item on a list of tasks which are required to be accomplished by the firm in order to satisfactorily complete the scope of work.

Section 2. Transportation Cabinet Employee Ethics and Responsibilities. All cabinet personnel engaged in the procurement of engineering or related services shall comply with the following:

(1) Consider the interests of the Commonwealth of Kentucky and the cabinet first when contracting for professional services;

(2) Request and accept assistance from other cabinet and state personnel as required without allowing it to impair the dignity and responsibility of the employee's position;

(3) Seek to obtain the maximum value for each dollar spent for professional services;

(4) Strive for honesty and truth in contracting;

(5) Denounce all forms of bribery or favors;

(6) Invite all firms to submit their qualifications for consideration by the cabinet;

(7) Assist other cabinet personnel in the contracting for professional services as necessary; and

(8) Comply with both the letter and the spirit of KRS Chapter 11A, KRS 45A.340, and to the cabinet's Official Order Number 94057 regarding Conflict of Interest.

Section 3. Federal Regulatory Requirements. (1) If a highway project is funded in part by federal-aid funds, the cabinet shall be regulated by Title 23 of the United States Code and by the Code of Federal Regulations 23 CFR 172 and 49 CFR 18.

(2) The cabinet shall submit justification and receive approval from the FHWA before using the noncompetitive negotiated method of contracting when federal-aid highway funds are used in the contract. A contract in which federal-aid highway funds may be awarded by noncompetitive negotiation shall be limited to the following:

(a) The service is available only from a single source;

(b) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or

(c) After solicitation of a number of sources, competition is determined to be inadequate.

Section 4. Prequalification for Professional Engineering or Related Services. (1) [~~To be considered for a contract to provide engineering related services with the cabinet, a firm shall meet the cabinet's prequalification requirements in the same manner as a firm providing engineering services pursuant to KRS 45A.825.~~

~~(2)~~] A firm desiring consideration for prequalification shall complete each qualification questionnaire pertaining to the categories for which prequalification is desired. These forms include the following which are incorporated by reference as a part of this administrative regulation:

(a) Consulting Engineer and Related Services Prequalification Application, TC 40-1, effective July, 1994 [~~May, 1992~~];

(b) Prequalification Requirements for Geotechnical Drilling Services, TC 64-540, effective May, 1992;

(c) Prequalification Requirements for Geotechnical Engineering Services, TC 64-541, effective May, 1992; and

(d) Prequalification Requirements for Geotechnical Laboratory Services, TC 64-542, effective May, 1992.

(2) [~~(3)~~] The completed prequalification form shall be submitted to the Division of Specialized Programs, 7th Floor, State Office Building, 501 High Street, Frankfort, KY 40622.

(3) [~~(4)~~] Each firm's qualifications for a requested prequalification category shall be reviewed by the offices or divisions within the cabinet with expertise in that requested prequalification category.

(4) [~~(5)~~] The criteria for prequalification to be used by the user divisions and offices are listed in the appendix to the Consulting Engineer and Related Services Prequalification Application as adopted July, 1994 [~~August 11, 1993~~] which is incorporated by reference as a part of this administrative regulation.

(5) [~~(6)~~] The head of the user division or office shall notify the Division of Specialized Programs of its evaluation results.

(6) [~~(7)~~](a) The Division of Specialized Programs shall notify each firm of all evaluation results involving that firm.

(b) If a firm is disapproved for any requested prequalification category or service, the firm shall also be notified of the appeals procedure set forth in Section 5 of this administrative regulation.

(7) [~~(8)~~](a) A prequalified firm shall annually submit qualification and performance data on or prior to its anniversary dates of prequalification.

(b) The annual application shall include eleven (11) completed sets of the appropriate qualification forms and eleven (11) copies of the firm's current marketing brochure unless different instructions are communicated to the firm either verbally or in writing.

(c) Failure to submit the completed forms in a timely manner shall

cause the removal of the firm's prequalification status.

(8) [(9)] A prequalified firm shall notify the Division of Specialized Programs of any major changes either increasing or decreasing the firm's professional or financial qualifications, capabilities, personnel, address, firm name change, or other of the major qualification criteria.

(9) [(10)] The user division or office shall review the updated information received from the firm and shall reclassify the firm as appropriate with respect to types of work and capacity of the firm.

(10) [(11)](a) If a prequalified firm fails to notify the Division of Specialized Programs of a change of address, it may [shall] be removed from the list of prequalified firms until it notifies the division of its new address.

(b) If the change of address notification is submitted to the Division of Specialized Programs during what would have been the firm's prequalification year and no other changes have occurred in the firm, the firm shall be restored to the list of prequalified firms.

(c) Removal from the list of prequalified firms pursuant to this subsection, shall not be a basis for appeal under the provisions of Section 6 [5] of this administrative regulation.

Section 5. Removal from List of Prequalified Firms. (1) A firm may be removed from the list of prequalified firms by the prequalification committee for any of the following reasons:

(a) Failure to submit an annual application on the firm's anniversary date;

(b) Falsification of the firm's prequalification application as to its qualifications;

(c) Falsification of the firm's response to announcement of any project;

(d) Violation of the Executive Branch Ethics Law contained in KRS Chapter 11A;

(e) Falsification of the information provided to the Transportation Cabinet for audit purposes;

(f) Failure to have a current firm license from the Kentucky Professional Board of Registration;

(g) Failure to notify the Transportation Cabinet of the loss of personnel which has an impact on the firm's prequalification or project management within thirty (30) days; or

(h) Violation of the firm's certification that the firm's owner, principals or partners, or any family member having an interest of ten (10) percent or more in any business entity involved in the performance of the contract have not contributed more than the amount specified in KRS 121.056(2) to the gubernatorial campaign of the current governor.

(2) The chairman of the prequalification committee shall notify the firm in writing of its proposed removal from the list of prequalified firms and the reason for the proposed removal.

Section 6. Appeal Procedure for Firms Not Qualified or Removed from Prequalified List. (1) A firm may appeal any disapproval relating to its request for approval of a prequalification category pursuant to Section 4 of this administrative regulation.

(2) A firm may appeal its removal from the list of prequalified firms pursuant to Section 5 of this administrative regulation.

(3) The cabinet shall establish a consultant prequalification committee to evaluate the statements of qualifications of firms which appeal a disapproval rating or removal from the list of prequalified firms.

(4) [(3)] The members of the consultant prequalification committee shall be the following:

(a) Director, Division of Specialized Programs, chairperson;
(b) Executive Director, Office of Aeronautics;
(c) Director, Division of Traffic;
(d) Director, Division of Design;
(e) Director, Division of Bridges;
(f) Director, Division of Materials;
(g) Director, Division of Planning;
(h) Director, Division of Environmental Analysis;
(i) Director, Division of Maintenance;
(j) Director, Division of Construction; and
(k) Director, Division of Mass Transportation.

(5) [(4)] An appeal pursuant to Section 4 of this administrative regulation shall be made in writing to the chairman of the consultant prequalification committee within thirty (30) days of notification of the action of the committee.

(6) [(5)] The basis of the appeal and the relief sought shall be stated in the written communication to the chairman.

(7) [(6)](a) Within sixty (60) days from receipt of an appeal, the committee members or their designees shall review the appeal and shall make a decision regarding the appeal.

(b) If the firm agrees, the committee may delay its decision for an additional sixty (60) days while the committee meets with the firm to discuss the appeal.

(8) [(7)] The committee shall notify the State Highway Engineer and the firm of its decision.

(9) [(8)] If the firm's appeal is denied by the committee, the firm may appeal the decision within thirty (30) days of written notice:

(a) Relating to nonqualification to the State Highway Engineer; or

(b) Relating to removal from the list of prequalified firms to the Secretary of the Transportation Cabinet. [within thirty (30) days of written notice of denial.]

(10) [(9)] The State Highway Engineer or Transportation Cabinet Secretary, as appropriate, shall notify the firm of his decision within thirty (30) days. The decision of the State Highway Engineer or Transportation Cabinet Secretary shall be final.

Section 7. [6.] Conditional Prequalification. (1) The user division or office or consultant prequalification committee may grant conditional prequalification to a firm if the firm:

(a) Has no direct highway or transportation experience but has identified personnel which have technical training or education and other types of experience which may allow the firm to perform the required services; or

(b) Performed poorly on past projects for the cabinet or has been removed from the list of prequalified firms for performance-related reasons and has restructured itself to address the problems.

(2) After the firm has performed services for the cabinet in the category of work for which it was conditionally prequalified, it may request a prequalification determination from the committee in accordance with Section 4 of this administrative regulation.

(3) Denial of conditional prequalification of a firm to perform services for the cabinet shall not be appealed.

Section 8. [7.] Procurement Bulletin and Advertisement for Selection of Professional Firms for Engineering of Related Services. (1)(a) The user division or office shall recommend the evaluation factors and relative weightings to the Transportation Cabinet Secretary. Unless unique or particularly complex circumstances exist, the evaluation factors shall be selected from the list set forth below. The Transportation Cabinet Secretary shall approve the evaluation factors and relative weighting placed on each of the factors that appear in a procurement bulletin for selection of professional firms for engineering or related services.

1. Relative experience of professional personnel assigned to project team:

a. With highway projects or projects on another mode of transportation or intermodal transportation projects for the Kentucky Transportation Cabinet; and [or]

b. With highway projects or projects on another mode of transportation or intermodal transportation projects for federal, local or other state governmental agencies;

2. Capacity to comply with project schedule;

3. Past record of performance on project of similar type and complexity;

4. Project approach and proposed procedures to accomplish the services for the project;

5. Location where the work will be performed;

6. Special or unique expertise;

7. Special or unique equipment; and

8. Familiarity with geographic areas and resources.

(b) The weighting of each factor shall be published in the announcement for the specific project.

(2)(a) A procurement bulletin prepared by the cabinet shall include the following:

1. A request for proposal for each project anticipated to be contracted during a specified period of time which includes the following:

a. The general scope of the project as provided by the user division;

b. A discussion of procedures to follow for submission of a proposal on the project [~~A request for expression of general interest~~];

c. An anticipated project schedule as provided by the user division; [~~A request for a statement of technical qualification; and~~]

d. Any requirements for Disadvantaged Business Enterprise (DBE) utilization;

e. Deadline for filing responses;

f. The evaluation factors and their relative weights on which the responses will be evaluated by the selection committee;

g. A timetable for the selection committee's meetings for the project;

h. A list of firms prequalified in each applicable category as of the date of the bulletin; [~~and~~]

i. In certain circumstances deemed appropriate by the state highway engineer, the maximum **budget** [~~fee~~] for consultant services for the project; **and**

j. The items required by KRS 45A.825(2)(b).

2. A list of the firms prequalified in each category as of the date of the bulletin;

3. A list of the firms prequalified in each category and certified as a disadvantaged business enterprise in accordance with 600 KAR 4:010 as of the date of the bulletin.

(b) A copy of the procurement bulletin shall be mailed to each firm prequalified in any category to perform engineering or related services for the cabinet.

(c) If deemed appropriate by the State Highway Engineer, the procurement bulletin may [~~indicate the maximum fee for a particular proposed project or~~] require the initial solicitation of a complete work price and qualification proposal **except for engineering services**.

(d) A procurement bulletin for statewide engineering or related services may specify that more than one (1) firm [~~may~~] be selected to provide the services requested in the bulletin.

(3) Each time a procurement bulletin is published, the cabinet shall place an advertisement of the cabinet's need for engineering or related services and availability of the procurement bulletin in at least two (2) newspapers of general, multicounty circulation and one (1) newspaper which has minorities as its targeted readership.

(4)(a) A prequalified firm responding to a procurement bulletin for engineering or related services shall submit to the Division of Specialized Programs the following:

1. The specified number of copies of a completed Response to Announcement for Engineering or Related Services, form TC 40-15 revised July, 1994 [~~June, 1993~~]. Form TC 40-15 is incorporated by reference as a part of this administrative regulation;

2. A letter of transmittal which summarizes the scope of services;

3. Item numbers from the Six (6) Year Plan, when appropriate, placed on all correspondence and any forms;

(b) A prequalified firm responding to a procurement bulletin for construction-related engineering services shall submit to the Division of Specialized Programs in addition to the items in subsection (4)(a) of this section the Supplemental Information in Response to Announcement for Construction Services, form TC 40-7 revised June, 1992. Form TC 40-7 is incorporated by reference as a part of this administrative regulation.

(c) A prequalified firm which proposes to employ a subcontractor when responding to a procurement bulletin shall submit to the Division of Specialized Programs in addition to the other items required by this subsection the Subconsultant Qualifications for Response to Advertisement for Engineering and Related Services, form TC 40-15-SUB revised July, 1994 [~~June, 1993~~]. Form TC 40-15-SUB is incorporated by reference as a part of this administrative regulation.

(d) A firm not responding with the correct number of copies or providing incomplete information on the forms shall not be considered for selection.

(5) [~~In addition to complying with subsection (3) of this section,~~] A firm or subcontractor be prequalified in the specified areas of prequalification prior to the response due date published in the announcement of the need for engineering or related services for a particular project or shall not be considered for selection. [~~which has not been prequalified shall submit the number of copies specified in the procurement bulletin of the forms required for prequalification in Section 4 of this administrative regulation and a like number of the firm's marketing brochures at least one (1) week prior to the deadline.~~]

(6)(a) The Director, Division of Specialized Programs, shall certify the list of firms that responded to the procurement bulletin in a timely manner to the appropriate professional engineering services selection committee.

(b) Responses received after the deadline shall be returned to the firm and shall not be listed for consideration to perform the project.

(c) Responses received with fewer copies of the response than required shall be returned to the firm and shall not be listed for consideration to perform the project.

(d) The list of responses to the procurement bulletin shall be confidential until the contract is negotiated and executed and the selected firm receives a notice of approval for payment from the Division of Specialized Programs as set forth in Section 16 [~~15~~] of this administrative regulation.

Section 9. [~~8.~~] Establishing a Professional Engineering Services Selection Committee. (1) A professional engineering services selection committee shall be selected as set forth in KRS 45A.810(5) and (6).

(2)(a) The Transportation Cabinet Secretary shall annually request voluntary applications from the professional engineering staff in the cabinet for availability to serve in the pool of six (6) professional engineers required by KRS 45A.810(5)(a).

(b) The Transportation Cabinet Secretary, or his designee, shall review all applications and submit a list of ten (10) applications from which the secretary shall select six (6) to serve in the pool for a period of one (1) year.

(c) Only persons who are [~~merit~~] employees of the cabinet and registered professional engineers of the Commonwealth shall be appointed to the pool.

(d) A person serving on the professional engineering services selection committee from this pool shall not be eligible to also serve on the same selection committee as a representative of a user division as specified KRS 45A.810(5)(b).

(3)(a) The director of the user division that shall be responsible for monitoring the professional services shall appoint two (2) professional engineers from either the user division or the same functional area from the highway district offices where the project is located.

(b) If the user division does not have two (2) professional engineering merit employees or if the services in the announcement are for nonengineering but related services, the director shall appoint two (2) [~~merit~~] employees who have familiarity and experience related to the services that are being contracted.

(c) [~~If the director is a merit employee,~~] The director may appoint

himself to the committee.

(d) If there are two (2) user divisions with approximately equal or separate responsibilities for the project, **the provisions of KRS 45A.810(6)(b) shall apply.** [~~upon approval of the Director of the Division of Specialized Programs, each co-user division shall appoint one (1) member to the selection committee.~~]

(e) If the cabinet is procuring professional engineering or related services in conjunction with another agency or governmental entity or state, that unit outside the cabinet may be designated as a co-user division and be eligible to appoint one (1) member of the selection committee.

(4) An employee of the cabinet shall not be required to involuntarily serve as a member of a professional engineering services selection committee.

(5) Each member of a professional engineering services selection committee shall execute the following forms which are incorporated by reference as a part of this administrative regulation:

(a) [a] Certificate of Understanding of Restrictions for Members of Professional Engineering Services Selection Committee, form TC 40-9 effective May, 1994. [~~July, 1992. This form is incorporated by reference as a part of this administrative regulation.~~]

(b) "Ex Parte Disclosure Form", Form TC 40-6 as effective May, 1994;

(c) "Certificate of Confidentiality Form", Form TC 40-4 as effective May, 1994; and

(d) "Certificate of Conformity with Procurement Process", Form TC 40-10 as effective May, 1994.

(6)(a) If the individual, randomly selected to serve on a selection committee in accordance with KRS 45A.810(5)(c) is an employee of a consulting firm, that consulting firm shall not be considered for any projects which are reviewed by that selection committee.

(b) If a firm submitted a response under this circumstance, the firm's response for that project shall be returned by the selection committee with a letter of explanation.

(7) After issuing written approval to contract for a firm to perform professional engineering or related services, the secretary of the cabinet, or his designee, shall establish a professional engineering services selection committee for each project to be advertised.

(8) The Division of Specialized Programs shall provide each professional engineering services selection committee with the necessary administrative and technical support and office supplies.

(9)(a) Each member of a professional engineering services selection committees shall comply with the Executive Branch Code of Ethics established in KRS Chapter 11A.

(b) Each member of a selection committee shall scrupulously comply with both the letter and the spirit of the cabinet's Official Order Number 94057 regarding Conflict of Interest which was issued on March 9, 1992. This official order is incorporated by reference as a part of this administrative regulation.

(c) Each Transportation Cabinet member of a selection committee shall file an annual statement of financial disclosure pursuant to KRS 11A.050.

Section 10. [~~9.~~] Operation of a Professional Engineering Services Selection Committee. (1)(a) The initial meeting of a professional engineering services selection committee shall be called by the Division of Specialized Programs.

(b) A quorum for the initial meeting shall be three (3) of the five (5) voting [~~six (6)~~] members.

(2)(a) Meetings of a professional engineering services selection committee may be called by the chairperson at a mutually convenient time during normal working hours with at least one (1) week's notice.

(b) Special meetings may also be called upon consensus of four (4) of the five (5) voting members of the selection committee.

(c) A motion or decision of the selection committee shall require a simple affirmative vote of all [~~simply majority affirmative of all voting~~] members present for passage.

(d) A quorum for all but the initial meeting shall be constituted by four (4) of the five (5) voting members present.

(e) Voting by proxy shall not be allowed.

(3)(a) The professional engineering services selection committee shall give fair and impartial consideration to all responses certified in accordance with KRS 45A.825(6).

(b) The selection committee shall utilize the evaluation factors and weights indicated in the announcement for each project to screen all certified firm responses.

(c) Prior to the second meeting of the selection committee to determine and rank the three (3) most qualified firms, each voting selection committee member shall review all certified responses and preliminarily evaluate and numerically rate each firm using the weighted evaluation factors that appeared in the procurement bulletin. These evaluations and ratings are preliminary and therefore confidential working documents.

(4) In executive session at its second meeting, the selection committee shall determine the three (3) best qualified firms and develop a ranking of the three (3) by considering the weighted evaluation factors that appeared in the procurement bulletin.

(5)(a) Each committee member shall list all firms in his top three (3) rankings.

(b) All firms included on any of these lists shall be placed on the short list of firms.

(6)(a) All firms included on the short list shall be individually discussed by the committee with regard to their qualifications and the quality of their proposals.

(b) Each committee member shall be given the opportunity to provide insight into why each firm should or should not be selected for the project.

(c) Any firm may be eliminated from further consideration by consensus of the selection committee members.

(7)(a) Each firm remaining under consideration after the discussion period set forth in subsection (6) of this section shall be individually ranked by the committee members using secret ballots.

(b) A new listing of short-listed firms based on the composite rankings of the secret ballots shall be discussed by the selection committee.

(c) Any firm may be eliminated from further consideration by consensus of the selection committee members.

(8) If at the end of the process set forth in subsection (7) of this section, more than three (3) firms remain under consideration, the process set forth in subsection (7) of this section shall be repeated until only three (3) firms remain for consideration by the selection committee.

(9) Each of the three (3) firms identified in subsection (8) of this section shall be individually ranked by the committee members using secret ballots.

(10)(a) Unless there is a tie between two (2) of the firms, the results of subsection (9) of this section shall determine the ranked order of the three (3) best qualified firms.

(b) **On nonfederally funded projects,** if there is a tie ranking and if one (1) of the firms has indicated that more of its work tasks will be performed in Kentucky, **the provisions of 1994 Ky. Acts ch. 95, Sec. 6 shall govern the process** [~~that firm shall be ranked higher than the other with which it had tied~~].

(c) **On federally funded projects or nonfederally funded projects,** if there is a tie ranking and if the work tasks to be performed in Kentucky are equal, the selection committee shall again perform the functions set forth in subsection (7) of this section until the tie is broken.

[~~(4) At the meeting of the selection committee, each member's ratings shall be used to select the most qualified firms according to that member's ratings.~~

~~(5) The entire selection committee shall discuss all of the firms which have been rated by any member as one (1) of the three (3) most qualified of the firms certified to the selection committee for~~

~~evaluation.~~

~~(6) Based on a consensus of the selection committee any of the firms discussed in subsection (4) of this section may be eliminated from further consideration for this project.~~

~~(7)(a) Each member of the selection committee shall individually evaluate and rate and by secret ballot rank each of the firms remaining for consideration based on the published evaluation factors and weights.~~

~~(b)1. Based on all ratings performed in subsection (7)(a) of this section, the three (3) most qualified firms shall be established by the selection committee.~~

~~2. In case of a tie rating for one (1) of the three (3) most qualified positions the selection committee shall rediscuss then reevaluate the firms which had the tied ratings until the tie is broken.~~

~~(8) The selection committee shall rediscuss the three (3) firms established as the most qualified.~~

~~(9)(a) The selection committee shall by secret ballot rank the three (3) firms.~~

~~(b) In case of a tie for one (1) of the three (3) rankings, the selection committee shall rediscuss and revote between the tied firms.~~]

(11) [~~(10)~~] If the selection committee elects, it may interview any of the responding firms to aid in its determination of the best qualified firm.

(12) [~~(11)~~] For selection committee reviews involving statewide services advertised in accordance with Section 7(2)(d) of this administrative regulation, the committee shall rank the [~~same~~] number of top-ranked firms as specified in the procurement bulletin and may select a second and third ranked firm, but at a minimum of [~~least~~] three (3) firms shall be ranked.

(13) [~~(12)~~] The evaluations and ratings of the individual selection committee members shall be considered preliminary and confidential working documents and shall not be available to the public.

(14) [~~(13)~~](a) The chairman of the professional engineering services selection committee shall notify the Director of the Division of Specialized Programs of the firms determined by the committee to be the three (3) best qualified and the order of their ranking.

(b) The Division of Specialized Programs shall send the letters required in KRS 45A.825(7)(c).

(c) The Division of Specialized Programs shall immediately notify by letter the top-ranked firm of its selection for the advertised project.

Section 11. [~~10.~~] Prenegotiation Procedures. (1) The selected firm shall meet with cabinet representatives in accordance with the schedule identified in the procurement bulletin to discuss in detail the scope of services to be provided by the firm for the project.

(2) After this meeting, the firm shall submit the following to the cabinet:

(a) For roadway design, work units which qualifies the tasks to be performed to achieve the roadway design services that appeared in the advertisement or procurement bulletin and an identification of the assignment of the work units to the prime firm or a subcontractor.

1. The cabinet has the following options regarding the submittal:

a. Concur;

b. Modify and return the modification to the firm; or

c. Reject and ask the firm to evaluate and resubmit the work units.

2. After an agreement on the work units between the cabinet and the firm, each shall independently develop labor rates to be applied to the work units to determine manhours for each task.

(b) For structure work, work units include a description of the structure to be designed including but not limited to type, length, span arrangement, curves, skew, pilings based on preliminary geotechnical information, an identification of the assignment of the work units to the prime firm or a subcontractor, and any other pertinent considerations.

1. The cabinet has the following options regarding the submittal:

a. Concur;

b. Modify and return the modification to the firm; or

c. Reject and ask the firm to evaluate and resubmit the work units.

2. After an agreement on the work units between the cabinet and the firm, each shall independently develop labor rates to be applied to the work units to determine manhours for each task.

(c) For environmental assessments, a copy of the work units and corresponding manhours to achieve each task and an identification of the assignment of the work units to the prime firm or a subcontractor. [~~including all subconsultants.~~]

(d) For geotechnical assessments a copy of the work units which qualifies the tasks to be performed to achieve the geotechnical services that appear in the announcement and an identification of the assignment of the work units to the prime firm or a subcontractor.

1. The cabinet has the following options regarding the submittal:

a. Concur;

b. Modify and return the modification to the firm; or

c. Reject and ask the firm to evaluate and resubmit the work units.

2. After an agreement on the work units between the cabinet and the firm, each shall independently develop labor rates to be applied to the work units to determine manhours for each task.

(e) For bridge maintenance inspection a copy of work units and proposed equipment usage to achieve the inspection services that appeared in the announcement and an identification of the assignment of the work units to the prime firm or a subcontractor.

1. The cabinet has the following options regarding the submittal:

a. Concur;

b. Modify and return the modification to the firm; or

c. Reject and ask the firm to evaluate and resubmit the work units.

2. After an agreement on the work units between the cabinet and the firm, each shall independently develop labor rates to be applied to the work units to determine manhours for each task.

(f) For planning studies, work units which qualifies the tasks to be performed to achieve the planning study services that appeared in the announcement and an identification of the assignment of the work units to the prime firm or a subcontractor.

1. The cabinet has the following options regarding the submittal:

a. Concur;

b. Modify and return the modification to the firm; or

c. Reject and ask the firm to evaluate and resubmit the work units.

2. After an agreement on the work units between the cabinet and the firm, each shall independently develop labor rates to be applied to the work units to determine manhours for each task.

(3) The firm shall submit to the Division of Specialized Programs a fair and reasonable fee proposal which shall be prepared using the following:

(a) Personnel classifications and average wage rates for each classification as they appear in the audit and adjusted for work in the future years;

(b) Distribution of work by the personnel classifications;

(c) Overhead rates as determined by an audit;

(d) Subcontractors and fee proposals for each;

(e) Direct expenses not included in the overhead and subject to the limitations of Section 12 [~~11~~](3)(c) and (d) of this administrative regulation; and

(f) Manhours to achieve the agreed upon task to achieve the scope of services that appear in the advertisement or procurement bulletin.

(3) After the Division of Specialized Programs requests a proposal and fee estimate from the firm, the user division shall:

(a) Prepare an estimate of resources required to complete the project;

(b) Discuss the project with other divisions and request resource

estimates from them as necessary; and

(c) Coordinate all of the resource estimates from other divisions to be used by the Division of Specialized Programs in negotiation of the contract.

Section 12. [~~11.~~] Financial Records of Professional Firms. (1) A professional firm which has been prequalified shall allow the cabinet access to all financial information necessary to determine the firm's direct wage rates, indirect cost rates, overhead and direct project charges which are not included in overhead rates.

(2) These firms shall maintain all financial records including payroll time records for all employees including the firm's principals in accordance with 48 CFR 1 Part 31.

(3)(a) The maximum direct salary for a principal or partner of a professional firm shall be $75,000 per year (thirty-six (36) dollars and six (6) cents per hour);

(b) In the calculation of indirect costs for overhead, the maximum salary for a principal or partner of a professional firm for administrative purposes shall be $100,000 per year;

(c) Effective January 1, 1995 for negotiation purposes, the maximum direct salary for a nonprincipal or nonpartner of a professional firm shall be $75,000 per year (thirty-six (36) dollars and six (6) cents) per hour);

(d) Effective January 1, 1995, in the calculation of indirect costs for overhead, the maximum salary of a nonprincipal or nonpartner of a professional firm for administrative purposes shall be $75,000 per year;

(e) The maximum allowable overhead rate shall be 150 percent;

(f) [~~(d)~~] Travel expenses for firm employees or survey crews shall be limited to those incurred from an office in Kentucky or the border of Kentucky nearest the firm's office;

(g) Through December 31, 1994, [~~(e)~~] direct expenses not included in overhead shall have the following limits:

1. Passenger car - twenty-five (25) cents per mile;

2. Truck or four (4) - wheel drive vehicle - thirty-five (35) cents per mile;

3. Lodging:

a. Professional staff - fifty-five (55) dollars per night per person; and

b. Survey field personnel - seventy (70) dollars per night for two (2) persons in one (1) room;

4. Meals:

a. Breakfast - five (5) dollars per day per person;

b. Lunch - five (5) dollars per day per person; or

c. Dinner - ten (10) dollars per day per person.

5. Personal computer time - fifteen (15) dollars per hour;

6. Photocopying - ten (10) cents per page;

7. Blueprints - actual cost incurred not to exceed one (1) dollar per sheet, but excluding labor costs if subcontracted;

8. Mylar - actual cost incurred not to exceed four (4) dollars per sheet, but excluding labor costs if subcontracted;

9. Printing of reports - estimated cost from the printer; and

10. Travel time for survey crew - travel time to and from a job site in hours multiplied by the survey crew wage rate multiplied by one and three-tenths (1.3) for salary additives.

(h) Effective January 1, 1995, for negotiation purposes, direct expenses shall be limited to the following items and limits:

1. Passenger car - twenty-five (25) cents per mile;

2. Truck or four (4) wheel drive vehicle - thirty-five (35) cents per mile;

3. Lodging:

a. Professional staff - fifty-five (55) dollars per night per person; and

b. Survey field personnel - seventy (70) dollars per night for two (2) persons in one (1) room;

4. Meals:

a. Breakfast - five (5) dollars per day per person;

b. Lunch - five (5) dollars per day per person; or

c. Dinner - **eleven (11)** [~~ten (10)~~] dollars per day per person.

5. Printing of reports for distribution external to the Transportation Cabinet - estimated cost from the printer per document;

6. Travel time for survey crew - travel time to and from a job site in hours multiplied by the survey crew wage rate multiplied by one and three-tenths (1.3) for salary additives;

7. Special equipment which is project specific; and

8. Capital cost of money.

(i) [~~(f)~~] To compute the average hourly pay rate for any job classification at the firm, the number of available annual working hours per year shall be 2,080.

(4) This information shall be reviewed annually and at the discretion of the cabinet.

(5) If the cabinet has not audited the firm in the previous twelve (12) months, the last available audit may be used for determination of the fee specified in the contract with the understanding that a contract modification shall be processed if an audit by the cabinet reveals substantial differences in overhead rates, wage rates or direct project expenses.

(6) If the firm has a current audit of sufficient detail accepted by [~~from~~] a federal, state or local governmental agency and desires the Transportation Cabinet to utilize that audit for establishment of its overhead rate, the firm shall provide the audit report to the Transportation Cabinet prior to the scheduled audit. [~~,~~] The negotiation unit may use the overhead rates, wage rates and direct project expenses from that audit in negotiating a fee with the understanding that a contract modification shall be processed if an audit by the cabinet reveals substantial differences in overhead rates, wage rates or direct project expenses.

(7) Quarterly, the Division of Specialized Programs shall select a minimum of one (1) and a maximum of three (3) lump sum contracts that have been completed during the previous three (3) months and shall request an audit from the Department of Fiscal Management.

Section 13. [~~12.~~] Methods of Contracting with Professional Firms. (1) The following methods of contracting with professional firms shall be acceptable:

(a) Lump sum;

(b) Cost plus a fixed fee;

(c) Specific rates of compensation; or

(d) Cost per unit of work.

(2)(a) When the cabinet chooses the lump sum method of contracting, the firm shall present a statement to the Division of Specialized Programs showing the probable cost for the elements of work and the expected operating margin.

(b) This statement shall include a supported breakdown of the direct and indirect costs and subcontractor costs which the firm expects to incur.

(c) The method of dividing the project into work units and the calculation of related time units shall be devised so that the estimate can be easily reviewed.

(d) The Division of Specialized Programs and the user division shall verify the following supporting documentation before recommending the contract for approval:

1. Reasonableness of the amount proposed and consideration of the degrees of risk and responsibility to be assumed by the professional firm;

2. The extent, scope, complexity, character and duration of the required services;

3. Professional and financial investments to be required of the firm;

4. The firm's normally expected return for such services;

5. Conditions under which the professional firm is expected to perform;

6. The cabinet's estimate of the appropriate amount for the services required; and

7. The cabinet's findings on the basis of experience and knowledge.

(3)(a) When the cabinet chooses the cost plus a fixed fee method of contracting, an upper limit of payment of actual cost shall be established which cannot be exceeded without obtaining cabinet approval.

(b) During negotiations, the Division of Specialized Programs or other negotiation unit shall be responsible for establishing the upper limit along with the fixed fee to be paid to the professional firm for the services required.

(c) The Division of Specialized Programs or other negotiation unit shall establish the fixed fee and upper limit based on past experience gained from negotiations of similar projects, judgment regarding scheduling and complexity of work and the user division's estimates.

(4)(a) When the cabinet chooses the specific rate of compensation method of contracting, the Division of Specialized Programs or other negotiation unit shall document the basis on which the amount specified as the upper limit or upset limit was established.

(b) The agreement shall contain provisions which permit adjustment to this upper limit when the firm establishes, and the user division agrees, that there has been or is to be a significant change in the:

1. Scope, complexity or character of the services to be performed;

2. Conditions under which the work is required to be performed; or

3. Duration of the work if the change from the time period specified in the agreement for completion of the work warrants such adjustment.

(c) In the case of statewide agreements under which there is to be subsequent individual authorizations, the establishment of a maximum amount shall not be required. A maximum amount, however, shall be established for each of the individual authorizations.

(5)(a) When the cabinet is using the cost per unit of work method of compensation, the professional firm shall be paid on the basis of units completed.

(b) This method of contracting is appropriate when the extent of the work cannot be definitely defined but when cost of the work per unit may be determined in advance with reasonable accuracy.

(c) A proposal using this method of contracting shall be supported in the same manner as that indicated for the lump sum method used for professional firms.

(6)(a) For an individual acting as a professional firm, the specific rates of compensation shall include the direct salary costs, salary additives, indirect costs and the net fee. The agreement of supporting data shall specifically identify these costs.

(b) Other direct costs may be included as an element of a specific rate or as independent cost items.

Section 14. [~~13.~~] Contract Negotiations. (1)(a) The Division of Specialized Programs shall be the designated negotiating agent for the Department of Highways in the cabinet.

(b) If professional engineering or related services are requested by user divisions within the cabinet but not in the Department of Highways, that user division shall be responsible for negotiating the fee.

(2)(a) The Division of Specialized Programs or other designated negotiation unit shall receive the proposal and fee estimate from the professional firm. The proposal submitted by the firm shall include either a statement that the payment shall be based on the percentage of work completed or the proposed project milestones and corresponding maximum percentage payments and a breakdown of the estimated fee for performing the work including the following:

1. Direct salaries;

2. Overhead;

3. Payroll additives;

4. Other direct costs including cost of materials which are not included in the overhead;

5. Subcontractor costs;

6. Operating margin; and

7. Use of **certified disadvantaged business enterprise** [~~DBE~~] firms.

(b) The Division of Specialized Programs or other designated negotiation unit shall analyze the proposal and may confer with others regarding the proposal as necessary. The proposal shall be used as a basis for further negotiation of the professional services agreement.

(c) Unreasonable or deliberately inflated proposals shall be rejected and may be cause for terminating negotiations in accordance with KRS 45A.825(9).

(3) If the contract which is being negotiated uses a method of compensation other than lump sum, the professional firm shall use an accounting system which segregates and accumulates reasonable, allocable and allowable costs to be charged to a contract for an audit by the Department of Fiscal Management.

(4)(a) If a firm intends to utilize the services of a subcontractor to perform any part of the work, at the time of negotiations the firm shall submit a fee proposal for the amount of work to be subcontracted.

(b) The fee proposal shall be based on the audited overhead and wage rates for the subcontractor.

(c) A subcontractor shall be prequalified with the cabinet to perform the services to be subcontracted to it if the services are required to be prequalified.

(d) Prior approval from the Division of Specialized Programs or other negotiation unit shall be necessary.

(e) If a firm desires to utilize a subcontract to perform part of the work after a contract has been approved and notice has been given to begin work, the procedures set forth in Section 17 of this administrative regulation shall be followed.

(5) A firm which is awarded a contract for professional engineering or related services with the cabinet shall perform at least fifty (50) percent of the dollar value of the work for the project unless otherwise approved by the Director of the Division of Specialized Programs.

(6)(a) The operating margin allowed a professional engineering or related services firm shall be allowed only on the negotiated direct labor and overhead costs regardless of the type of contract and shall not exceed the following:

1. Lump sum contract:

a. Fifteen (15) percent of the total direct labor cost plus overhead costs [~~plus all direct expenses not included in the overhead~~] for a contract, including all contract modifications, less than $2,000,000; or

b. Ten (10) percent of the total direct labor cost plus overhead costs [~~plus all direct expenses not included in the overhead~~] for a contract, including all contract modifications, equal to or in excess of $3,000,000 [~~2,000,000~~]; or

c. For a contract with the total direct labor cost, plus overhead cost of $2,000,000 to $3,000,000, the operating margin shall be fourteen (14) percent to ten (10) percent with a one (1) percent reduction for each $200,000 increase in fee.

2. Unit price contract - fifteen (15) percent of the estimated unit cost at the time of execution of the contract.

(b) A cost plus fixed fee contract shall have a lump sum fee equal to ten (10) percent of the estimated cost at the time of the execution of the agreement.

(7) The Division of Specialized Programs or other negotiation unit shall compare the firm's established fee with the cabinet's estimate to determine both the reasonableness of the fee and areas of substantial differences which may require further negotiation.

(8) The Division of Specialized Programs or other negotiation unit shall negotiate with the professional firm to establish a reasonable fee and basis of payment, including incremental payments for completed work where appropriate, for the services to be performed under the contract.

(9)(a) The firm shall keep written documentation of each negotiations meeting and shall submit to the Division of Specialized Programs or other negotiation unit the following:

1. Minutes of negotiations;
2. As-negotiated fee;
3. As-negotiated manhours;
4. Classification percentage distribution; and
5. Direct cost breakdowns.

(b) The public shall not be denied access to the items set forth in paragraph (a) of this subsection.

(10) After the Division of Specialized Programs or other negotiation unit has negotiated a contract, the head of the unit shall send letters to the two (2) other finalists informing them of the firm which successfully negotiated a contract and the procedure that shall be followed in awarding the contract.

Section 15. [~~14.~~] Contract Preparation and Execution. (1) The Division of Specialized Programs or other negotiation unit shall prepare an agreement or contract to cover the services to be provided, method and amount of payment, the time of completion and necessary special provisions.

(a) The agreement shall also include by reference the General Provisions Attachment as revised July, 1994 [~~June, 1993~~] unless the project is for a consultant structure inspection. The General Provisions Attachment is incorporated by reference as a part of this administrative regulation.

(b) If the project is for a consultant structure inspection, the agreement shall also include by reference the Division of Maintenance, Consultant Structure Inspection Provisions as revised in May 1993. The Division of Maintenance, Consultant Structure Inspection Provisions are incorporated by reference as a part of this administrative regulation.

(2) The contract and negotiation minutes shall be sent to the firm for the signature of an authorized representative. All original documents shall be returned to the Division of Specialized Programs or other negotiation unit.

(3) The contract shall be reviewed and approved by the secretary of the cabinet.

(4) When the project is subject to approval from the FHWA and after the contract has received final approval from the cabinet, the Division of Specialized Programs shall send to the FHWA the following requesting their approval:

(a) A copy of the contract;
(b) The negotiated fee and manhours;
(c) The firm's fee and manhour proposal;
(d) The cabinet's manhour estimate;
(e) The minutes of the negotiation;
(f) The minutes of the predesign conference;
(g) A copy of the advertisement and announcement;
(h) The list of firms that responded to the announcement in a timely manner;
(i) The written approval from the secretary of the cabinet to engage a professional firm;
(j) The minutes of the professional engineering services selection committee; and
(k) The memorandum from the chairman of the selection committee stating the ranking of the three (3) best-qualified firms by the professional engineering services selection committee; and
(l) The audit report of overhead and wage rates which was used to establish the fee.

(6) If FHWA does not approve the contract, the secretary of the cabinet, after discussion with the State Highway Engineer and staff, may decide to modify the contract, redefine the project, terminate the project or ask for reconsideration by the FHWA.

Section 16. [~~15.~~] Notice to Proceed and Payments. (1) Before a notice of approval for payment can be issued, funds shall be encumbered by the cabinet.

(2) When the Division of Specialized Programs or other negotiation unit receives a copy of the transmittal sheet indicating that the LRC Personal Service Contract Review Subcommittee has received the contract and project information for review, a notice to proceed shall be sent to the firm indicating that it may commence work but it shall not bill for services until specifically authorized to do so. For projects requiring approval of a unit of the federal government, notice to proceed shall not be issued until the federal approval is obtained.

(3) When the LRC Personal Service Contract Review Subcommittee issues a notification of acceptance on a contract, the Division of Specialized Programs or other negotiation unit shall issue a letter to the firm informing it that it may bill the cabinet for charges incurred while working on the project.

(4)(a) If the LRC Personal Service Contract Review Subcommittee objects to the contract and the cabinet determines that the contract is to be cancelled, the Division of Specialized Programs or other negotiation unit shall notify the firm of the cancellation and shall take necessary steps to close the contract.

(b) If the cabinet determines that the contract is to be modified to comply with the concerns of the LRC Personal Service Contract Review Subcommittee, the Division of Specialized Programs or other negotiation unit shall notify the firm of the necessary modifications and shall follow the contract modification and change order procedures specified in Section 16 of this administrative regulation.

(c) If the cabinet determines that the contract is to be executed as submitted to the LRC Personal Service Contract Review Subcommittee, the Division of Specialized Programs or other negotiation unit shall issue a letter to the firm informing it that it may bill the cabinet for charges incurred while working on the project.

Section 17. [~~16.~~] Contract Administration. All work performed under a professional services contract shall be subject to general supervision, direction, review and approval by the cabinet.

(1)(a) A project supervisor shall be assigned to the project by the director or office head of the user division.

(b) The division director or office head may serve as the project supervisor.

(c) The project supervisor shall be responsible for coordinating all cabinet activities with the firm and for providing necessary supervision through the duration of the contract. This coordination shall include the following:

1. Scheduling, monitoring and controlling the firm's activities; 2. Reporting the status of these activities to the appropriate authority;
3. Periodically reviewing the work to determine if the work:
a. Is acceptable;
b. Is in accordance with the agreement for the particular project; and
c. Scope has changed to the point that it may require a supplemental agreement and increased or decreased compensation.

(2)(a) During the project, the firm may subcontract with other firms to perform specialized services in a manner similar to Section 13(4) of this administrative regulation. The subcontractor shall be prequalified by the cabinet if the services that are subcontracted are required to be prequalified.

(b) If the services to be performed by the subcontractor are subject to prequalification by the cabinet and were not previously identified in the original negotiation or subsequent change orders, the firm shall submit a request for a fee adjustment for the manhours to be performed by the subcontractor.

(c) If the subcontractor services are not subject to prequalification procedures and exceed $25,000, they shall be reviewed by the Department of Fiscal Management for reasonableness of cost. For subcontracts equal to or less than $25,000, the Director of the Division of Specialized Programs or other negotiation unit upon recommendation of the negotiator, may accept the rates and costs if they are reasonable and in line with past costs incurred for similar work.

Section 18. [~~17.~~] Contract Modifications. (1) When it is determined

by either the firm or the cabinet that one (1) or more of the following conditions are acceptable and necessary, a contract modification for a fee or schedule adjustment may be requested:

(a) Change in termini or section;

(b) Addition of major phases of work to the negotiated scope of work;

(c) Modification of previously approved work resulting from factors beyond the control of the professional firm;

(d) Modification of a major item, if in the original contract, the item is designated as a basis of the original negotiations and the conditions for a change order consideration are identified in the original contract;

(e) Delay by the cabinet as outlined in each contract; or

(f) Use of a subcontractor for services previously identified to be done by the firm or other subcontractor; or

(g) Availability of current audit established in accordance with Section 11 of this administrative regulation.

(2) The request for a contract modification may be originated by the Division of Specialized Programs, user division, highway district office or the firm.

(3) When the director or office head of the user division determines the change is appropriate, the user division shall advise the firm in writing of the contemplated change in the scope, complexity, extent, character or duration of the original agreement. When additional or reduced compensation is justified, the user division shall request a revised proposal from the firm.

(4) The contract modification shall be negotiated using the procedures set forth in Section 13 of this administrative regulation.

(5) The Division of Specialized Programs or other negotiation unit shall send the Change Order form TC 40-17 [~~61-5~~] as revised June, 1992 [~~August, 1986~~] or the Change Order form, TC 63-1 [~~63-53~~] revised March, 1994 [~~August, 1986~~], to the firm for its approval. These forms are incorporated by reference as a part of this administrative regulation.

(6) After approval by the cabinet, the Change Order, LRC's Proof of Necessity form and other supporting documentation shall be submitted to the LRC Personal Service Contract Review Subcommittee.

(7) For projects requiring FHWA oversight, the approved Change Order shall be sent to the Federal Highway Administration for approval.

(8) Funds shall be encumbered by the cabinet sufficient to pay for the approved Change Order.

Section 19. [~~18.~~] Completion of Contract. (1) Upon completion of the contract, the cabinet shall review the work performed to determine that it meets the terms and conditions of the contract and shall evaluate the firm for future reference.

(2) The project supervisor or the director of the user division shall review the work performed by the firm, including any progress and final reports, to determine that all terms and conditions of the contract have been met before processing the final voucher for payment or releasing the firm.

(3) Before approving the final invoice for payment, the director of the user division or the project supervisor shall evaluate the firm and prepare written documentation of the firm's performance on the project.

(4) The user division shall send the firm written documentation of the firm's performance for the project. Copies of the documentation shall be placed in the contract file maintained by the Division of Specialized Programs and in the firm's experience record file.

(5)(a) The firm may appeal in writing a below average rating to the user division director within thirty (30) days of written documentation of the firm's performance for the project.

(b) The appeal shall specifically set forth the reasons why the firm believes the below average rating is in error.

(c) The user division director shall notify the firm within thirty (30) days from the firm's appeal of the director's decision of whether or not to revise the performance rating.

(d) The firm may appeal in writing the user division director's decision to the chairman of the consultant prequalification committee within thirty (30) days.

(e) The consultant prequalification committee shall review all documentation relating to the firm's performance for the project. The committee may discuss the performance rating with the project supervisor or the firm.

(f) The committee shall notify the firm and the user division of its decision within ninety (90) days from the firm's appeal.

(g) If the firm's appeal is denied by the consultant prequalification committee, it may appeal the decision to the State Highway Engineer within thirty (30) days of written notice of denial of its appeal by the consultant prequalification committee.

(h) The State Highway Engineer shall notify the firm of his decision within thirty (30) days.

(i) The decision of the State Highway Engineer shall be final.

(j) If the performance evaluation documentation is revised, the initial documentation shall be removed from all files and replaced with the revised performance document.

(6) The Director of the Division of Specialized Programs or head of other negotiation unit shall request the Department of Fiscal Management to perform a final audit if appropriate. The audit shall determine the total allowable contract costs and the total dollars to be paid to the firm. All contracts utilizing a cost plus fixed rate method of payment shall be audited.

(7) The user division shall forward the Federal Highway Administration a copy of all progress and final reports for federal-aid projects if required or requested by the FHWA.

Section 20. [~~19.~~] Cancellation of Contract. (1) Each professional service contract shall include a provision for the termination of the agreement and shall allow for the cancellation of the contract by the cabinet **pursuant to KRS 45A.104** [~~with proper notice to the firm~~].

(2) When the cabinet decides to cancel a professional services contract, the Division of Specialized Programs or other negotiation unit shall notify the firm of the cancellation and of the reasons for the cancellation.

(3) The cabinet shall be liable only for payment of services up to the date of cancellation of the contract as specified by the terms of the contract.

Section 21. [~~20.~~] Payments to Firms. Before payment of a partial or final request for payment, the cabinet shall review the work of the firm, including any progress or final reports, to ensure that the work for which the payment is to be made has been completed and that the terms and conditions of agreement have been satisfactorily followed.

(1) During the course of the project, progress billings shall be submitted by the firm as agreed upon in the contract. The firm shall submit an Engineer's Pay Estimate, TC 61-408 revised March, 1988 with a progress report as an invoice to the chief district engineer or director of the user division or to their designees. This form is incorporated by reference as a part of this administrative regulation.

(2) The chief district engineer or director of the user division or his designee shall review the estimate, verify that the work has been completed as described in the document, and sign the engineer's pay estimate.

(3) Final invoices and requests for payment shall be authorized only after all work has been reviewed and accepted or approved, including any final reports prepared by the firm. All terms and conditions of the contract shall be satisfactorily met and the final audit shall be performed prior to processing the final payment.

Section 22. [~~21.~~] Material Incorporated by Reference. All material incorporated by reference as a part of this administrative regulation

may be obtained, viewed or copied at the Division of Specialized Programs, 7th Floor State Office Building, 501 High Street, Frankfort, KY 40622. Its telephone number is (502)564-4555. Its office hours are 8 a.m. to 4:30 p.m. eastern time on weekdays.

J.M. YOWELL, P.E., State Highway Engineer
JERRY D. ANGLIN, Deputy Secretary and Commissioner
BOB BODNER, Executive Director
DON C. KELLY, P.E., Secretary
APPROVED BY AGENCY: June 7, 1994
FILED WITH LRC: June 8, 1994 at 11 a.m.

COMPILER'S NOTE:The following administrative regulation, 601 KAR 1:005, was amended by the Interim Joint Committee on Transportation, and became effective on July 13, 1994.

TRANSPORTATION CABINET
Department of Vehicle Regulation
Division of Motor Vehicle Enforcement
(As Amended)

601 KAR 1:005. Safety regulations.

RELATES TO: KRS Chapters 138, 281, Title 49, Code of Federal Regulations, Parts 40, 382-383, 390-397

STATUTORY AUTHORITY: KRS 138.665, 281.600, 281.726, 281.730, 281.750, Title 49, Code of Federal Regulations, Parts 40, 382-383, 390-397

NECESSITY AND FUNCTION: This administrative regulation is necessary to set forth the safety requirements that KRS 281.600 allows the Transportation Cabinet to establish. This administrative regulation sets out safety procedures to be followed by motor carriers operating in the Commonwealth of Kentucky.

Section 1. Definitions. (1) "Farm-to-market agricultural transportation" means the operation of a motor vehicle that is controlled and operated by a farmer who, as a private motor carrier is using a vehicle:

(a) To transport agricultural products from his farm;

(b) To transport farm machinery or farm supplies to his farm; or

(c) Generally thought of as farm machinery; and

(d) Which is not transporting hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with 601 KAR 1:025.

(2) "Daylight hours" means that period of time one-half (1/2) hour before sunrise through one-half (1/2) hour after sunset.

(3) "Load limit" means the [~~rated~~] seating capacity established by the manufacturer for [~~which~~] a passenger-carrying vehicle [~~is licensed~~] plus an additional twenty-five (25) percent [~~of the rated seating capacity~~].

Section 2. Governing Federal Regulations. All commercial motor vehicles operated for-hire or in private carriage, interstate or intrastate, except as set forth in Section 3 of this regulation shall be governed by the following Motor Carrier Safety Regulations adopted and issued by the United States Department of Transportation:

(1) Title 49, Code of Federal Regulations Part 40, Procedures for Transportation Workplace Drug Testing Programs effective as amended through October 1, 1992;

(2) Title 49, Code of Federal Regulations Part 382, Controlled Substances and Alcohol Use and Testing effective as amended through March 17, 1994;

(3) Title 49, Code of Federal Regulations Part 383, Commercial Driver's License Standards; Requirements and Penalties, effective as amended through **June 17, 1994** [~~November 9, 1992~~];

(4) [~~(2)~~] Title 49, Code of Federal Regulations Part 390, General, effective as amended through **June 17, 1994** [~~January 20, 1994~~] [~~August 23, 1993~~];

(5) [~~(3)~~] Title 49, Code of Federal Regulations, Part 391, Qualifications of Drivers, effective as amended through **June** [~~March~~] 17, 1994 [~~June 21, 1993~~];

(6) [~~(4)~~] Title 49, Code of Federal Regulations, Part 392, Driving of Motor Vehicles, effective as amended through March 17, 1994 [~~November 15, 1988~~];

(7) [~~(5)~~] Title 49 Code of Federal Regulations, Part 393, Parts and Accessories Necessary for Safe Operation, with a latest effective date of November 24, 1989;

(8) [~~(6)~~] Title 49, Code of Federal Regulations, Part 395, Hours of Service of Drivers, effective as amended through March 17, 1994 [~~August 31, 1992~~];

(9) [~~(7)~~] Title 49, Code of Federal Regulations, Part 396, Inspection, Repair and Maintenance, as effective October 8, 1992; and

(10) [~~(8)~~] Title 49, Code of Federal Regulations, Part 397, Transportation of Hazardous Materials; Driving and Parking Rules, effective as amended through September 24, 1992.

Section 3. Exemptions and Exceptions. The following exemptions and exceptions to compliance with the provisions of Section 2 of this regulation are adopted:

(1) City buses, suburban buses, taxicabs, motorcycles and motor vehicles primarily designed for carrying passengers and having provisions for not more than eight (8) passengers and the driver are not required to comply with the federal regulations adopted by or incorporated by reference in this administrative regulation. Except that any operator of one (1) of these vehicles who is required by KRS Chapter 281A to obtain a commercial driver's license shall comply with the provisions of 49 CFR Part 383 and provide proof of having passed the medical examination set forth in 49 CFR Part 391 or have received a medical waiver as set forth in 601 KAR 11:040 and subsection (7) [~~(8)~~] of this section.

(2)(a) Vehicles owned by the federal government, a state government, a county government, a city government, or a board of education and vehicles operating in interstate commerce which are specifically excluded by Title 49, Code of Federal Regulations, Part 390 are not required to comply with the federal regulations adopted in this administrative regulation.

(b) In spite of the requirements specified in paragraph (a) of this subsection, any operator of one (1) of these vehicles who is required by KRS Chapter 281A to obtain a commercial driver's license shall provide proof of having passed the medical examination set forth in 49 CFR Part 391 or having received a medical waiver as set forth in 601 KAR 11:040 and subsection (7) [~~(8)~~] of this section.

(3) Motor vehicles which are used exclusively in intrastate commerce and exclusively in farm-to-market agricultural transportation when operated during daylight hours by a private motor carrier are not required to comply with Title 49, Code of Federal Regulations, Part 393, Subpart B, relative to lighting device requirements. They are, however, required to have two (2) stop lamps and mechanical turn signals as set forth in 49 CFR 393, Subpart B.

(4) Motor vehicles which are used exclusively in intrastate commerce and exclusively for the transportation of primary forest products from the harvest area to a mill or other processing facility which is located at a point not more than fifty (50) air miles (eighty and five-tenths (80.5) air kilometers) from the harvest area when operated during daylight hours are not required to comply with Title 49, Code of Federal Regulations, Part 393, Subpart B relative to lighting devices requirements. They are, however, required to have two (2) stop lamps and mechanical turn signals as set forth in 49 CFR 393, Subpart B.

(5) Except for transporters of hazardous materials under 601 KAR 1:025, motor vehicle operators who are operating a vehicle on an intrastate commerce basis are not required to be twenty- one (21) years of age as set forth in 49 CFR 391.11(b)(1). However, they shall

be at least eighteen (18) years of age.

(6) Electric utility motor carriers while operating exclusively in intrastate commerce shall be exempt from the maximum and on-duty hours for drivers set forth in 49 CFR 395.3 during an emergency which requires their employees to work to restore electric power.

(7) ~~[Motor carriers which operate exclusively in intrastate commerce shall be exempt from the drug testing requirements of 49 CFR Parts 391 and 394.~~

~~(8)~~] A commercial vehicle driver who operates a commercial vehicle exclusively in intrastate commerce within Kentucky, may apply for a medical waiver of the requirements of 49 CFR Part 391 under the provisions of 601 KAR 11:040. If a medical waiver is issued, the waiver shall be in the possession of the commercial driver any time he is operating a commercial motor vehicle.

(8) [~~(9)~~] Motor carrier vehicles operated exclusively in intrastate commerce may comply with the provisions of 601 KAR 1:160 rather than 49 CFR Part 390.21.

Section 4. Buses. (1) Buses shall be maintained in a clean and sanitary condition so that the health of passengers will not be impaired.

(2) Seats shall be comfortable in order that passengers will not be subjected to unreasonable discomfort which might be detrimental to their health and welfare.

(3) Employees in charge of buses shall be courteous and helpful to passengers, properly caring for baggage so that it will not be damaged, and shall be acquainted with the routes traveled and schedules maintained, so that the passengers will not be subjected to unnecessary delays.

(4) All operators shall take into consideration the health and welfare of their passengers and control their operations in the public interest.

(5) Express and freight, mail bags, newspapers and baggage shall be so placed as not to interfere with the driver or with the safety and comfort of passengers. These items shall be protected from the weather but shall not be carried in the aisles or in a position to block exits or doorways on the bus.

Section 5. Overcrowding of Passenger Vehicles. A bus operated by an authorized carrier, except city or suburban buses, shall not be used to transport passengers in excess of its load limit. A passenger shall not be permitted to occupy the rear door-well of any bus vehicle that is equipped with a rear doorwell.

Section 6. [~~Cargo Securement. (1) The "CVSA Cargo Securement Tie-down Guidelines" adopted on February 15, 1992 by the Commercial Vehicle Safety Alliance is hereby incorporated by reference as part of this administrative regulation. The criteria in this document shall apply to the devices used in securing loads to commercial motor vehicles.~~

~~(2) The material incorporated by reference in this section may be reviewed at any of the weigh stations operated by the Transportation Cabinet. These weigh stations are generally in operation twenty-four (24) hours a day. Further, the material may be inspected, copied or obtained at the Division of Motor Vehicle Enforcement, 8th Floor, State Office Building, Corner of High and Clinton Streets, Frankfort, Kentucky 40622. The office hours there are 8 a.m. through 4:30 p.m. eastern time on regular Kentucky state government work days.~~

~~Section 7.~~] Out-of-service Criteria and Sticker. (1) The basic safety criteria to be followed by the Kentucky Transportation Cabinet in determining if a commercial driver or vehicle shall be declared unqualified or placed out-of-service shall be the "North American Uniform Out-of-service Criteria" adopted on June 21, 1993 by the Commercial Vehicle Safety Alliance. The criteria are incorporated by reference as a part of this administrative regulation.

(2)(a) If a commercial vehicle is being operated either improperly registered or without registration or in violation of any safety regulation or requirement, officers of the Division of Motor Vehicle Enforcement are authorized to affix to the vehicle a notice indicating the nature of the violation and requiring its correction before the motor vehicle is further operated.

(b) Refusal of the vehicle operator to grant permission for a law enforcement officer to conduct a safety inspection of the vehicle shall be cause for the officer to place the vehicle out-of-service until the permission is granted. Operation of a vehicle in violation of the out-of-service notice affixed to it shall constitute a separate violation of these regulations.

(3) If a commercial driver is determined to be unqualified to drive and is placed out-of-service but the commercial motor vehicle is not placed out-of-service, the motor carrier may provide a different driver for the commercial motor vehicle. However, the commercial driver placed out-of-service shall not again operate a commercial motor vehicle until he is once again qualified. Refusal of the commercial driver to grant permission for a law enforcement officer to conduct a safety inspection regarding the driver himself shall be cause for the officer to place the driver out-of-service until the permission is granted. Operating a commercial motor vehicle in violation of an out-of- service order shall constitute a separate violation of this administrative regulation.

(4) The material incorporated by reference in this section may be reviewed at any of the weigh stations operated by the Transportation Cabinet. These weigh stations are generally in operation twenty-four (24) hours a day. Further, the material may be inspected, copied or obtained at the Division of Motor Vehicle Enforcement, 8th Floor, State Office Building, Corner of High and Clinton Streets, Frankfort, Kentucky 40622. The office hours there are 8 a.m. through 4:30 p.m. eastern time on regular Kentucky state government work days.

NORRIS BECKLEY, Commissioner
DON C. KELLY, P.E., Secretary
APPROVED BY AGENCY: May 13, 1994
FILED WITH LRC: May 13, 1994 at 10 a.m.

EDUCATION, ARTS, AND HUMANITIES CABINET
Department of Education
Office of Learning Programs Development
(As Amended)

704 KAR 3:401. Principal assessment centers.

RELATES TO: KRS 156.105
STATUTORY AUTHORITY: KRS 156.070, 156.105
NECESSITY AND FUNCTION: KRS 156.105 mandates that the Department of Education shall establish principal assessment centers prior to July 1, 1992, and that the State Board for Elementary and Secondary Education shall establish criteria for successful completion of the assessment center process. This administrative regulation implements the principal assessment center process.

Section 1. Definitions. (1) "Assessment center" means a **location where** psychometric procedure emphasizing multiple school activities, including individual and group exercises, **is** used to develop a behavior profile on candidates seeking employment in principalship positions.

(2) "Assessment center candidate" means a principal or applicant for a principalship position who has been recommended by a district, vocational region, or the Kentucky Department of Education to undergo school assessment.

(3) "Assessee" means an individual who undergoes the assessment process.

(4) "Assessment" means an application of the NASSP process that requires assessees to function in simulated activities that are

representative of the principalship position and yields an extensive diagnosis of each assessee's strengths and weaknesses in skill dimensions validated as essential for effective performance in the principalship.

(5) "Assessor" means a trained observer who records and analyzes assessee performance during a two (2) day assessment center.

(6) "Assessment team" means a group of assessors and a center director who analyze and judge the performance data of each assessee.

(7) "Written assessment report" means a performance report which describes each assessee's strengths, weaknesses, overall performance rating, suggestions to help improve the assessee's skills, and is signed by all assessment team members.

(8) "Principal" means the primary administrator and instructional leader of elementary, middle, secondary, vocational, and vocational rehabilitation schools.

(9) "Center director" means an individual who assumes full responsibility for conducting each assessment center and who meet certification requirements of center directors.

(10) "Successful completion" means an overall performance rating of a moderate or above on the majority of the skills assessed of the principal candidates, and for practicing principals it means passing on a pass-fail basis according to their performance in the assessor training.

(11) "NASSP (National Association of Secondary School Principals) assessment" means a methodology that is based on the identification of generic skill dimensions specified as important for success in any school principalship position. The validated NASSP assessment consists of performance-based simulated exercises that can be observed, recorded, and analyzed.

(12) "Kentucky Department of Education Assessment Center" means an accredited program in the assessment center project operated by the NASSP that is conducted under contract according to NASSP specifications.

(13) "State principal assessment director" means an individual who serves as the primary director of the Kentucky Department of Education Assessment Center.

(14) "Assessor training" means training in which participants are taught how to observe and record behaviors displayed by assessment center candidates and are taught to write objective and comprehensive reports on the skill dimensions assessed.

Section 2. (1) Compliance with KRS 156.105 shall be granted to any principal who has:

(a) Successfully completed the NASSP assessment center process at any accredited NASSP assessment center; or

(b) Holds certification as an assessor in the NASSP assessment center.

(2) Successful completion of assessor training shall satisfy the assessment requirements for all previously employed principals.

(3) Request for recognition of compliance shall be made to the Kentucky Department of Education. Compliance status shall be granted to principals and applicants after the state principal assessment center director verifies "successfully completed" status.

Section 3. (1) The Kentucky Department of Education shall establish and operate regional principal assessment centers which shall be located in geographic areas throughout the state with consideration of location being given to the distribution of both the number of schools and the number of principals. Centers shall be responsible for the assessment of principals and principalship applicants as well as assuming the responsibility of providing assessor training.

(2) The state principal assessment center director shall coordinate the establishment of satellite principal assessment centers, provide staff for regional centers, and with the NASSP shall jointly provide training for center directors.

Section 4. (1) Before a candidate may be assessed in the principal assessment center, eligibility and selection requirements shall be met.

(2) Candidates shall be selected by local school district superintendents, vocational directors, vocational rehabilitation directors, or the state principal assessment director.

(3) Each district and vocational region may recommend no more than three (3) candidates for assessment for any single principalship position. Recommendations of candidates shall be listed in priority order and submitted to the state principal assessment director for assessment center assignment. Exceptions may be made by the state principal assessment director upon an appeal by the local district superintendent.

(4) Persons desiring to be assessed as principals, but who are not candidates at the time, shall have requests granted by the state principal assessment director as assessment center slots are available.

(5) Each assessment center candidate shall sign, prior to assessment, an agreement to respect the confidentiality of the assessment center process and materials.

Section 5. (1) All individuals previously employed as principals prior to July 1, 1994, shall successfully complete the principal assessor training which shall serve as the assessment for previously employed principals.

(2) All principal applicants who do not successfully complete the assessment process may be reassessed after one (1) year.

Section 6. (1) Upon completion of the NASSP assessment center process, center directors shall provide to a sponsoring nominator a written assessment report of the candidate's performance. The written assessment report shall include the assessee's strengths, weaknesses, overall performance rating, suggestions to help improve the assessee's skills, and signatures of all assessment team members.

(2) Each assessee, upon completion of the principal assessment center process, shall receive a final assessment report. The final assessment report shall include a written assessment report given to the assessee which provides the overall performance rating and the performance rating for each skill and includes suggestions for improvement and growth.

Section 7. The state principal assessment center director, in consultation with the principal assessment center director, shall allocate assessment center slots to local school districts and vocational regions. Final decisions concerning the allocation of assessment center slot shall be made by the state principal assessment center director. Districts and vocational regions with actual or imminent principalship vacancies shall be given priority in the assignment of assessment center slots.

Section 8. (1) Principal assessment assessors shall be certified jointly by the state principal assessment director and the NASSP principal assessment director. Minimum qualifications for assessors shall include:

(a) Experience as a principal or as a district-level or state-level employee in a supervisory role over principals;

(b) Successful completion of a formal assessor training program by the NASSP;

(c) Achievement of certification by the NASSP as an accredited assessor;

(d) Completion of a preassessment center briefing by the Kentucky Department of Education if six (6) months have elapsed since last service as an assessor;

(e) A high degree of competency in each of the skill dimensions

assessed by the Kentucky Assessment Center as determined by the district superintendent or appropriate supervisor;

(f) A high-energy level and the willingness to work intensively during an assessment center; and

(g) Behavioral observation skills.

(2) Persons certified as assessors shall:

(a) Serve as an assessor in a minimum of one (1) assessment center;

(b) Adhere to the ethical standards of quality required by the NASSP and the Kentucky Department of Education in the use of the assessment center materials and processes;

(c) Maintain the copyright and confidentiality of the NASSP assessment center process and materials; and

(d) Maintain the confidentiality of the individual assessee performance data.

Section 9. (1) The state principal assessment center director shall maintain assessment center reports. Each written assessment report shall be the property of the Kentucky Department of Education and the school district or vocational region.

(2) Two (2) copies of each assessee's written assessment report shall be retained - one (1) copy for the school district or vocational region and one (1) for the state principal assessment center director. Written assessment reports shall be mailed to the school district superintendent or vocational director only.

(3) The security of assessment center data shall be maintained. Access to the district's copy of each assessment report shall be restricted to the superintendent or vocational director or designee.

(4) Written assessment reports shall not be released to any outside party by any school district or vocational region. Reports shall be disseminated by the state principal assessment center director only after written authorization has been given by the assessee.

(5) The complete written assessment report shall be retained indefinitely in confidential state principal assessment center director files. Working documents used by the assessment team to formulate each report shall be discarded after five (5) years.

Section 10. To assure an adequate number of accessors are available for principal assessment purposes, each school district and vocational region shall provide a minimum of one (1) assessor for every three (3) principals currently employed in that district or vocational region. If less than three (3) principals are employed in a district or vocational region, the district or vocational region shall provide one (1) assessor each year.

Section 11. (1) Reimbursement for school district or vocational region. Assessees' and assessors' expense reimbursement shall be made in accordance with 200 KAR 2:006.

(2) Reimbursement for school district and vocational region assessee candidates shall be made by the Department of Education for up to three (3) assessee candidates per principalship opening.

(3) The Kentucky Department of Education shall pay a stipend for duties performed by an assessor.

(4) All other aspiring principals shall be responsible for any costs associated with the assessment as openings occur in the assessment centers.

Section 12. Complaints regarding failure to comply with statutory and regulatory provisions of the principal assessment program shall be directed to and evaluated by the Kentucky Department of Education. Whenever practicable, a decision on such complaints shall be made within sixty (60) days following written receipt of the complaint.

Section 13. The Kentucky Department of Education shall collect and analyze data on an annual basis regarding the performance and evaluation of assessors and assessees in the principal assessment center process.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
APPROVED BY AGENCY: May 13, 1994
FILED WITH LRC: May 13, 1994 at 11 a.m.

EDUCATION, ARTS, AND HUMANITIES
Department of Education
Office of Learning Programs Development
(As Amended)

704 KAR 3:406. Superintendent training program and assessment process.

RELATES TO: KRS 156.111, 160.350
STATUTORY AUTHORITY: KRS 156.111
NECESSITY AND FUNCTION: KRS 156.111 mandates that the Kentucky Department of Education establish a superintendent training program and assessment center and that the State Board for Elementary and Secondary Education adopt administrative regulations to govern the training content, number of hours, written examination, and criteria for successful completion of the training and assessment center process. This administrative regulation implements the superintendent training program and assessment center process.

Section 1. Definitions. (1) "Assessee" means an individual who undergoes the assessment process.

(2) "Assessment center candidate" means a superintendent or applicant for a superintendent position who has been recommended by a local board of education or the Kentucky Department of Education to undergo assessment.

(3) "Assessor" means a trained observer who records and analyzes assessee performance during an assessment.

(4) "Assessor training" means training in which participants are taught how to observe and record behaviors displayed by assessment center candidates and are taught to write objective and comprehensive reports.

(5) "Comprehensive superintendent examination" means a written comprehensive examination over the following subjects:

(a) Core concepts of management;

(b) School-based decision making;

(c) Kentucky school law;

(d) Kentucky school finance;

(e) School curriculum and assessment.

(6) "Final assessment report" means a written report providing the overall performance ratings as well as the performance rating for each skill, and shall include suggestions for improvement and growth, and signatures of all persons involved in the assessment process.

(7) "Mastery level on the Kentucky Superintendent Comprehensive Examination" means a required level of performance on each of the five (5) components of the Kentucky Superintendent Comprehensive Examination to be determined by an advisory committee to the Kentucky Department of Education based on technical reports secured from field test data obtained during the 1992-93 school year.

(8) "Screening committee" means the local superintendent search screening committee required by KRS 160.352.

(9) "Superintendent assessment and training and testing process" means a comprehensive assessment process and training program

including assessment of personal administrative skills, training modules in identified skill dimensions and selected concepts related to the position of school superintendent, and a comprehensive examination. Assessment and training are more specifically defined as follows:

(a) "Assessment process" means a Kentucky Department of Education psychometric procedure emphasizing multiple individual and group simulations representative of the superintendent position which will yield extensive feedback of each assessee's strengths and behaviors in skill dimensions validated as essential for effective performance. The assessment process is used to develop a personal skills profile on candidates seeking employment or employed in superintendent positions.

(b) "Training program" means a series of training modules designed for the purpose of improving individual skills of superintendent candidates or providing knowledge in the following subjects:

1. Core concepts of management, up to eighteen (18) hours;
2. School-based decision making, up to nine (9) hours;
3. Kentucky school law, up to nine (9) hours;
4. Kentucky school finance, up to twelve (12) hours;
5. School curriculum and assessment, up to twenty-four (24) hours.

(10) "Written assessment report" means a report which provides each assessee with a profile of strengths and behaviors and suggestions to help improve the assessee's skills.

(11) "Written testing report" means a report which provides each assessee with certification of successful completion of each component of the comprehensive superintendent examination.

Section 2. (1) The Superintendent Training and Assessment Center shall be responsible for the assessment of superintendents and superintendent applicants, provide assessor training, provide training using Kentucky Department of Education approved modules, and serve as the site for the administration of the comprehensive superintendent examination.

(2)(a) The center staff shall coordinate assessments and trainings, maintain all records, make provisions for the necessary reporting of training and assessment status as to all superintendents, and report the status of all superintendent candidates to the chairperson of the local board of education.

(b) The report shall:

1. Be sent at the conclusion of participation in the training, testing, and assessment process;
2. Include a copy to the participating superintendent;
3. Specify whether the participating superintendent successfully completed the training, testing, and assessment process.

(c) A report shall be made to the assessee, the Office of Teacher Education and Certification, and the local board of education chairperson on any person serving in the position of superintendent, who does not complete the assessment and successfully complete the comprehensive superintendent examination within the applicable deadlines set forth in KRS 156.111 and 160.350.

Section 3. (1) The following requirements shall apply to a person hired for the first time as a superintendent in Kentucky after July 1, 1992 and before July 1, 1994:

(a) Superintendents who complete the assessment phase and demonstrate mastery on the Kentucky Superintendent Comprehensive Exam shall be certified as having met the requirements of KRS 156.111.

(b) A superintendent who does not demonstrate mastery on any one (1) of the components of the Kentucky Superintendent Comprehensive Exam shall be eligible to participate in a second training of the appropriate module(s) of the training program prior to retaking the comprehensive examination or shall retake the comprehensive examination on the next scheduled date of the examination.

(2) Persons employed as superintendent in Kentucky prior to July 1, 1992, may elect to not participate in any, or all, of the modules of the training phase and take the appropriate components of the comprehensive examination.

(a) Superintendents who complete the assessment phase and demonstrate mastery on the Kentucky Superintendent Comprehensive Exam shall be certified as having met the requirements of KRS 156.111.

(b) Superintendents who do not demonstrate mastery on the Kentucky Superintendent Comprehensive Exam shall be eligible to participate in further training in corresponding module(s) as a requirement for eligibility to repeating the comprehensive examination.

(3) A person hired for the first time as a superintendent in Kentucky after June 30, 1994, shall have one (1) year from the time of employment to successfully complete the assessment and training and testing program described in subsection (1)(a) and (b) of this section.

Section 4. (1) The Superintendent Training and Assessment Center director shall allocate training and assessment center slots, considering factors to assure diversity and equal access. Local school districts with actual or imminent superintendent vacancies shall be given priority in the assignment of training and assessment center slots.

(2) Each assessee, upon completion of the superintendent assessment center process, shall receive a final assessment report. Superintendents and superintendent candidates shall complete the requirements for training and assessment and achieve the designated mastery level on each of the modules of the Kentucky Superintendent Comprehensive Examination to successfully complete the training and testing and assessment.

(3) Upon completion of the assessment and successful completion of testing by superintendent candidates, the Superintendent Training and Assessment Center staff shall provide the Office of Teacher Education and Certification and the chairperson of the appropriate local board of education a written report confirming completion of the assessment and successful completion of testing.

(4) Persons desiring to be assessed as superintendent, but who are not employed as a superintendent or are not candidates for superintendency at the time, may have requests granted by the Superintendent Training and Assessment Center director at the candidate's expense.

(5) Prior to assessment, an assessment center candidate shall be required to sign an oath which pledges nondisclosure of the assessment center process and materials.

Section 5. (1) The Superintendent Training and Assessment Center staff shall maintain all assessment center reports.

(2) The security of training and testing and assessment data shall be maintained by the Superintendent Training and Assessment Center staff. Each written report shall be the property of the Kentucky Department of Education. Individual profile reports shall be disseminated by the Superintendent Training and Assessment Center staff only after written authorization has been given by the assessee.

(3) All complete written training and assessment center reports shall be retained in confidential Superintendent Training and Assessment Center files. Working documents used by the assessment or training team to formulate each report shall be discarded after three (3) years.

Section 6. The Kentucky Department of Education may pay a stipend for each assessment performed by an assessor and for services necessary to conduct training and testing as needed.

Section 7. Complaints regarding failure to comply with statutory and regulatory provisions of the Superintendent Training and Assessment Program shall be directed to and evaluated by the Kentucky Department of Education.

Section 8. (1) Continuing education for superintendents shall include:

(a) Participation in forty-two (42) hours of Kentucky Department of Education approved training over twenty-four (24) months; or

(b) Completion of an annual individual personal growth training plan of at least twenty-one (21) hours.

(2) Completion of continuing education of the superintendent shall be reported to the Kentucky Department of Education. The Kentucky Department of Education shall annually notify the local board of education chairperson of the status of the school district's superintendent's continuing education.

(3) Failure to comply with the requirements of this administrative regulation shall result in referral of the matter to the Education Professional Standards Board for consideration of revocation of the superintendent certificate.

Section 9. 704 KAR 3:405 is repealed.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
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EDUCATION, ARTS, AND HUMANITIES CABINET
Department of Education
Office of Special Instructional Services
(As Amended)

705 KAR 4:231. General program standards for secondary vocational education programs.

RELATES TO: KRS 151B.025, 156.029, 20 USC 2301-2471

STATUTORY AUTHORITY: KRS 156.029, 156.070, 20 USC 2301-2471

NECESSITY AND FUNCTION: KRS 151B.025 retains with the State Board for Elementary and Secondary Education the authority to prescribe program standards for area vocational education centers. This administrative regulation establishes those standards for secondary vocational education essential for compliance with federal vocational education acts.

Section 1. Secondary vocational education programs shall be designed to serve students enrolled in the following middle school and secondary program areas: agricultural education, business education, health and personal services, home economics, industrial/technology education, marketing education, special vocational programs, career exploration, and special applied academic area for vocational students. Instructional programs shall not discriminate on the basis of race, color, national origin, age, religion, marital status, sex, or disability, in violation of state or federal statutes.

Section 2. Instruction shall be designed to:

(1) Assist individuals in the process of preparing for school to work transition.

(2) Prepare individuals for advanced or highly skilled vocational and technical education programs, including Tech Prep, or entrance into college.

(3) Prepare individuals for gainful employment in recognized occupations and in new or emerging occupations.

(4) Assist individuals in obtaining computer literacy skills.

Section 3. The content of the instruction in secondary vocational programs shall:

(1) Be based on the skills, attitudes, and knowledge required to achieve the objectives of the instruction and include a planned sequence of courses or experiences necessary for the individual to achieve the objective;

(2) Be developed and conducted in consultation with employers and other individuals having skills and knowledge of the occupation or the occupational fields included in the instruction;

(3) Include the most up-to-date knowledge and skills necessary for competencies required to meet the objectives of such instruction; and

(4) Be sufficiently extensive in duration and intensive within a scheduled unit of time to enable students to achieve the objectives of the instruction.

Section 4. A student completing the requirements for a career major may receive a Certificate of Secondary Vocational Education Completion of Occupation Program.

Section 5. Secondary vocational programs shall be designed to accommodate students with special learning needs, i.e., the disadvantaged, the disabled and individuals with limited English proficiency. Special programming shall conform to the requirements outlined in the Program of Studies for Kentucky Schools, 704 KAR 3:303.

Section 6. Secondary vocational education programs shall provide a variety of learning experiences. Programs in grades six (6) through eight (8) shall be designed to allow students to become aware of and explore clusters of occupations. Programs in grades nine (9) **through** ~~[and]~~ twelve (12) shall provide in-depth exploration, specialized skill development or prepare individuals for advanced education. Students enrolled in public or private schools shall be permitted to enroll in a state-operated vocational program consistent with that school district's enrollment quota.

Section 7. Vocational preparation programs shall provide a curriculum of sufficient length to permit students to secure entry level skills in the occupation for which they are training. The curriculum shall conform to the requirements in the Program of Studies for Kentucky Schools, 704 KAR 3:303.

Section 8. Recognized vocational student organizations shall be an integral part of the instructional program provided and shall be supervised by qualified vocational education personnel. All students shall be provided an opportunity to participate in leadership development activities.

Section 9. Instructional and administrative personnel shall meet the teacher certification requirements as specified by the Education Professional Standards Board.

Section 10. An annual plan for each school year along with an application for funds shall be submitted by each eligible recipient annually. This shall be submitted directly to the Department of Education for review and approval.

Section 11. Each vocational program area shall have an active program advisory committee to assist in planning, implementing, and evaluating programs.

Section 12. Requests for exceptions to any standards for vocational instructional programs shall be submitted in writing by the local educational agency to the chief state school officer. Exceptions shall be limited to experimental programs, innovative programs, and

unusual cases and shall be approved on an individual and annual basis.

Section 13. (1) The maximum number of students per class shall be based on the class setting. For a classroom setting, the maximum enrollment shall be thirty-one (31); for a laboratory or shop setting, the maximum enrollment shall be twenty-seven (27). The number of students enrolled in a class cannot exceed the number of work stations available in the facility. For a supervised out-of-school setting, the maximum enrollment shall be twenty-seven (27). Approval by the chief state school officer is required for justification of exceptions, and such shall be granted only for good cause shown.

(2) There shall be at least one (1) class period for supervision of cooperative vocational education work experience program. Additional periods for supervision may be justified based on the number of students enrolled in the program. Each participating student shall have a training agreement and training plan between school, student, and employer.

(3) Each program shall provide classrooms, laboratories, and other facilities including instructional equipment, supplies, teaching aids, and other materials in sufficient quantity and quality to meet the objectives of the vocational instruction. Equipment used in vocational education programs shall be similar to that used in business and industry. An inventory of all equipment with an original purchase price of $300 or more shall be maintained by the local school district. The facilities for each program shall be of adequate size to accommodate the activities and the number of work stations unique to the program. The facility shall be approved by the chief state school officer.

Section 14. Each vocational program shall be evaluated annually in accordance with the requirements of the Carl Perkins Vocational and Applied Technology Education Act, Core Standards and Measures, 20 USC 2301 to 2471, the Department of Technical Education, the local education agency, and the Kentucky Department of Education. The evaluation shall be used to determine the effectiveness of the program in terms of its objectives and shall include annual follow-up data as well as annual enrollment reports. An audit of the utilization of federal and state funds shall be conducted by the Division of Secondary Vocational Education or Department of Technical Education to assure that **the programs** [~~such~~] are meeting the requirements for each approved vocational education program.

Section 15. Programs offered by any eligible recipient of federal funds shall be disapproved for the federal funds if program requirements and provisions of the Kentucky State Plan for Vocational Technical Education are not met.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
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CABINET FOR HUMAN RESOURCES
Department for Social Insurance
Division of Management & Development
(As Amended)

904 KAR 3:041. Food Stamp Employment and Training Program.

RELATES TO: KRS 194.050, 7 CFR 273.7
STATUTORY AUTHORITY: KRS 194.050
NECESSITY AND FUNCTION: The Cabinet for Human Resources is required to administer a Food Stamp Employment and Training (ET) Program. KRS 194.050 provides that the secretary shall, by administrative regulation, develop policies and operate programs concerned with the welfare of the citizens of the Commonwealth. This administrative regulation sets forth the technical eligibility requirements used by the cabinet in the administration of the Food Stamp ET Program.

Section 1. Definitions. (1) "Conciliation" means a fifteen (15) day period that is used to determine why noncompliance with ET requirements occurred.

(2) "Exempt" means an individual who is excused by the agency from participation in the employment and training program.

(3) "Primary wage earner (PWE)" means the household member providing the most earned income in the prior two (2) months.

(4) "Voluntary quit" means the self-termination of employment by a household member on a voluntary basis.

Section 2. Work Registration. (1) Except those meeting exempt criteria in subsection (4) of this section, all household members shall be required to register for work:

(a) At the initial application for food stamps; and

(b) Every twelve (12) months following the initial application.

(2) Work registration shall be completed by:

(a) The member required to register; or

(b) The person making application for the household.

(3) Unless otherwise exempt, persons who are excluded household members of the food stamp case, shall be required to register for work during periods of disqualification. These individuals are:

(a) Ineligible aliens;

(b) Individuals disqualified for refusing to provide or apply for a Social Security number; and

(c) Individuals disqualified for intentional program violation.

(4) The following shall be exempt from work registration requirements:

(a) A person younger than sixteen (16) years of age or a person sixty (60) years of age or older;

(b) A person age sixteen (16) or seventeen (17) who is not a head of a household or who is attending school, or enrolled in an employment training program on at least a half-time basis;

(c) A person who is physically or mentally disabled;

(d) A household member subject to and complying with any work requirement in the AFDC Program;

(e) A parent or other household member who is responsible for the care of:

1. A dependent child under age six (6); or

2. An incapacitated person;

(f) A person who receives unemployment compensation or a person who has applied for, but has not yet begun to receive, unemployment compensation if that person was required to register for work with the Department for Employment Services as part of the unemployment compensation application process;

(g) A regular participant in a substance abuse or alcohol treatment and rehabilitation program;

(h) A person who is employed or self-employed and:

1. Working a minimum of thirty (30) hours weekly; or

2. Receiving weekly earnings at least equal to the federal minimum wage multiplied by thirty (30) hours;

(i) A migrant or seasonal farm worker who:

1. Meets the criteria in paragraph (h) of this subsection; and

2. Is under contract or similar agreement with an employer or crew chief to begin employment within thirty (30) days; or

(j) A student enrolled at least half time in any recognized school,

training program, or institution of higher education, provided that those meeting student status have met the eligibility conditions in 904 KAR 3:025, Section 3.

(5) A household member who loses exemption status due to a change in circumstances **that are subject to the reporting requirements of the Food Stamp Program** shall work register:

(a) When the change is reported, **if the change is:**

1. A change in the source of income or in the amount of gross monthly income totaling more than twenty-five (25) dollars, unless the amount change is in an Aid to Families with Dependent Children (AFDC) grant;

2. Any change in household composition, including the addition or loss of a household member;

3. A change in residence and the resulting change in shelter costs;

4. The acquisition of a nonexempt licensed vehicle or loss of a vehicle exemption for a physically disabled household member;

5. A change in total resources that reach or exceed the allowable maximum; or

(b) At the household's next recertification **if** ~~[depending on what]~~ the change in circumstance involves **a change not subject to reporting requirements in paragraph (a) of this subsection**.

(6) All nonexempt household members shall be subject to the following work requirements:

(a) Keep the initial assessment interview;

(b) Provide requested verification by mail or in person;

(c) Participate in an ET program if assigned;

(d) Respond to any request for additional information regarding employment status or availability for work;

(e) Report to an employer if referred by the ET worker or designee provided that the potential employment is not unsuitable as designated in Section 7 of this administrative regulation; and

(f) Accept a bona fide offer of suitable employment at a wage not less than state or federal minimum wage.

(7) Household members who are exempt or those completing the work registration requirements may volunteer to participate in the ET program.

(8) The ET worker shall explain to the food stamp applicant:

(a) The work requirements for each nonexempt household member;

(b) The rights and responsibilities of the work registered household members; and

(c) The consequences of failing to comply.

(9) Each household member required to register shall be notified in writing of the requirements in subsection (6) of this section.

Section 3. Employment and Training Participation. (1) Work registrants who reside in a county which offers a Food Stamp Employment and Training Program shall be required to participate in the Food Stamp Employment and Training Program based on priority status.

(2) Priority status shall be determined if the work registrant:

1. Has no high school diploma or GED;

2. Has no employment in the last twelve (12) months; or

3. Is a veteran.

(3) ET participants shall:

(a) Be placed in education, skills training or job search activities;

(b) Be reimbursed for miscellaneous and dependent care expenses, if otherwise eligible, up to:

1. **The child care maximum payments as specified in 904 KAR 2:107 for child care expenses incurred on or after September 1, 1994,** [~~$160~~] per dependent per month for incurred child care expenses; and

2. Twenty-five (25) dollars a month for miscellaneous expenses incurred while participating in the ET Program.

(4) Those participants who do not meet the criteria in subsection (2) of this section **shall** [~~may or may~~] not be selected to participate in an ET component **unless they are adamant about participating**.

Section 4. Components. All counties offering the Employment and Training Program shall offer the following services and activities:

(1) Educational components shall be:

(a) Literacy programs;

(b) Adult basic education (ABE);

(c) General equivalency diploma (GED); and

(d) Community college.

(2) Skills training components shall be:

(a) Vocational school;

(b) On-the-job training; and

(c) Kentucky Domestic Violence Association (KDVA).

(3) Job search components shall be:

(a) Job seeking skills training;

(b) Group job search; and

(c) Individual job search.

Section 5. Conciliation. (1) When an ET participant fails to comply with ET program requirements, a conciliation period is initiated.

(2) Conciliation is used to:

(a) Determine the reason for the noncompliance; and

(b) Allow the participant the opportunity to resolve the problem in order to continue participation.

(3) Conciliation lasts for fifteen (15) days and in that time the ET worker shall:

(a) Determine good cause for noncompliance; or

(b) Encourage the participant to resume ET activity; or

(c) Recommend disqualification for failure to comply with program requirements.

(4) If the participant resumes ET activity, no further action is required toward applying a sanction.

(5) If conciliation is unsuccessful and the participant does not provide good cause or refuses to comply, a disqualification is imposed.

Section 6. Determining Good Cause. (1) Good cause shall be determined in instances where the work registrant has failed to comply with:

(a) Work registration requirements as specified in Section 1 of this administrative regulation;

(b) Employment and training requirements as specified in Section 3 of this administrative regulation; or

(c) Voluntary quit requirements as specified in Section 9 of this administrative regulation.

(2) Good cause for failing to meet work registration and employment and training requirements shall include circumstances beyond the control of the registrant including:

(a) Illness;

(b) Illness of another household member requiring the presence of the registrant;

(c) A household emergency;

(d) Unavailability of transportation; and

(e) Inadequate child care for children who have reached age six (6) but are under age twelve (12).

Section 7. Sanctions in the ET Program. (1) Disqualifications are imposed as follows:

(a) If the **nonprimary wage earner** (non-PWE) fails to comply with ET, the individual is ineligible to receive food stamp benefits for two (2) months;

(b) If the **primary wage earner** (PWE) fails to comply with **ET requirements** [~~ETP~~], the entire household is ineligible to receive food stamp benefits for two (2) months.

(2) If a disqualification is imposed, the disqualified member **shall** [~~must~~] make reapplication for food stamps or request that the member

be added to an active food stamp case to initiate a cure for noncompliance.

(3) Ineligibility as outlined in subsections (1) and (2) of this section continues until the ineligible member:

(a) Leaves the household;

(b) Becomes exempt from work registration;

(c) Complies with the work registration requirements; or

(d) The two (2) month disqualification period expires, whichever occurs first.

(4) If an ineligible household member joins a new household and:

(a) Is the primary wage earner, the entire new household then becomes ineligible for the remainder of the disqualification period; or

(b) Is not the primary wage earner, only he remains ineligible for the remainder of the disqualification period.

Section 8. Unsuitable Employment. Employment shall be considered unsuitable by the agency if:

(1) The wage offered is less than the highest of the following:

(a) The applicable federal minimum wage;

(b) The applicable state minimum wage; or

(c) Eighty (80) percent of the federal minimum wage if neither the federal nor state minimum wage is applicable.

(2) The employment offered is on a piece-rate basis and the average hourly yield the employee can reasonably expect to earn is less than the applicable hourly wage specified in subsection (1) of this section.

(3) The household member, as a condition of employment or continuing employment, is required to join, resign from, or refrain from joining any legitimate labor organization.

(4) The work offered is at a site subject to a strike or lockout at the time of the offer, unless the strike has been enjoined under 29 USC 178 and 45 USC 152.

(5) In addition, employment is considered unsuitable if the household member involved can demonstrate or the worker otherwise becomes aware that:

(a) The degree of risk to health and safety is unreasonable;

(b) The member is physically or mentally unsuited to perform the employment. This must be documented by medical evidence or by reliable information from other sources;

(c) The employment offered within the first thirty (30) calendar days of registration is not in the member's major field of experience **as demonstrated by the individual or if the worker otherwise becomes aware**;

(d) Daily commuting time exceeds two (2) hours a day, not including transporting a child to and from a child care facility;

(e) The distance to the place of employment prohibits walking and neither public nor private transportation is available to transport the member to the job site; or

(f) The working hours or nature of the employment interferes with the member's religious observances, convictions or beliefs.

Section 9. Voluntary Quit. (1) A **primary wage earner** **[**~~head of household~~**]** who voluntarily quits a job of twenty (20) hours or more a week without good cause sixty (60) days or less prior to the date of food stamp application shall not be eligible to participate in the program.

(2) The disqualification period for voluntary quit shall be:

(a) Ninety (90) days from the date of quit if the individual is an applicant; and

(b) Ninety (90) days beginning with the first of the month after all normal procedures for taking adverse action have been taken if the individual is in an active food stamp case.

(3) Good cause for leaving employment includes criteria in Section 5 of this administrative regulation and the following:

(a) Discrimination by the employer based on:

1. Age;
2. Race;
3. Sex;
4. Color;
5. Disability;
6. Religious beliefs;
7. National origin; or
8. Political beliefs;

(b) Work demands or conditions that render continued employment unreasonable, **[**~~such~~**]** as **in** working without being paid on time;

(c) Acceptance of employment by the head of household, or enrollment of at least half time in any recognized school, training program or institution of higher education, that requires the head of household to leave employment;

(d) Acceptance of employment by any other household member or enrollment at least half time in any recognized school, training program or institution of higher education in another county or similar political subdivision which requires the head of household to leave employment;

(e) Resignations of persons under age sixty (60) which are recognized by the employer as retirement;

(f) Employment which becomes unsuitable by not meeting criteria in Section 8 of this administrative regulation after the acceptance of the employment;

(g) Acceptance of a bona fide offer of employment of more than twenty (20) hours a week or in which the weekly earnings are equivalent to the federal minimum wage multiplied by twenty (20) hours which, because of circumstances beyond the control of the primary wage earner, subsequently either does not materialize or results in employment of less than twenty (20) hours a week or weekly earnings of less than the federal minimum wage multiplied by twenty (20) hours; and

(h) Leaving a job in connection with patterns of employment in which workers frequently move from one (1) employer to another **[**~~such~~**]** as **in** migrant farm labor or construction work.

(4) Good cause for voluntary quit shall be verified if questionable.

Section 10. Curing Sanction for Voluntary Quit. (1) A household may begin participation in the Food Stamp Program following the voluntary quit disqualification period if it applies again and is determined eligible.

(2) Eligibility may be reestablished during a disqualification period and the household shall, if otherwise eligible, be allowed to resume participation if the member who caused the disqualification:

(a) Secures new employment which is comparable in salary or hours to the job which was quit; or

(b) Leaves the household.

(3) A work registrant who:

(a) Is required to participate in the:

1. Food Stamp Employment and Training Program; or
2. Aid to Families with Dependent Children (AFDC), Job Opportunities and Basic Skills (JOBS) Program as specified in 904 KAR 2:006 and 904 KAR 2:370; and

(b) Fails to participate shall be ineligible to receive food stamp benefits for two (2) months unless:

1. Good cause exists;
2. The noncompliant individual was participating in a JOBS component which is more stringent than the components of the ET Program; or
3. The noncompliant JOBS participant is otherwise exempt from work registration in the ET Program.

(c) An individual who is not sanctioned in the Food Stamp Program as meeting the criteria in paragraph (b)2 of this subsection shall be work registered in the ET Program unless otherwise exempt by subsection (2) of this section.

Section 11. Hearing Process. Work registrants shall have the same opportunity to request a hearing as specified in 904 KAR 3:070.

Section 12. Replacements for employment and training reimbursement checks that are lost or stolen shall be made by completing appropriate forms.

Section 13. Material Incorporated by Reference. (1) Forms necessary for participation in the Food Stamp Employment and Training Program are being incorporated effective January 1, 1994. These forms include:

(a) ET-101, revised 7/93;
(b) ET-102, revised 8/93;
(c) ET-102 Supplement A, revised 12/91;
(d) J/ET-108, revised 9/91;
(e) ET-111, revised 7/93;
(f) ET-112, revised 10/90;
(g) ET-114, revised 12/91;
(h) ET-116, revised 12/93.

(2) Material incorporated by reference may be inspected and copied at the Department for Social Insurance, 275 East Main Street, Frankfort, Kentucky 40621. Office hours are 8 a.m. to 4:30 p.m.

MIKE ROBINSON. Commissioner
FONTAINE BANKS, JR., Secretary
APPROVED BY AGENCY: March 1, 1994
FILED WITH LRC: May 9, 1994 at 11 a.m.

ADMINISTRATIVE REGULATIONS AMENDED AFTER PUBLIC HEARING OR RECEIPT OF WRITTEN COMMENT

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:001. Definitions of terms used in 401 KAR Chapter 5.

RELATES TO: KRS 224.01-010, ~~[224.01-110,]~~ 224.10-100, 224.10-110, 224.16-050, 224.16-060, 224.70-100, 224.70-110, 33 USC 1288, 1314(b), 1342, 40 CFR Parts 116, 136, 401-471

STATUTORY AUTHORITY: KRS ~~[224.01-110,]~~ 224.10-100, 224.10-110, 224.16-060, 224.70-100, 224.70-110, 33 USC 1288, 1314(b), 1342, 40 CFR Parts 116, 136, 401-471

NECESSITY AND FUNCTION: KRS 224.10-100 authorizes the Natural Resources and Environmental Protection Cabinet to promulgate administrative regulations for the prevention, abatement, and control of all water pollution. This chapter establishes administrative regulations for the issuance of permits to construct, modify, and operate facilities which discharge pollutants to waters of the Commonwealth. This administrative regulation establishes definitions for terms and acronyms, abbreviations, and symbols used in 401 KAR Chapter 5, relating to the issuance of those permits.

Section 1. Definitions. The definitions established in this administrative regulation govern the subject matter of this chapter. Terms not defined in this administrative regulation shall have the meanings given them by KRS 224.01-010.

(1) "Act" means the Federal Water Pollution Act, also known as the Clean Water Act, as amended, 33 USC 1251 et seq.

(2) "Activity" means, for purposes of 401 KAR 5:050 to 5:080 and when used in conjunction with facility, any KPDES point source, or any other activity, including land or appurtenances thereto, that is subject to regulation under the KPDES program.

(3) "Administrator" means the administrator of the United States Environmental Protection Agency, or the administrator's authorized representative.

(4) "Agricultural wastes handling system" means a no-discharge structure or equipment that conveys, stores, or treats manure from a concentrated animal feeding operation prior to land application.

(5) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under 401 KAR 5:055.

(6) "Animal feeding operation" means, for purposes of 401 KAR 5:050 to 5:080, a lot or facility, other than an aquatic animal production facility, where the following conditions are met:

(a)1. Animals other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained for a total of forty-five (45) days or more in any twelve (12) month period; and

2. Crops, vegetation forage growth, or postharvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(b) Two (2) or more animal feeding operations under common ownership are considered to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

(7) "Animal unit" means, for purposes of 401 KAR 5:050 to 5:080, the unit of measurement for any animal feeding operation, calculated according to the following equation:

$$\text{Animal Unit} = (N_1 \times 1.0) + (N_2 \times 1.4) + (N_3 \times 0.4) + (N_4 \times 0.1) + (N_5 \times 2.0)$$

Where:

N_1 = Number of slaughter and feeder cattle;
N_2 = Number of mature dairy cattle;
N_3 = Number of swine weighing over twenty-five (25) kg;
N_4 = Number of sheep; and
N_5 = Number of horses.

(8) "Applicable standards and limitations" means all standards and limitations to which a discharge or a related activity is subject under KRS Chapter 224, and administrative regulations promulgated pursuant thereto, including but not limited to effluent limitations, water quality standards, standards of performance, and toxic effluent standards.

(9) "Application" means the document submitted by an applicant to the cabinet which provides information used by the cabinet in the issuance of a permit or approval. The application may have several different forms, depending on the type of permit which is requested. The specific forms are required in the applicable administrative regulation.

(10) "Approved POTW pretreatment program", "POTW pretreatment program", "pretreatment program", or "program" means a program administered by a POTW that meets the criteria established in 401 KAR 5:057 and which has been approved by the cabinet.

(11) "Aquaculture project" means a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater plants and animals.

(12) "Area of review" means a fixed radius around a facility of not less than one-fourth (1/4) mile.

(13) "Arithmetic mean for seven (7) consecutive days" means the average of a minimum of two (2) samples taken on separate days in a seven (7) day period.

(14) "Arithmetic mean for thirty (30) consecutive days" means the average of a minimum of three (3) samples collected in separate calendar weeks during a period of thirty (30) consecutive days with a minimum of twenty (20) days occurring between the first and last sample days.

(15) "Association of Boards of Certification" or "ABC" means that organization which serves as an information center for certification activities, recommends minimum standards and guidelines for classification of water supply and wastewater systems, and assists authorities in establishing new certification programs and upgrading existing programs.

(16) "Average monthly discharge limitation" means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

(17) "Average weekly discharge limitation" means the highest allowable average of daily discharges over a calendar week, calculated as the sum of all daily discharges measured during a calendar week divided by the number of daily discharges measured during that week.

(18) "Balanced indigenous community" means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species, and a lack of domination by pollution tolerant species. Such a community may include historically nonnative species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modification. Normally, however, such a community does not

include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance of all sources with 401 KAR 5:065, and may not include species whose presence of abundance is attributable to alternative effluent limitations imposed pursuant to 401 KAR 5:055.

(19) "Barrel" means forty-two (42) U.S. gallons.

(20) "BAT" means best available technology economically achievable.

(21) "BCT" means best conventional pollutant control technology.

(22) "Best management practices" or "BMPs" means, for purposes other than agriculture operations, schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the Commonwealth. BMPs also include treatment requirements, operating procedures, practices to control site run-off, pollution of surface water and groundwater from nonpoint sources, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(23) "Biochemical oxygen demand", "BOD", or "BOD_5" means the amount of oxygen required to stabilize biodegradable organic matter under aerobic conditions within a five (5) day period. Other time periods may be measured, and if so, are indicated where the term is used.

(24) "BMPs" means best management practices.

(25) "Board" means the Kentucky Board of Certification of Wastewater System Operators, as established by KRS 224.73-110.

(26) "BOD" or "BOD_5" means biochemical oxygen demand.

(27) "BPT" means best practicable technology currently available.

(28) "Bypass" means the intentional diversion of sewage or waste streams from a portion of a facility or industrial user's treatment facility.

(29) "°C" means degrees Celsius.

(30) "CAH" means cold water aquatic habitat.

(31) "Carbonaceous biochemical oxygen demand" or "CBOD" means BOD, not including the nitrogenous oxygen demand of the wastewater.

(32) "CBOD" means carbonaceous biochemical oxygen demand.

(33) "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 USC 9601 et seq.).

(34) "Certificate" means the certificate of competency issued by the secretary or the secretary's designated agent stating that the operator has met the requirements for the specified operator classification as set by 401 KAR 5:010.

(35) "Certified operator" means a wastewater operator employed at a wastewater system who has primary responsibility for the system or a portion thereof which may affect the performance of the system and who holds a certificate of competency meeting the requirements of 401 KAR 5:010.

(36) "cfm" means cubic feet per minute.

(37) "CFR" means Code of Federal Regulations.

(38) "Clean Water Act" or "CWA" means the Clean Water Act as subsequently amended (33 USC Section 1251 et seq.), otherwise known as the Federal Water Pollution Control Act.

(39) "Coal remining operation" means a surface coal mining operation which begins after July 11, 1990, at a site on which a coal mining operation was conducted before August 3, 1977. It also means a surface coal mining operation existing on July 11, 1990, which receives a permit revision from the Department for Surface Mining Reclamation and Enforcement (DSMRE) in accordance with 405 KAR 8:010, Section 20 for a site on which a coal mining operation was conducted before August 3, 1977.

(40) "COD" means chemical oxygen demand.

(41) "Cold water aquatic habitat" or "CAH" means surface waters and associated substrate that will support indigenous aquatic life or self-sustaining or reproducing trout populations on a year-round basis.

(42) "Combined sewer" or "combined sewer line" means a sewer or sewer line designed to carry storm water run-off as well as sanitary wastewater.

(43) "Combined sewer overflow" or "CSO" means the flow from a combined sewer in excess of the interceptor or regulator capacity that is discharged into a receiving water without going to a POTW.

(44) "Composite sample" means:

(a) Not less than four (4) effluent portions collected at regular intervals over a period of eight (8) hours and combined in proportion to flow;

(b) Not less than four (4) combined equal volume effluent portions collected over a period of eight (8) hours at intervals proportional to flow;

(c) An effluent portion collected continuously over a period of twenty-four (24) hours at a rate proportional to the flow; or

(d) An effluent portion consisting of a minimum of four (4) combined equal volume grab samples taken approximately two (2) hours apart.

(45) "Concentrated animal feeding operation" means, for purposes of 401 KAR 5:050 to 5:080, an animal feeding operation where:

(a) More than the following numbers of indicated animals are confined:

1. 1,000 slaughter and feeder cattle;
2. 700 mature dairy cattle, whether milked or dry cows;
3. 2,500 swine each weighing over twenty-five (25) kilograms (approximately fifty-five (55) pounds);
4. 500 horses;
5. 10,000 sheep or lambs;
6. 55,000 turkeys;
7. 100,000 laying hens or broilers if the facility has continuous overflow watering;
8. 30,000 laying hens or broilers if the facility has a liquid manure system;
9. 5,000 ducks; or
10. 1,000 animal units; or

(b)1. More than the following number and types of animals are confined:

a. 300 slaughter or feeder cattle;
b. 200 mature dairy cattle, whether milked or dry cows;
c. 750 swine each weighing over twenty-five (25) kilograms (approximately fifty-five (55) pounds);
d. 150 horses;
e. 3,000 sheep or lambs;
f. 16,500 turkeys;
g. 30,000 laying hens or broilers if the facility has continuous overflow watering;
h. 9,000 laying hens or broilers if the facility has a liquid manure system;
i. 1,500 ducks; or
j. 300 animal units; and

2. Either pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar manmade device; or pollutants are discharged directly into waters of the Commonwealth which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(c) If an animal feeding operation discharges only during a twenty-five (25) year, twenty-four (24) hour storm event or greater, the animal feeding operation shall not be considered to be a concentrated animal feeding operation.

(46) "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in 401 KAR 5:060 or which the cabinet designates under 401 KAR 5:060.

(47) "Continuous discharge" means a discharge which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

(48) "Control authority" means the POTW if the POTW has an approved pretreatment program or the cabinet if the POTW does not have an approved pretreatment program.

(49) "Conventional domestic water supply treatment" means or includes coagulation, sedimentation, filtration, and chlorination.

(50) "Conventional pollutant" means biochemical oxygen demand (BOD), chemical oxygen demand (COD), total organic carbon (TOC), total suspended solids (TSS), ammonia (as N), bromide, chlorine (total residual), color, fecal coliform, fluoride, nitrate, kjeldahl nitrogen, oil and grease, and phosphorus.

(51) "Copermittee" means a permittee to a KPDES permit that is only responsible for the permit conditions relating to the discharge for which it is the operator.

(52) "Criteria" means specific concentrations or ranges of values, or narrative statements of water constituents which represent a quality of water expected to result in an aquatic ecosystem protective of designated uses of surface waters. Criteria are derived to protect legitimate uses such as aquatic life, domestic water supply, and recreation and to protect human health.

(53) "CSO" means combined sewer overflow.

(54) "CWA" means the Clean Water Act, as amended.

(55) "Daily discharge" means the discharge of a pollutant measured during a calendar day or any twenty-four (24) hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

(56) "Date of program approval" means September 30, 1983, the effective date of the administrator's approval of Kentucky's KPDES regulatory program under CWA Section 402 (33 USC Section 1342).

(57) "Day" means a twenty-four (24) hour period.

(58) "Designated project area" means the portions of the waters of the Commonwealth within which the permittee or permit applicant plans to confine the cultivated species, using a method or plan of operation, including, but not limited to, physical confinement, which, on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants, and be harvested within a defined geographic area.

(59) "Direct discharge" means the discharge of a pollutant into waters of the Commonwealth if the discharge is not included under the definition of indirect discharger.

(60) "Discharge" or "discharge of a pollutant" means any addition of any pollutant or combination of pollutants to waters of the Commonwealth from any point source. This definition includes, but is not limited to, additions of pollutants into waters of the Commonwealth from surface run-off which is collected or channelled by human effort; discharges through pipes, sewers or other conveyances whether publicly or privately owned which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.

(61) "Discharge monitoring report" or "DMR" means the report including any subsequent additions, revisions, or modifications, for the reporting of self-monitoring results by KPDES permittees.

(62) "Disposal well" means a borehole drilled or proposed to be drilled, or a well converted to be used, for the sole purpose of disposing of any water, gas, produced water, or other fluid by injection or other method into a subsurface zone.

(63) "Division" means the Kentucky Division of Water, within the Department for Environmental Protection, Natural Resources and Environmental Protection Cabinet.

(64) "DMR" means discharge monitoring report.

(65) "Domestic" means relating to household wastes or other similar wastes. It is used to distinguish municipal, household, or commercial water or wastewater services from industrial water or wastewater services.

(66) "Domestic sewage" means sewage devoid of industrial or other wastes and which is typical of waste received from residential facilities. It may include wastes from commercial developments, schools, restaurants, and other similar developments.

(67) "Domestic water supply" or "DWS" means surface waters that with conventional treatment are suitable for human consumption through a public water system as defined in 401 KAR 8:010, culinary purposes, or for use in any food or beverage processing industry; and meet state and federal regulations under the Safe Drinking Water Act, as amended, 42 USC 300f - 300j.

(68) "Draft permit" means a document prepared under 401 KAR 5:075 indicating the cabinet's preliminary decision to issue or deny, modify, revoke and reissue, revoke, or reissue a permit. It includes a notice of intent to revoke a permit and a notice of intent to deny a permit as provided in 401 KAR 5:075. It does not include a proposed permit; a denial of a request for modification, renovation, and reissuance; or a denial of a request for revocation.

(69) "Drilling pit" means an earthen excavation for the collection of fluids associated with the drilling, construction, completion, acidizing, or fracturing of an oil or gas well.

(70) "Dry gas well" means a gas well producing one (1) barrel or less of produced water at maximum production conditions during a given twenty-four (24) hour period.

(71) "DWS" means domestic water supply.

(72) "Effluent ditch" means that portion of a treatment system which is a discrete, person-made conveyance, either totally owned, leased or under valid easement by the discharger, which transports a discharge to surface waters of the Commonwealth.

(73) "Effluent lagoon" means a treatment lagoon.

(74) "Effluent limitation" means any restriction imposed by the cabinet on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the Commonwealth.

(75) "Effluent limitations guideline" means a federal regulation published by the administrator under CWA Section 304(b) (33 USC Section 1314(b)) to adopt or revise technology-based effluent limitations.

(76) "Enhanced recovery well" means a well used for the injection of fluids to improve or maintain reservoir productivity.

(77) "Environmental Protection Agency" or "EPA" means the United States Environmental Protection Agency.

(78) "EPA" means the United States Environmental Protection Agency.

(79) "Existing source" means, for purposes of 401 KAR 5:080, any source which is not a new source or a new discharger.

(80) "°F" means degrees Fahrenheit.

(81) "Facility" means:

(a) For purposes of 401 KAR 5:050 to 5:080 and when used in conjunction with activity, any KPDES point source, or any other facility, including land or appurtenances thereto, that is subject to regulation under the KPDES program; or

(b) For purposes of 401 KAR 5:090, any well, tank, pit, structure, appurtenance or improvement used in the exploration, drilling, or production of oil or gas or used for treating, storing, or disposing of produced water.

(82) "Facilities or equipment" means buildings, structures, process or production equipment, or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

(83) "Fecal coliform" means the portion of the coliform group of bacteria which are present in the intestinal tract or the feces of warm-blooded animals. It generally includes organisms which are capable of producing gas from lactose broth in a suitable culture medium

within twenty-four (24) hours at forty-four and five-tenths (44.5) degrees plus or minus two-tenths (0.2) degrees C.

(84) "Gas" means, for purposes of 401 KAR 5:090, all natural gas, including casinghead gas, and all other hydrocarbons not defined as oil.

(85) "General permit" means any KPDES permit authorizing a category of discharges under KRS Chapter 224 within a geographical area, issued under 401 KAR 5:055.

(86) "Geologically isolated" means a zone separated from drinking water aquifers and free of known open faults or fractures and free of any unprotected wells within the area of review.

(87) "GPD" means gallons per day.

(88) "Grab sample" means:

(a) For purposes of 401 KAR 5:045, a single instantaneous portion of the effluent; or

(b) For purposes of 401 KAR 5:050 to 5:080, a single effluent portion which is not a twenty-four (24) hour composite sample.

(89) "Harmonic mean flow" means the reciprocal of the mean of the reciprocal daily flow values.

(90) "Hazardous substance" means, for purposes of 401 KAR 5:050 to 5:080, any pollutant designated under 40 CFR Part 116.

(91) "Holding pit" means an earthen excavated depression which receives and stores produced water at a facility.

(92) "Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a KPDES permit, other than the KPDES permit for discharges from the municipal separate storm sewer, and discharges resulting from fire fighting activities.

(93) "Inactive mining operations" means mining sites that are not being actively mined, but which have an identifiable owner or operator. Inactive mining operations do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim.

(94) "Incorporated place" means a city, town, township, or village that is created under the Kentucky Revised Statutes.

(95) "Indirect discharge" or "discharge" means, for purposes of 401 KAR 5:057, the introduction of pollutants into a POTW from a nondomestic industrial source regulated by the program.

(96) "Indirect discharger" means a nondomestic discharger introducing pollutants to a publicly owned treatment works.

(97) "Industrial user" or "user" means a source of indirect discharge.

(98) "Interference" means a discharge which, alone or in conjunction with discharges from other sources:

(a) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use, or disposal; and

(b) Therefore, is a cause of a violation of a requirement of the POTW's KPDES permit, including an increase in the magnitude or duration of a violation, or of the prevention of sewage sludge use or disposal in compliance with the following statutory provisions and administrative regulations or permits issued thereunder or under more stringent local administrative regulations: Section 405 of the Clean Water Act, as amended, the Solid Waste Disposal Act as amended (SWDA), including RCRA, and including any administrative regulations contained in a sludge management plan prepared pursuant to Subtitle D of the SWDA as amended, the Clean Air Act as amended, and the Toxic Substances Control Act as amended.

(99) "Intermediate facility" means a WWTP with an average daily design capacity of 10,000 to 49,999 gallons per day (GPD) or sewer lines of 2,500 feet to 5,000 feet in length including appurtenances.

(100) "Intermediate nonpublicly owned treatment works" means a facility which has a design flow rate of between 10,000 gpd and 49,999 gpd of wastewater containing only conventional pollutants and which is not a POTW.

(101) "Interstate agency" means an agency of which Kentucky and one (1) or more states is a member established by or under an agreement or compact, or any other agency, of which Kentucky and one (1) or more other states are members, having substantial powers or duties pertaining to the control of pollution as determined and approved by the secretary or administrator under the CWA or KRS Chapter 224.

(102) "KAR" means Kentucky administrative regulations.

(103) "Kentucky Pollutant Discharge Elimination System" or "KPDES" means the Kentucky program for issuing, modifying, revoking and reissuing, revoking, monitoring and enforcing permits to discharge, and imposing and enforcing pretreatment requirements. The KPDES administrative regulations are 401 KAR 5:050 to 5:080.

(104) "kg" means kilograms.

(105) "KPDES" means the Kentucky Pollutant Discharge Elimination System.

(106) "KPDES permit" means a Kentucky Pollutant Discharge Elimination System permit issued to a facility, including a POTW, or activity pursuant to KRS Chapter 224 for the purpose of operating the facility or activity.

(107) "KRS" means Kentucky revised statutes.

(108) "Large facility" means a WWTP with an average daily design capacity of 50,000 GPD or more, or sewer lines of more than 5,000 feet in length including appurtenances.

(109) "Large municipal separate storm sewer system" means all municipal separate storm sewers that are either:

(a) Located in an incorporated place with a population of 250,000 or more as determined by the latest census of the Bureau of Census;

(b) Owned or operated by a municipality other than that described in paragraph (a) of this subsection, and that are designated by the cabinet as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (a) of this subsection. In making this determination the cabinet may consider the following factors:

1. Physical interconnections between the municipal separate storm sewers;

2. The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (a) of this subsection;

3. The quantity and nature of pollutants discharged to waters of the Commonwealth;

4. The nature of the receiving waters; and

5. Other relevant factors; or

(c) The cabinet may, upon petition, designate as a large municipal separate storm sewer system, those municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one (1) or more of the systems described in paragraph (a) or (b) of this subsection.

(110) "Large nonpublicly owned treatment works" means a facility which has a design flow rate of greater than or equal to 50,000 gpd of wastewater containing only conventional pollutants and which is not a POTW.

(111) "Log sorting and log storage facilities" means, for purposes of 401 KAR 5:050 to 5:080, facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water or stored on land where water is applied intentionally on the logs.

(112) "Major facility" means any KPDES facility or activity classified as such by the cabinet in cooperation with the regional administrator. Designation as a major industry as used in KRS 224.70-120, does not indicate automatic classification as a major facility.

(113) "Major industry" means an industry that generates and discharges process-related wastewater while engaged in commercial activities including, but not limited to, resource recovery, manufactur-

ing, products distribution, and wholesale and retail trade. Each industry has a design flow rate of greater than or equal to 50,000 gpd of process wastewater containing conventional, nonconventional, or thermal pollutants. A major industry designation is not a criteria for classification as a major facility.

(114) "Major municipal separate storm sewer outfall" or "major outfall" means:

(a) A municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of thirty-six (36) inches or more or its equivalent of a discharge from a single conveyance other than a circular pipe which is associated with a drainage area of more than fifty (50) acres; or

(b) For municipal separate storm sewers that receive storm water from lands zoned for industrial activity based on comprehensive zoning plans or the equivalent, an outfall that discharges from a single pipe with an inside diameter of twelve (12) inches or more or from its equivalent of a discharge from other than a circular pipe associated with a drainage area of two (2) acres or more.

(115) "Major outfall" means a major municipal separate storm sewer outfall.

(116) "Manmade" means constructed by humans.

(117) "Maximum daily discharge limitation" means the highest allowable daily discharge.

(118) "Measurement" means the ability of the analytical method or protocol to quantify as well as identify the presence of the substance in question.

(119) "Medium municipal separate storm sewer system" means all municipal separate storm sewers that are either:

(a) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the latest census by the Bureau of Census;

(b) Owned or operated by a municipality other than that described in paragraph (a) of this subsection, and that are designated by the cabinet as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (a) of this subsection. In making this determination the cabinet may consider the following factors:

1. Physical interconnections between the municipal separate storm sewers;

2. The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (a) of this subsection;

3. The quantity and nature of pollutants discharged to waters of the Commonwealth;

4. The nature of the receiving waters; and

5. Other relevant factors; or

(c) The cabinet, may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one (1) or more of the systems described in paragraph (a) or (b) of this subsection.

(120) "Milligrams per liter" or "mg/l" means the milligrams of substance per liter of solution, and is equivalent to parts per million in water, assuming unit density.

(121) "Minor industry" means an industry that generates and discharges process-related wastewater while engaged in commercial activities including, but not limited to, resource recovery, manufacturing, products distribution, and wholesale and retail trade. Each industry has a design flow rate of less than 50,000 gpd of process wastewater containing conventional, nonconventional, or thermal pollutants. If a facility discharges process-related wastewater and does not qualify under this definition, then the facility shall be considered to be a major industry.

(122) "µg/l" means micrograms per liter, same as ppb, assuming unit density.

(123) "mgd" means million gallons per day.

(124) "mg/l" means milligrams per liter, same as ppm, assuming unit density.

(125) "Municipal separate storm sewer" means a conveyance or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains:

(a) Owned or operated by a state, city, town, county, district, association, or other public body created by or pursuant to law, having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under state law such as a sewer district, flood control district, or drainage district, or similar entity, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the Commonwealth;

(b) Designed or used for collecting or conveying storm water;

(c) Which is not a combined sewer; and

(d) Which is not part of a POTW.

(126) "Municipality" means a city, district, or other public body created by or under the Kentucky revised statutes and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or a designated and approved management agency under CWA Section 208 (33 USC 1288).

(127) "National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements.

(128) "National pretreatment standard", "pretreatment standard", or "standard" means a federal regulation containing pollutant discharge limits promulgated by the U.S. EPA in accordance with Section 307(b) and (c) of the Act, which applies to industrial users. This term includes prohibitive discharge limits established pursuant to 401 KAR 5:057.

(129) "New discharger" means, for purposes of 401 KAR 5:050 to 5:080, any building, structure, facility or installation:

(a)1. From which there is or may be a discharge of pollutants;

2. That did not commence the discharge of pollutants at a particular site prior to August 13, 1979;

3. Which has never received a finally effective NPDES or KPDES permit for discharges at that site; and

4. Which is not a new source.

(b) This definition includes an indirect discharger which commences discharging into the waters of the Commonwealth after August 13, 1979. It also includes any existing mobile point source that begins discharging at a site for which it does not have a permit.

(130) "New source" means:

(a) For purposes of 401 KAR 5:050 to 5:080, any building, structure, facility, or installation from which there is or may be a direct or indirect discharge of pollutants, the construction of which commenced:

1. After promulgation of EPA's standards of performance or pretreatment standards which are applicable to such source; or

2. After proposal of EPA's standards of performance or pretreatment standards which are applicable to such source, but only if the federal standards are promulgated within 120 days of their proposal; or

(b)1. For purposes of 401 KAR 5:057, a building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced after the publication of proposed pretreatment standards which will be applicable to the source if the standards are thereafter promulgated if:

a. The building, structure, facility or installation is constructed at a site at which no other source is located;

b. The building, structure, facility or installation totally replaces the process of production equipment that causes the discharge of pollutants at an existing source; or

c. The production or wastewater generating processes of the building, structure, facility, or installation are substantially independent of an existing source at the same site. In determining if these are substantially independent, factors such as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source shall be considered.

2. Construction on a site at which an existing source is located results in a modification rather than a new source if the construction does not create a new building, structure, facility, or installation meeting the criteria of subparagraph 1b or c of this paragraph but otherwise alters, replaces, or adds to existing process or production equipment.

3. Construction of a new source has commenced if the owner or operator has:

a. Begun, or caused to begin as part of a continuous on-site construction program:

(i) A placement, assembly, or installation of facilities or equipment;

(ii) Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

b. Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which may be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this clause.

(131) "Nonconventional pollutant" means a pollutant not considered to be a conventional pollutant, including priority pollutants identified in 401 KAR 5:060.

(132) "Nonpoint" means any source of pollutants not defined by a point source, as used in this chapter.

(133) "Nonprocess industry" means an industry that generates and discharges only nonprocess wastewater while engaged in commercial activities including manufacturing, resource recovery, products distribution, and wholesale and retail trade. Each industry discharges nonprocess wastewater, for example, noncontact cooling or stockpile run-off, and discharges wastewater that neither contains nor is likely to contain toxic pollutants in concentrations equal to or greater than the ninety-six (96) hour lethal concentration for fifty (50) percent mortality (ninety-six (96) LC_{50}) for a representative indigenous aquatic organism. If any of the above conditions is not met, then the discharge is considered to be from a minor industry.

(134) "NPDES" means National Pollutant Discharge Elimination System.

(135) "Oil" means, for purposes of 401 KAR 5:090, natural crude oil or petroleum and other hydrocarbons, regardless of specific gravity, which are produced at the well in liquid form and which are not the result of condensation of gas after it leaves the underground reservoir.

(136) "O&M" means operation and maintenance.

(137) "Operate" means, for purposes of 401 KAR 5:090, any act relating to the construction, operation, or maintenance of any facility.

(138) "Operator" means:

(a) Any person involved in the operation of a facility or activity;

(b) For purposes of 401 KAR 5:010, any person involved in the operation of a wastewater system; or

(c) For purposes of 401 KAR 5:090, any person who operates a facility.

(139) "Other wastes" means sawdust, bark or other wood debris, garbage, refuse, ashes, offal, tar, oil, chemicals, acid drainage, wastes from agricultural enterprises, and other foreign substances not included within the definitions of industrial wastes and sewage which may cause or contribute to the pollution of any waters of the Commonwealth.

(140) "Outfall" means a point source at the point where a municipal separate storm sewer discharges to waters of the Commonwealth, but does not include open conveyances connecting two (2) municipal separate storm sewers, or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the Commonwealth and are used to convey waters of the Commonwealth.

(141) "Overburden" means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(142) "Overflow" means:

(a) Any intentional or unintentional diversion of flow from a facility; or

(b) For purposes of 401 KAR 5:057, the intentional or unintentional diversion of flow from the POTW before the POTW treatment plant.

(143) "Owner" means any person who possesses any interest in:

(a) The right to develop, operate, or produce oil or gas; or

(b) Any facility or activity.

(144) "Pass through" means a discharge which exits the POTW into waters of the Commonwealth in quantities or concentrations which, alone or in conjunction with discharges from other sources, is a cause of violation of a requirement of the POTW's KPDES permit, including an increase in the magnitude or duration of a violation.

(145) "pCi/l" means picocuries per liter.

(146) "PCR" means primary contact recreation.

(147) "Permit" means a KPDES permit.

(148) "Point source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or concentrated animal feeding operation, from which pollutants are or may be discharged. The term does not include agricultural storm water run-off or return flows from irrigated agriculture.

(149) "POTW" means publicly owned treatment works as defined in KRS 224.01-010.

(150) "POTW treatment plant" means that portion of the POTW which is designed to provide treatment, including recycling and reclamation, of municipal sewage and industrial waste.

(151) "ppb" means parts per billion; assuming unit density, same as µg/l.

(152) "ppm" means parts per million; assuming unit density, same as mg/l.

(153) "Preexisting discharge" means any discharge that is occurring when applying for a KPDES permit under 401 KAR 5:029 or 5:040.

(154) "Pretreatment" means the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing the pollutants into a POTW. The reduction or alteration may be obtained by physical, chemical, or biological processes, process changes or by other means, except as prohibited by 401 KAR 5:057. Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that may interfere with or otherwise be incompatible with the POTW. However, if wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent from the equalization facility shall meet an adjusted pretreatment limit, calculated in accordance with 401 KAR 5:057.

(155) "Pretreatment requirement" means a substantive or procedural requirement related to pretreatment, other than a pretreatment standard, imposed on an industrial user.

(156) "Pretreatment standard" means a national pretreatment standard.

(157) "Primary contact recreation water" means those waters suitable for full body contact recreation during the recreation season

of May 1 through October 31.

(158) "Primary industry category" means any industry category listed as being a primary industry in 401 KAR 5:060.

(159) "Primary responsibility" means having the authority to conduct the procedures and practices necessary to ensure that the wastewater system or any portion thereof is operated in accordance with accepted practices, laws, and administrative regulations of the Commonwealth, or to supervise others in conducting these practices.

(160) "Privately-owned treatment works" means any device or system which is used to treat wastes from any facility or source of sewage whose owner or operator is not the owner or operator of the treatment works and which is not a POTW.

(161) "Process wastewater" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

(162) "Produced water" means all water, pollutants, and combinations thereof resulting, obtained, or produced from the exploration, drilling, or production of oil or gas.

(163) "Professional engineer" or "engineer" means a person registered to practice engineering pursuant to KRS Chapter 322.

(164) "Proposed permit" means a KPDES permit prepared after the close of the public comment period and, when applicable, any public hearing and administrative appeals, which is sent to EPA for review before final issuance by the cabinet. A proposed permit is not a draft permit.

(165) "RCRA" means the Resource Conservation Recovery Act as amended (42 USC 6901 et seq.).

(166) "Reclamation area" means the surface area of a coal mine which has been returned to required contour and on which revegetation (seeding or planting) work has commenced.

(167) "Recommencing discharger" means a source which recommences discharge after terminating operations.

(168) "Regional administrator" means the regional administrator of the Region IV office of the U.S. EPA or the authorized representative of the regional administrator.

(169) "Register" means to file forms with the division which contain information as to oil and gas well geographic location, production, produced water production, methods used for treating, storing, or disposing of produced water, and other information deemed necessary by the division.

(170) "Remined area" means only that area of any coal remining operation on which a coal mining operation was conducted before August 3, 1977.

(171) "Removal" means, for purposes of 401 KAR 5:057, a reduction in the amount of a pollutant in the POTW's effluent or alteration of the nature of a pollutant during treatment at the POTW. The reduction or alteration may be obtained by physical, chemical, or biological means and may be the result of specifically designed POTW capabilities or may be incidental to the operation of the treatment system. Removal shall not mean dilution of a pollutant in the POTW.

(172) "Representative important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish, and wildlife in the body of water into which a discharge of heat is made.

(173) "Requester" means any industrial user or a POTW or other interested person seeking a variance from the limits specified in a categorical pretreatment standard.

(174) "Rock crushing and gravel washing facilities" means facilities which process crushed and broken stone, gravel, and riprap.

(175) "Run-off coefficient" means the fraction of total rainfall that will appear at a conveyance as run-off.

(176) "SARA" means the Superfund Amendments and Reauthorization Act, as amended.

(177) "Schedule of compliance" means a schedule of remedial measures included in a permit, including an enforceable sequence of interim requirements leading to compliance with KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(178) "SCR" means secondary contact recreation.

(179) "Secondary contact recreation waters" means those waters that are suitable for partial body contact recreation, with minimal threat to public health due to water quality.

(180) "Secondary industry category" means any industry category which is not a primary industry category.

(181) "Secondary treatment" means that degree of treatment which results in an effluent quality which meets the minimum requirements of 401 KAR 5:045.

(182) "Seven-Q-ten" or "$7Q_{10}$" means that minimum average flow which occurs for seven (7) consecutive days with a recurrence interval of ten (10) years.

(183) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage shall not mean economic loss caused by delays in production.

(184) "Sewage" means the water-carried human or animal wastes from residences, buildings, or other places together with industrial wastes or underground, surface, storm or other water, as may be present.

(185) "Sewage sludge" means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a wastewater treatment plant. Sewage as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water run-off, that are discharged to or otherwise enter a wastewater treatment plant.

(186) "Sewer line" means those devices used for collecting, transporting, pumping, or disposing of sewage, but not a building sewer which serves an individual building. A sewer line begins at the junction of two (2) building sewers which serve different buildings.

(187) "SIC" means Standard Industrial Classification.

(188) "Significant industrial user" means:

(a) Except as provided in paragraph (b) of this subsection:

1. Industrial users subject to categorical pretreatment standards promulgated by EPA and codified in 40 CFR Chapter I, Subchapter N (Parts 401 through 471); and

2. Any other industrial user that:

a. Discharges an average of 25,000 gallons per day or more of process wastewater to the POTW, excluding sanitary, noncontact cooling and boiler blowdown wastewater;

b. Contributes a process waste stream which makes up five (5) percent or more of the average dry weather hydraulic or organic capacity of the POTW treatment plant; or

c. Is designated as such by the control authority on the basis that the industrial user has a reasonable potential for adversely affecting the POTW's operation or for violating a pretreatment standard or requirement.

(b) Upon a finding that an industrial user meeting the criteria for a significant industrial user has no reasonable potential for adversely affecting the POTW's operation or for violating a pretreatment standard or requirement, the control authority may, on its own initiative or in response to a petition received from an industrial user or a POTW, and in accordance with 401 KAR 5:057, determine that the industrial user is not a significant industrial user.

(189) "Significant materials" means, but is not limited to, and for purposes of 401 KAR 5:050 to 5:080: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under Section 101(14) of CERCLA; any chemical the facility is required to report pursuant to Section 313 of Title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag, and sludge that have the potential to be released with storm water discharges.

(190) "Silvicultural point source" means, for purposes of 401 KAR 5:050 to 5:080, any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the Commonwealth. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural run-off.

(191) "Site" means, for purposes of 401 KAR 5:050 to 5:080, the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

(192) "Sludge requirements" means the following statutory provisions and administrative regulations or permits issued thereunder, or under more stringent local administrative regulations: Section 405 of the Clean Water Act, as amended; the Solid Waste Disposal Act (SWDA), as amended, including Title II, more commonly referred to as the Resource Conservation Recovery Act (RCRA) and administrative regulations contained in any sludge management plan prepared pursuant to Subtitle D of SWDA, as amended; the Clean Air Act, as amended; and the Toxic Substances Control Act, as amended.

(193) "SMCRA" means the Surface Mining Control and Reclamation Act, as amended (33 USC 1201 et seq.).

(194) "Small facility" means a WWTP with an average daily design capacity less than 10,000 GPD or sewer lines of less than 2,500 feet in length including appurtenances.

(195) "Small nonpublicly owned treatment works" means a facility which has a design flow rate of less than 10,000 gpd of wastewater containing only conventional pollutants and which is not a POTW.

(196) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

(197) "SPCC" means spill prevention control and countermeasure.

(198) "Standard" means:

(a) For purposes of 401 KAR 5:026, 5:029 or 5:031, a water quality standard; or

(b) For purposes of 401 KAR 5:057, a pretreatment standard.

(199) "Storm water" means storm water run-off, snow melt run-off, and surface run-off and drainage.

(200) "Stripper well" means any oil well producing ten (10) barrels or less per day of oil.

(201) "Storm water discharge associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw material storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the KPDES program under 401 KAR 5:055. For the categories of industries identified in paragraphs (a) to (j) of this subsection, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or byproducts used or created by the facility; material handing sites; refuse sites; sites used for the application or disposal of process waste waters; sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas including tank farms for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the categories of industries identified in paragraph (k) of this subsection, the term includes only storm water discharges from all the areas except access roads and rail lines, that are listed in the previous sentence where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery are exposed to storm water. For the purposes of this subsection, material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished product, byproduct, or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities including industrial facilities that are federally, state, or municipally owned or operated that meet the description of the facilities listed in this subsection, include those facilities designated under 401 KAR 5:060, Section 12(1)(a). The following categories of facilities are considered to be engaging in an industrial activity for purposes of this subsection:

(a) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 401 KAR 5:065, Section 4, except facilities with toxic pollutant effluent standards which are exempted under paragraph (k) of this subsection;

(b) Facilities classified as Standard Industrial Classifications 24 except 2434; 26 except 265 and 267; 28 except 283; 29; 311; 32 except 323; 33; 3441; and 373;

(c) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations, except for areas of coal mining operations that are no longer reclamation areas because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of noncoal mining operations which have been released from applicable state or federal reclamation requirements after December 17, 1990, and oil and gas exploration production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, by-products, or waste products located on the site of these operations;

(d) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under Subtitle C of RCRA;

(e) Landfills, land application sites, and open dumps that receive or have received any industrial wastes, that is waste that is received from any of the facilities described under this subsection, including those that are subject to regulation under Subtitle D of RCRA;

(f) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(g) Steam electric power generating facilities, including coal handling sites;

(h) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 except 4221-4225, 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance, including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication, equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (a) to (g) and (i) to (k) of this subsection are associated with industrial activity;

(i) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including lands dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of one (1.0) mgd or more, or required to have an approved pretreatment program under 401 KAR 5:057. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance

with Section 405 of the CWA;

(j) Construction activity including clearing, grading and excavation activities except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale;

(k) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 except 311, 323, 34 except 3441, 35, 36, 37 except 373, 38, 39, 4221-4225, and which are not otherwise included within categories of paragraphs (b) to (j) of this subsection.

(202) "Submission" means, for purposes of 401 KAR 5:057:

(a) A request by a POTW to the cabinet for approval of a pretreatment program; and

(b) A request by a POTW to the cabinet for authority to revise the discharge limits in categorical pretreatment standards to reflect POTW pollutant removals.

(203) "Surface mining operation" means only those facilities required to have a permit by 405 KAR Chapters 7 through 26.

(204) "Surface waters" means those waters having well-defined banks and beds, either constantly or intermittently flowing; lakes and impounded waters; marshes and wetlands; and any subterranean waters flowing in well-defined channels and having a demonstrable hydrologic connection with the surface. Effluent ditches and lagoons used for waste treatment which are situated on property owned, leased, or under valid easement by a permitted discharger are not considered to be surface waters of the Commonwealth.

(205) "SWDA" means the Solid Waste Disposal Act, as amended (42 USC 6901 et seq.).

(206) "Tank battery" means an installation where oil is collected from wellheads and is separated from produced water.

(207) "TDS" means total dissolved solids.

(208) "Total dissolved solids" or "TDS" means the total dissolved solids (filterable residue) as determined by use of the method specified in 40 CFR Part 136.

(209) "Total suspended solids" or "TSS" means the total suspended solids (nonfilterable residue) as determined by use of the method specified in 40 CFR Part 136.

(210) "Toxic pollutant" means, for purposes of 401 KAR 5:050 to 5:080, any pollutant listed as being toxic in 401 KAR 5:080.

(211) "Treatment lagoon" or "effluent lagoon" means, as used in 401 KAR 5:029 and as applied to facilities subject to 401 KAR 5:090, a secondary recovery or water-flood impoundment on which on-site construction commenced before May 19, 1980; owned or operated by a person eligible to receive a KPDES permit for a discharge from that impoundment, if used for the purpose of diluting produced water, and if the owner or operator received approval from the cabinet of its request for designation as such on or before September 4, 1986.

(212) "TSS" means total suspended solids.

(213) "Twenty-four (24) hour composite sample" means not less than twelve (12) effluent portions collected at regular intervals over a period of twenty-four (24) hours which are composited in proportion to flow.

(214) "Underground injection" means a well injection.

(215) "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with categorical pretreatment standards or technology-based effluent limitations because of factors beyond the reasonable control of the industrial user or permittee. An upset shall not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(216) "USC" means United States Code.

(217) "U.S. EPA" means the United States Environmental Protection Agency.

(218) "USGS" means the United States Geological Survey.

(219) "Variance" means any mechanism or provision under the KPDES administrative regulations which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines.

(220) "WAH" means warm water aquatic habitat.

(221) "Warm water aquatic habitat" or "WAH" means any surface water and associated substrate capable of supporting indigenous warm water aquatic life.

(222) "Wastewater system" means a sewage system as defined in KRS 224.01-010.

(223) "Wastewater treatment plant" or "WWTP" means a facility used for the treatment and disposal of sewage.

(224) "Water quality standard" means an administrative regulation promulgated by the cabinet establishing the designated use of a surface water and the water quality criteria necessary to maintain and protect that designated use.

(225) "Well" or "water well" means:

(a) For purposes of 401 KAR 5:050 to 5:080, a bored, drilled, or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension; or

(b) For purposes of 401 KAR 5:090, a borehole drilled, or proposed to be drilled for the purpose of producing gas or oil or one through which gas or oil is being produced, or a borehole drilled or proposed to be drilled for the purpose of injecting any water, gas, produced water, or other fluid therein or one into which any water, gas, produced water, or other fluid is being injected.

(226) "Well injection" means the subsurface emplacement of fluids through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

(227) "Wetlands" means land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

(228) "Whole effluent toxicity" means the aggregate toxic effect of an effluent measured directly by a toxicity test.

(229) "WWTP" means wastewater treatment plant.

(230) "Zone" means a subsurface layer or stratum capable of producing or receiving fluids.

Section 2. Federal Regulations Adopted Without Change. The following federal regulations govern the subject matter of this administrative regulation and are hereby adopted without change. The federal regulations are available for inspection and copying, subject to copyright laws, during normal business hours of 8 a.m. to 4:30 p.m., eastern time, excluding state holidays, at the Division of Water, 14 Reilly Road, Frankfort, Kentucky, or may be purchased from the U.S. Superintendent of Documents, Washington, D.C.:

(1) 40 CFR Part 116, "Designation of Hazardous Substances under the Federal Water Pollution Control Act", U.S. Environmental Protection Agency, as of August 25, 1993;

(2) 40 CFR Part 136, "Test Procedures for the Analysis of Pollutants", U.S. Environmental Protection Agency, as of September 11, 1992; and

(3) 40 CFR Chapter I, Subchapter N, Parts 401 through 471, "Effluent Guidelines and Standards", U.S. Environmental Protection Agency, as of July 1, 1993.

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:050. ~~[Definitions and]~~ General provisions of ~~[:]~~ KPDES permitting program.

RELATES TO: KRS 224.01-010, 224.10-110, 224.16-050, 224.70-100, 224.70-110

STATUTORY AUTHORITY: KRS ~~[224.01-110,]~~ 224.10-100

NECESSITY AND FUNCTION: KRS Chapter 224 authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into the waters of the Commonwealth. KRS 224.16-050 empowers the cabinet to issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.). Permits issued pursuant to KRS 224.16-050 ~~[224.034]~~ shall be referred to as KPDES permits. ~~[This regulation defines essential terms used in connection with the following KPDES regulations: 401 KAR 5:050; 401 KAR 5:055; 401 KAR 5:060; 401 KAR 5:065; 401 KAR 5:070; 401 KAR 5:075; 401 KAR 5:080; and 401 KAR 5:085.]~~

~~[Section 1. Definitions. Whenever used in the KPDES regulations, unless a different meaning clearly appears from the context or unless a different meaning is stated in a definition applicable to only a portion of these regulations, the following terms have the meaning as set forth herein. Terms not further defined in this section have the meaning given by KRS 224.01-010 and regulations promulgated pursuant thereto.~~

~~(1) "Administrator" means the Administrator of the United States Environmental Protection Agency, or an authorized representative.~~

~~(2) "Applicable standards and limitations" means all standards and limitations to which a discharge or a related activity is subject under KRS Chapter 224, and regulations promulgated pursuant thereto, including but not limited to effluent limitations, water quality standards, standards of performance, and toxic effluent standards.~~

~~(3) "Application" means the forms approved by the cabinet, which are equivalent to the EPA standard NPDES forms for applying for a KPDES permit, including any additions, revisions or modifications to the forms.~~

~~(4) "Average monthly discharge limitation" means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.~~

~~(5) "Average weekly discharge limitation" means the highest allowable average of daily discharges over a calendar week, calculated as the sum of all daily discharges measured during a calendar week divided by the number of daily discharges measured during that week.~~

~~(6) "Best management practices (BMPs)" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the Commonwealth. BMPs also includes treatment requirements, operating procedures, practices to control plant site run off, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.~~

~~(7) "Continuous discharge" means a discharge which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.~~

~~(8) "CWA" means the Clean Water Act as subsequently amended (33 USC Section 1251 et seq.), otherwise known as the Federal Water Pollution Control Act.~~

~~(9) "Daily discharge" means the discharge of a pollutant measured during a calendar day or any twenty four (24) hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.~~

~~(10) "Date of program approval" means September 30, 1983, the effective date of the administrator's approval of Kentucky's KPDES regulatory program under CWA Section 402 (33 USC Section 1342).~~

~~(11) "Direct discharge" means the discharge of a pollutant into waters of the Commonwealth when such discharge is not included under the definition of "indirect discharger."~~

~~(12) "Director" means the secretary of the cabinet, or an authorized representative. For purposes of permit issuance decisions, the director is the director of the Division of Water, in the Department for Environmental Protection.~~

~~(13) "Discharge" or "discharge of a pollutant" means any addition of any pollutant or combination of pollutants to waters of the Commonwealth from any point source. This definition includes, but is not limited to, additions of pollutants into waters of the Commonwealth from surface run off which is collected or channelled by man; discharges through pipes, sewers or other conveyances whether publicly or privately owned which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.~~

~~(14) "Discharge monitoring report (DMR)" means the cabinet's form including any subsequent additions, revisions, or modifications, for the reporting of self monitoring results by permittees.~~

~~(15) "Draft permit" means a document prepared under 401 KAR 5:075, Section 3, indicating the director's preliminary decision to issue or deny, modify, revoke and reissue, terminate, or reissue a permit. A notice of intent to terminate a permit, and a notice of intent to deny a permit, as provided in 401 KAR 5:075, Section 2, are types of draft permits. A denial of a request for modification, revocation and reissuance, or termination, as provided in 401 KAR 5:075, Section 2, is not a draft permit. A proposed permit is not a draft permit.~~

~~(16) "Effluent limitation" means any restriction imposed by the director on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the Commonwealth.~~

~~(17) "Effluent limitations guidelines" means a regulation published by the administrator under CWA Section 304(b) (33 USC Section 1314(b)) to adopt or revise effluent limitations.~~

~~(18) "Environmental Protection Agency (EPA)" means the United States Environmental Protection Agency.~~

~~(19) "Facility or activity" means any KPDES point source, or any other facility or activity, including land or appurtenances thereto, that is subject to regulation under the KPDES program.~~

~~(20) "General permit" means any KPDES permit authorizing a category of discharges under KRS Chapter 224 within a geographical area, issued under 401 KAR 5:055.~~

~~(21) "Hazardous substance" means any substance designated under 40 CFR Part 116.~~

~~(22) "Indirect discharger" means a nondomestic discharger introducing pollutants to a publicly owned treatment works.~~

~~(23) "Kentucky Pollutant Discharge Elimination System (KPDES)" means the Kentucky program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements. The KPDES regulations are: 401 KAR 5:050, 401 KAR 5:055, 401 KAR 5:060, 401 KAR 5:065, 401 KAR 5:070, 401 KAR 5:075, 401 KAR 5:080, and 401 KAR 5:085.~~

~~(24) "Interstate agency" means an agency of which Kentucky and one (1) or more states is a member established by or under an agreement or compact, or any other agency, of which Kentucky and~~

one (1) or more other states are members, having substantial powers or duties pertaining to the control of pollution as determined and approved by the secretary or administrator under the CWA or KRS Chapter 224.

(25) "Major facility" means any KPDES facility or activity classified as such by the director in cooperation with the regional administrator; designation as a "major industry," as set forth in 401 KAR 5:085, Section 2, does not indicate automatic classification as a major facility.

(26) "Maximum daily discharge limitation" means the highest allowable daily discharge.

(27) "Municipality" means a city, district, or other public body created by or under the Kentucky Revised Statutes and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or a designated and approved management agency under CWA Section 208 (33 USC 1258).

(28) "National Pollutant Discharge Elimination System (NPDES)" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements.

(29) "New discharger" means any building, structure, facility or installation:

(a)1. From which there is or may be a discharge of pollutants;

2. That did not commence the discharge of pollutants at a particular site prior to August 13, 1979;

3. Which has never received a finally effective NPDES or KPDES permit for discharges at that site; and

4. Which is not a new source.

(b) This definition includes an indirect discharger which commences discharging into the waters of the Commonwealth after August 13, 1979. It also includes any existing mobile point source that begins discharging at a site for which it does not have a permit.

(30) "New source" means any building, structure, facility, or installation from which there is or may be a direct or indirect discharge of pollutants, the construction of which commenced:

(a) After promulgation of EPA's standards of performance or pretreatment standards which are applicable to such source; or

(b) After proposal of EPA's standards of performance or pretreatment standards which are applicable to such source, but only if the federal standards are promulgated within 120 days of their proposal.

(31) "Owner or operator" means the owner or operator of any facility or activity subject to regulation under the KPDES program.

(32) "Permit" means an authorization, license, or equivalent control document issued by the cabinet or U.S. EPA to implement the requirements of the KPDES or NPDES regulations. Permit does not include any permit which has not yet been the subject of final agency action, such as a draft permit or a proposed permit.

(33) "Person" means an individual, association, partnership, corporation, municipality, state or federal agency, or an agent or employee thereof.

(34) "Point source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(35) "Pollutant" means as defined in KRS 224.01-010 including filter backwash, munitions and cellar dirt, except:

(a) Radioactive materials which are regulated under the Atomic Energy Act of 1954, as amended (42 USC Section 2011 et seq.);

(b) Sewage from vessels; or

(c) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by the state or federal agency administering the Underground Injection Control program pursuant to the Safe Drinking Water Act (42 USC Section 300f et seq.) or by the cabinet pursuant to 401 KAR Chapter 5 and the appropriate agency and if the state agency determines that the injection or disposal will not violate any applicable law or regulation.

(36) "Primary industry category" means any industry category listed in 401 KAR 5:060, Section 10.

(37) "Privately owned treatment works" means any device or system which is used to treat wastes from any facility whose operator is not the operator of the treatment works and which is not a POTW.

(38) "Process wastewater" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

(39) "Proposed permit" means a KPDES permit prepared after the close of the public comment period and, when applicable, any public hearing and administrative appeals, which is sent to EPA for review before final issuance by the cabinet. A proposed permit is not a draft permit.

(40) "Publicly owned treatment works (POTW)" means any device or system used in the treatment, including recycling and reclamation, of municipal sewage or industrial wastes of a liquid nature which is owned by the Commonwealth or a municipality. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment. For purposes of pretreatment in 401 KAR 5:055, Section 9, POTW includes a municipality having jurisdiction over the indirect discharges to and discharges from the treatment works.

(41) "Recommencing discharger" means a source which recommences discharge after terminating operations.

(42) "Regional administrator" means the regional administrator of the Region IV office of the EPA or the authorized representative of the regional administrator.

(43) "Schedule of compliance" means a schedule of remedial measures included in a permit, including an enforceable sequence of interim requirements leading to compliance with KRS Chapter 224 and regulations promulgated pursuant thereto.

(44) "Secondary industry category" means any industry category which is not a primary industry category.

(45) "Sewage from vessels" means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under CWA Section 312 (33 U.S.C Section 1324).

(46) "Sewage sludge" means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a publicly owned treatment works. Sewage as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water run off, that are discharged to or otherwise enter a publicly owned treatment works.

(47) "Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

(48) "Total dissolved solids (TDS)" means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR Part 136.

(49) "Toxic pollutant" means any pollutant listed as toxic in 401 KAR 5:080, Section 5.

(50) "Twenty four (24) hour composite sample" means not less than twelve (12) effluent portions collected at regular intervals over a period of twenty four (24) hours which are composited in proportion to flow; "grab sample" means a single effluent portion which is not a twenty four (24) hour composite sample.

(51) "Underground injection" means a "well injection."

(52) "Variance" means any mechanism or provision under the KPDES regulations which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines.

(53) "Waters of the Commonwealth" means as defined in KRS

~~224.01-010.~~

~~(54) "Well" means a bored, drilled or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension.~~

~~(55) "Well injection" means the subsurface implacement of fluids through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension.~~

~~(56) "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.]~~

Section 1. [~~2.~~] Compatibility With the CWA. The KPDES administrative regulations promulgated pursuant to KRS Chapter 224 are intended to be compatible with the federal regulations adopted pursuant to CWA.

Section 2. [~~3.~~] Conflicting Provisions. The provisions of the KPDES administrative regulations are to be construed as being compatible with and complementary to each other. If [~~In the event that~~] any of these administrative regulations are found by a court of competent jurisdiction to be contradictory, the more stringent provisions shall apply.

[~~Section 4. Severability. In the event that any provision of KRS Chapter 224 or any regulation promulgated pursuant thereto is found to be invalid by a court of competent jurisdiction, the remaining KPDES regulations shall not be affected or diminished thereby.~~

~~Section 5. Abbreviations and Acronyms. The following abbreviations and acronyms, as used throughout the KPDES regulations, shall have the meaning given below:~~

~~(1) "BAT" means best available technology economically achievable;~~

~~(2) "BCT" means best conventional pollutant control technology;~~

~~(3) "BOD" means biochemical oxygen demand;~~

~~(4) "BPT" means best practicable technology currently available;~~

~~(5) "BMPs" means best management practices;~~

~~(6) "COD" means chemical oxygen demand;~~

~~(7) "CFR" means code of federal regulations;~~

~~(8) "DMR" means discharge monitoring report;~~

~~(9) "KAR" means Kentucky Administrative Regulations;~~

~~(10) "KPDES" means Kentucky Pollutant Discharge Elimination System;~~

~~(11) "KRS" means Kentucky Revised Statutes;~~

~~(12) "NPDES" means National Pollutant Discharge Elimination System;~~

~~(13) "POTW" means publicly owned treatment works;~~

~~(14) "SIC" means standard industrial classification;~~

~~(15) "TSS" means total suspended solids; and~~

~~(16) "USC" means United States Code.]~~

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:055. Scope and applicability of the KPDES program.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110, 224.99-010

STATUTORY AUTHORITY: KRS [~~224.01-110,~~] 224.10-100

NECESSITY AND FUNCTION: KRS 224.10-100 provides that the Natural Resources and Environmental Protection Cabinet may require for persons discharging into the waters of the Commonwealth, by administrative regulation, technological levels of treatment and effluent limitations. KRS 224.16-050(1) provides that the cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Sections 1342(b) and (d), KRS 224.16-050(1) requires that any exemptions granted in the issuance of these [~~such~~] permits shall be pursuant to 33 USC Sections 1311, 1312, and 1326(a). Further, KRS 224.16-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this administrative regulation an [~~any~~] effluent limitation, monitoring requirement or other condition which is more stringent than the effluent limitation, monitoring requirement or other condition which would have been applicable under the federal regulation if the permit were issued by the federal government. This administrative regulation contains the scope and applicability of the KPDES program including specific inclusions and exclusions, prohibitions, requirements for general permits, and requirements for disposal into wells, into POTWS and by land application.

Section 1. Applicability of the KPDES Requirements. The KPDES program requires permits for the discharge of pollutants from a [~~any~~] point source into waters of the Commonwealth. Compliance with the KPDES program requirements constitutes compliance with the operational permit requirements of 401 KAR 5:005, [~~Section 3(2)~~] and requirements related to the operational permit. Failure to obtain a KPDES permit does not relieve a discharger subject to the KPDES program from complying with the applicable performance standards of that program, 401 KAR 5:050 to 5:080 [~~5:085~~], inclusive.

(1) Specific inclusions. The following are examples of specific categories of point sources requiring KPDES permits for discharges. These terms are further defined in 401 KAR 5:001 [~~5:060, Sections 5 through 12~~].

(a) Concentrated animal feeding operations;

(b) Concentrated aquatic animal production facilities;

(c) Discharges into aquaculture projects;

(d) Discharges from separate storm sewers; [~~and~~]

(e) Silviculture point sources; and

(f) Permits required on a case-by-case basis.

1. Various sections of 401 KAR 5:060 allow the cabinet to determine, on a case-by-case basis, that certain concentrated animal feeding operations, concentrated aquatic animal production facilities, storm water discharges, and certain other facilities covered by a general permit that do not generally require an individual permit may be required to obtain an individual permit because of their contributions to water pollution.

2. If the cabinet decides that an individual permit is required under this section, except as provided in subparagraph 3 of this paragraph, the cabinet shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the notice. The discharger shall apply for a permit under 401 KAR 5:060 within sixty (60) days of notice, unless permission for a later date is granted by the cabinet. The question whether the

designation was proper shall remain open for consideration during the public comment period under 401 KAR 5:075 and in any subsequent hearing.

3. Prior to a case-by-case determination that an individual permit is required for a storm water discharge under 401 KAR 5:060, Section 12 the cabinet may require the discharger to submit a permit application or other information regarding the discharge under 401 KAR 5:060, Section 1(6). In requiring the information, the cabinet shall notify the discharger in writing and shall send an application form with the notice. The discharger shall apply for a permit under 401 KAR 5:060, Section 12 within sixty (60) days of notice, unless permission for a later date is granted by the cabinet. The question whether the initial designation was proper shall remain open for consideration during the public comment period under 401 KAR 5:075 and in any subsequent hearing pursuant to KRS 224.10-420(2).

(2) Specific exclusions. The following discharges do not require KPDES permits:

(a) [~~Any~~] Discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or [~~any~~] other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other [~~such~~] materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured in waters of the Commonwealth for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the Commonwealth which are regulated under CWA Section 404 (33 USC Section 1344).

(c) The introduction of sewage, industrial wastes, or other pollutants into publicly owned treatment works by indirect discharges. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the Commonwealth are eliminated.

(d) **Discharges in compliance with the instructions of an on-scene coordinator pursuant to 40 CFR Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR Part 153 (Pollution by Oil and Hazardous Substances), discharges in compliance with the state hazardous substance contingency plan issued pursuant to KRS 224.01-400, or discharges authorized by state on-scene coordinators in response to releases of hazardous substances, pollutants and contaminants or petroleum.** [~~Any~~] [~~Discharge in compliance with the instructions of an on-scene coordinator pursuant to 33 CFR Part 151 (The National Oil and Hazardous Substances Pollution Plan) or 33 CFR Part 153 (Pollution by Oil and Hazardous Substances) or discharges in compliance with the state hazardous substance contingency plan issued pursuant to KRS 224.01-400.~~]

(e) [~~Any~~] Introduction of pollutants from nonpoint source agricultural and silvicultural activities, including storm water run-off from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges form concentrated animal feeding operations [~~as defined in 401 KAR 5:060, Section 5~~], discharges from concentrated aquatic animal production facilities [~~as defined in 401 KAR 5:060, Section 6~~], discharges to aquaculture projects [~~as defined in 401 KAR 5:060, Section 7~~], and discharges from silvicultural point sources [~~as defined in 401 KAR 5:060, Section 9~~].

(f) Return flows from irrigated agriculture.

(g) Discharges into a privately owned treatment works, except as the cabinet [~~director~~] may otherwise require under 401 KAR 5:065, Section 2(12).

(h) Authorizations by permit or by rule which are prepared to assure that underground injection will not endanger drinking water supplies, pursuant to the Safe Drinking Water Act (42 USC Section 300f et seq.), and which are issued under a state or federal Underground Injection Control program; and, underground injections and disposal wells which are permitted by the cabinet pursuant to 401 KAR Chapter 5.

(i) Discharges which are not regulated by the U.S. EPA under CWA Section 402 (33 USC Section 1342).

Section 2. Prohibitions. No permit shall [~~may~~] be issued by the cabinet [~~director~~]:

(1) When the conditions of the permit do not provide for compliance with the applicable requirements of KRS Chapter 224, or administrative regulations promulgated pursuant thereto;

(2) When the regional administrator has objected to issuance of the permit in writing under the procedures specified in 40 CFR Section 123.44 [~~75~~];

(3) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of Kentucky and all affected states;

(4) When, in the judgment of the secretary of the U.S. Army, acting through the Chief of Engineers, anchorage and navigation in or on [~~any of the~~] waters of the United States would be substantially impaired by the discharge;

(5) For the discharge of [~~any~~] radiological, chemical, or biological warfare agent or high-level radioactive waste;

(6) For the discharge inconsistent with a water quality management plan or plan amendment approved by EPA; or

(7) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet Kentucky water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by the KPDES administrative regulations and for which the cabinet has performed a pollutant load allocation for the pollutants to be discharged, shall [~~must~~] demonstrate, before the close of the public comment period, that:

(a) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(b) The existing dischargers into that segment are subject to schedules of compliance designed to bring the segment into compliance with Kentucky water quality standards.

Section 3. Variance Requests by Non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under [~~any of~~] the following statutory or regulatory provisions within the times specified in this section:

(1) Fundamentally different factors. A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be filed as follows: [~~made by the close of the public comment period under 401 KAR 5:075, Section 5.~~]

(a) For a request from best practicable control technology currently available (BPT), by the close of the public comment period under 401 KAR 5:075.

(b) For a request from best available technology economically achievable (BAT) or best conventional pollutant control technology (BCT), by no later than:

1. July 3, 1989, for a request based on an effluent limitation guideline promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

2. 180 days after the date on which an effluent limitation guideline is published in the Federal Register for a request based on an effluent limitation guideline promulgated on or after February 4, 1987. The request shall explain how the requirements of 401 KAR 5:080, Section 3, have been met.

(2) Nonconventional pollutants. A request for a variance from the BAT requirements for "nonconventional" pollutants, pursuant to Section 7(1) of this administrative regulation because of the economic capability of the owner or operator, or pursuant to Section 7(2) of this administrative regulation because of certain environmental considerations, shall [~~must~~] be made as follows. A nonconventional pollutant variance shall be available only for ammonia; chlorine; color; iron; total phenols (4AAP), as determined by the U.S. EPA to be a pollutant covered by CWA Section 301(b)(2)(F); and any other pollutant which the U.S. EPA lists under CWA Section 301(g)(4). [~~A completed request must be submitted no later than the close of the public comment period under 401 KAR 5:075, Section 5 demonstrating that the applicable requirements of 401 KAR 5:080 have been met.~~]

(a) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by:

1. Submitting an initial request to the cabinet stating the name of the discharger, the permit number, the outfall number, the applicable effluent guideline, and whether the discharger is requesting a modification under Section 7(1) or (2) of this administrative regulation or both Section 7(1) and (2) of this administrative regulation. This request shall have been filed not later than:

a. September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

b. 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 17, 1977; and

2. Submitting a completed request no later than the close of the public comment period under 401 KAR 5:075, Section 5 demonstrating that the requirements of 401 KAR 5:075, Section 8 and the applicable requirements of 401 KAR 5:080 have been met. Notwithstanding this provision, the complete application for a request under Section 7(2) of this administrative regulation shall be filed 180 days before a decision is desired.

(b) For those requests for a variance from effluent limitation guidelines, the request need only comply with paragraph (a)2 of this subsection and need not be preceded by an initial request under paragraph (a)1 of this subsection.

(3) Delay in construction of POTW. An extension under CWA Section 301(i)(2) of the statutory deadlines in Section 301(b)(1)(A) or (b)(1)(C) of the CWA based on delay in completion of a POTW into which the source is to discharge shall have been requested on or before June 26, 1978 or 180 days after the relevant POTW requested an extension under 40 CFR 122.21(n)(2) whichever is later, but not later than January 30, 1988. The request shall explain how the requirements of 40 CFR Part 125, Subpart J have been met.

(4) [~~(3)~~] Innovative technology. An extension under Section 7(3) of this administrative regulation from the deadline in 401 KAR 5:080, Section 1, for best available technology (BAT) or for best conventional pollutant control technology (BCT), based on the use of innovative technology, shall [~~may~~] be requested no later than the close of the public comment period under 401 KAR 5:075, Section 5, for the discharger's initial permit requiring compliance with applicable effluent limitations. The request shall demonstrate that the requirements of 401 KAR 5:080 have been met.

(5) [~~(4)~~] Thermal discharges. A variance under Section 7(4) of this administrative regulation for the thermal component of a [~~any~~] discharge shall [~~must~~] be filed with a timely application for a permit under 401 KAR 5:060, except that if thermal effluent limitations are established by EPA or are based on Kentucky water quality standards the request for a variance shall [~~may~~] be filed by the close of the public comment period under 401 KAR 5:075, Section 5.

Section 4. Expedited Variance Procedures and Time Extensions. Notwithstanding the time requirements in Section 3 of this administrative regulation, the cabinet [~~director~~] may notify a permit applicant before a draft permit is issued under 401 KAR 5:075, Section 3, that the draft permit will likely contain limitations which are eligible for variances.

(1) In the notice the cabinet [~~director~~] may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of 401 KAR 5:080 applicable to the variance have been met. The cabinet [~~director~~] may require the submittal within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which shall [~~may~~] become effective upon final grant of the variance.

(2) A discharger who cannot file a complete request required under Section 3(2) of this administrative regulation may request an extension. The extension may be granted or denied by [~~at the discretion of~~] the cabinet [~~director~~]. Extensions shall [~~should~~] be no more than six (6) months in duration.

Section 5. General Permits. (1) Coverage. The cabinet shall [~~director may~~] issue a general permit in accordance with the following:

(a) Area. The general permit shall [~~will~~] be written to cover a category of discharges described in the permit under paragraph (b) of this subsection, except those covered by individual permits, within a geographic area. The area shall [~~will~~] correspond to existing geographic or political boundaries, such as:

1. Designated planning areas under CWA Sections 208 and 303 (33 USC Sections 1288 and 1313);

2. City, county, or state political boundaries;

3. State highway systems;

4. Standard metropolitan statistical areas as defined by the University of Louisville Urban Studies Center, consistent with the U.S. Office of Management and Budget;

5. Urbanized areas as designated by the University of Louisville Urban Studies Center consistent with the U.S. Bureau of the Census; or

6. [~~Any~~] Other appropriate division or combination of boundaries.

(b) Sources. The general permit shall [~~may~~] be written to regulate, within the area described in paragraph (a) of this subsection, either:

1. Storm-water point sources; or

2. A category of point sources other than storm-water point sources if the sources all:

a. Involve the same or substantially similar types of operations;

b. Discharge the same types of wastes;

c. Require the same effluent limitations or operating conditions;

d. Require the same or similar monitoring; and

e. In the opinion of the cabinet [~~director~~], are more appropriately controlled under a general permit than under individual permits.

(2) Administration.

(a) General permits shall [~~may~~] be issued, modified, revoked and reissued, or revoked [~~terminated~~] in accordance with applicable requirements of 401 KAR 5:075.

(b) Requiring an individual permit.

1. The cabinet [~~director~~] may require any person authorized to discharge by a general permit to apply for and obtain an individual KPDES permit. [~~Any~~] Interested person may petition the cabinet [~~director~~] to take action under this paragraph. [~~Cases where~~] An individual KPDES permit may be required if [~~include the following~~]:

a. [~~The discharger is a significant contributor of pollution as determined by the factors set forth in 401 KAR 5:060, Section 8(3)(b);~~

~~b.~~] The discharger is not in compliance with the conditions of the general KPDES permit;

b. [~~c.~~] A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

c. [~~d.~~] Effluent limitation guidelines are promulgated for point sources covered by the general KPDES permit;

d. [~~e.~~] A Kentucky Water Quality Management Plan containing requirements applicable to these [~~such~~] point sources is approved; or

e. [f.] The requirements of subsection (1) of this section are not met.

2. An [Any] owner or operator authorized by a general permit may request to be [the] excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit an application under 401 KAR 5:060, Section 1, to the cabinet [director] with reasons supporting the request. The request shall be submitted no later than ninety (90) days after the notice by the cabinet in accordance with 401 KAR 5:075, Section 5. The request shall be processed under 401 KAR 5:075. If the reasons cited by the owner or operator are adequate to support the request, the cabinet may issue an individual permit.

3. When an individual KPDES permit is issued to an owner or operator otherwise subject to a general KPDES permit, the applicability of the general permit to the individual KPDES permittee is automatically revoked [terminated] on the effective date of the individual permit.

4. A permittee, excluded from a general permit solely because the permittee [he] already has an individual permit, may request that the individual permit be revoked. The permittee shall then request to be covered by the general permit. Upon revocation of the individual permit, the general permit shall apply to the source.

Section 6. Disposal of Pollutants into Wells, into POTWs or by Land Application. (1) The cabinet may issue permits to control the disposal of pollutants into wells, when necessary to protect the public health and welfare and to prevent the pollution of ground and surface waters.

(2) If [When] part of a discharger's process wastewater is not being discharged into waters of the Commonwealth because it is disposed into a well, into a POTW, or by land application thereby reducing the flow or level of pollutants being discharged into waters of the Commonwealth, applicable effluent standards and limitations for the discharge in a KPDES permit shall be adjusted to reflect the reduced raw waste resulting from this [such] disposal. Effluent limitations and standards in the permit shall be calculated by one (1) of the following methods:

(a) If none of the waste from a particular process is discharged into waters of the Commonwealth, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(b) In all cases other than those described in paragraph (a) of this subsection, effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater now to be treated and discharged into waters of the Commonwealth, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted under 401 KAR 5:080, Section 3, to make them more stringent if discharges to wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters. This method shall [may] be algebraically expressed as:

$$P = E \times N/T$$

When P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total waste stream, N is the wastewater flow to be treated and discharged to waters of the Commonwealth and T is the total wastewater flow.

(3) Subsection (2) of this section shall not apply to the extent that promulgated effluent limitations guidelines:

(a) Control concentrations of pollutants discharged but not mass; or

(b) Specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into POTWs.

(4) Subsection (2) of this section does not alter a discharger's obligation to meet [any] more stringent requirements established under 401 KAR 5:065.

Section 7. Variances Available to KPDES Applicants. Consistent with KRS 224.16-050, the variance provisions in this section and in 401 KAR 5:080, Sections 3 and 4, lists, inclusively, those variances available to KPDES applicants.

(1) Economic capability. The cabinet [director], with the concurrence of EPA, may modify the BAT requirements set out in 401 KAR 5:080, Section 1, for a point source, upon a showing by the owner or operator of that point source, satisfactory to the cabinet [director] that the modified requirement will:

(a) Represent the maximum use of technology within the economic capability of the owner or operator; and

(b) Result in reasonable further progress toward the elimination of the discharge of pollutants.

(2) Environmental considerations.

(a) The cabinet [director], with the concurrence of EPA, may modify the BAT requirement set out in 401 KAR 5:080, Section 1, for a point source which does not discharge toxic pollutants identified in 401 KAR 5:080, Section 6 [5], conventional pollutants, or the thermal component of that discharge upon a showing by the owner or operator satisfactory to the cabinet [director] that:

1. The modified requirement will result, at a minimum, in compliance with the BPT requirement identified in 401 KAR 5:080 or Kentucky water quality standards, whichever is applicable;

2. The modified requirement will not result in any additional requirement on any other point or non**point** source **[**point**]**; and

3. The modification will not:

a. Interfere with the attainment or maintenance of that water quality which will assure protection of public water supplies, protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water; and

b. Result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity, including carcinogenicity, mutagenicity or teratogenicity, or synergistic propensities.

(b) If an owner or operator of a point source applies for a modification under this section for a [any] pollutant, that owner or operator shall [will] be eligible to apply for a modification under subsection (1) of this section with respect to that pollutant only during the same time period as he is eligible to apply for a modification under this section.

(3) Innovative technology.

(a) The cabinet shall [director may] establish a date for complying with the deadline for achieving BAT set out in [Section 1 of] 401 KAR 5:080, Section 1, no later than two (2) years after the date for compliance with the effluent limitation which would otherwise be applicable [July 1, 1987], if the owner or operator establishes to the satisfaction of the cabinet [director] the following:

1. That the existing production capacity of the facility will be replaced with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to that facility, and which moves toward the state's goal of eliminating the discharge of all pollutants; or

2. That an innovative control technique will be installed which has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation, and which moves toward the state's goal of eliminating the discharge of all pollutants; or

3. That an innovative system will be installed which has the potential for significantly lower costs than the system which has been determined by the cabinet [director] to be economically achievable.

(b) The innovative system shall [must] have the potential for

industry-wide application.

(c) The cabinet shall [~~director may~~] not modify any requirement under this section which applies to a pollutant on the toxic pollutant list set out at 401 KAR 5:080, Section 6 [~~5~~].

(d) The cabinet may include any of the following conditions in the permit of a discharger to which a compliance extension beyond the otherwise applicable compliance date is granted:

1. A requirement that the discharger report annually on the installation, operation, and maintenance costs of the innovative technology; or

2. Alternative BAT limitations that the discharger shall meet as soon as possible and not later than two (2) years after the date for compliance with the effluent limitation which would otherwise be applicable if the innovative technology limitations that are more stringent than BAT are not achievable.

(4) Thermal pollution.

(a) The cabinet [~~director~~] may impose an alternative effluent limitation for the thermal component of a discharge from a point source if the owner or operator can establish to the satisfaction of the cabinet [~~director~~] that the original effluent limitation proposed by the cabinet [~~director~~] is more stringent than necessary to assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge will be made.

(b) The alternative effluent limitation imposed by the cabinet [~~director~~] upon request by the owner or operator shall [~~will~~] take into account the interaction of the thermal component with other pollutants, and shall [~~will~~] assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on that body of water.

~~[Section 8. Variances from Categorical Pretreatment Standards for Fundamentally Different Factors. (1) Definitions. "Requester" means an industrial user or a POTW seeking a variance from the limits specified in a categorical pretreatment standard.~~

~~(2) The criteria and standards for evaluating a request for a fundamentally different factors variance shall be pursuant to 401 KAR 5:080, Section 3.~~

~~(3) Application procedure.~~

~~(a) Application deadline.~~

~~1. Requests for a variance and supporting information must be submitted in writing to the director.~~

~~2. In order to be considered, request for variances must be submitted within 180 days after the effective date of the categorical pretreatment standard unless the user has requested a categorical determination.~~

~~3. When the user has requested a categorical determination the user may elect to await the results of the category determination before submitting a variance request under this section. When the user so elects, the user must submit the variance request within thirty (30) days after a final decision has been made on the categorical determination.~~

~~(b) Contents of submission. Written submissions for variance request shall include:~~

~~1. The name and address of the requester;~~

~~2. Identification of the interest of the requester which is affected by the categorical pretreatment standard for which the variance is requested;~~

~~3. Identification of the POTW currently receiving the waste from the industrial user for which alternative discharge limits are regulated;~~

~~4. Identification of the categorical pretreatment standards which are applicable to the industrial user;~~

~~5. A list of each pollutant or pollutant parameter for which an alternative discharge limit is sought;~~

~~6. The alternative discharge limits proposed by the requester for each pollutant or pollutant parameter identified in subparagraph 5 of this paragraph;~~

~~7. A description of the industrial user's existing water pollution control facilities;~~

~~8. A schematic flow representation of the industrial user's water system including water supply, process wastewater systems, and points of discharge; and~~

~~9. A statement of facts clearly establishing why the variance request should be approved, including detailed support data, documentation, and evidence necessary to fully evaluate the merits of the request.~~

~~(c) Deficient requests. The director will only act on written requests for variances that contain all of the information required. Requesters who have made incomplete submissions will be notified by the director that their requests are deficient and unless the time period is extended, will be given up to thirty (30) days to correct the deficiency. If the deficiency is not corrected within the time period allowed by the director, the request for a variance shall be denied.~~

~~(d) Public notice. Upon receipt of a complete request, the director will provide notice of receipt, opportunity to review the submission, and opportunity to comment.~~

~~1. The public notice will be circulated in a manner designed to inform interested and potentially interested persons of the request. Procedures for the circulation of public notice will include mailing notices to:~~

~~a. The POTW into which the industrial user discharges;~~

~~b. Adjoining states whose waters may be affected; and~~

~~c. Designated CWA Section 208 (33 USC Section 1288) planning agencies, federal and state fish, shellfish and wildlife resource agencies, and to any other person or group who has requested individual notice, including those on appropriate mailing lists.~~

~~2. The public notice will provide for a period not less than thirty (30) days following the date of the public notice during which time interested persons may review the request and submit their written views on the request.~~

~~3. Following the comment period, the director will make a determination on the request taking into consideration any comments received. Notice of this final decision will be provided to the requester and all persons who submitted comments on the request.~~

~~(e) Review of requests by state.~~

~~1. When the director finds that fundamentally different factors do not exist, the director may deny the request, and notify the requester of the denial.~~

~~2. When the director finds that fundamentally different factors do exist the director will forward the request, with a recommendation that the request be approved, to the enforcement division director of EPA region IV.~~

~~Section 9. Pretreatment. (1) Applicability.~~

~~(a) This section applies to the following:~~

~~1. Pollutants from nondomestic sources covered by pretreatment standards which are indirectly discharged, transported by truck or rail, or otherwise introduced into POTWs;~~

~~2. POTWs which receive wastewater from sources subject to national pretreatment standards; and~~

~~3. Any new or existing source subject to national pretreatment standards.~~

~~(b) National pretreatment standards do not apply to sources which discharge to a sewer which is not connected to a POTW treatment plant.~~

~~(2) Definitions. The following definitions pertain to indirect dischargers and POTWs subject to pretreatment standards under the KPDES program.~~

~~(a) "Approved POTW pretreatment program" means a program administered by a POTW that meets the criteria established in subsection (8) of this section and which has been approved by the director in accordance with subsection (9) of this section.~~

~~(b) "Indirect discharge" or "discharge" means the introduction of pollutants into a POTW from any nondomestic source regulated by~~

~~the KPDES program.~~

~~(c) "Industrial user" or "user" means a source of indirect discharge.~~

~~(d) "Interference" means an inhibition or disruption of the POTWs, its treatment processes or operations, or its sludge processes, use or disposal which is a cause of or significantly contributes to a violation of any requirement of the POTW's KPDES permit, including an increase in the magnitude or duration of a violation, or to the prevention of sewage sludge use or disposal by the POTW in violation of any applicable regulation. An industrial use significantly contributes to a permit violation or prevention of sludge use or disposal whenever the user:~~

~~1. Discharges a daily pollutant loading in excess of that allowed by contract with the POTW or by applicable law;~~

~~2. Discharges wastewater which substantially differs in nature or constituents from the user's average discharge; or~~

~~3. Knows or has reason to know that its discharge, alone or in conjunction with discharges from other sources, would result in a POTW permit violation or prevent sewage sludge use or disposal in accordance with the POTW's approved method of sludge management.~~

~~(e) "National pretreatment standard" means any regulation containing pollutant discharge limits promulgated by EPA in accordance with CWA Section 307(b) and (c) (33 USC Section 1317(b) and (c)) which applies to industrial users. This includes prohibitive discharge limits established pursuant to subsection (4) of this section.~~

~~(f) "Pass through" means the discharge of pollutants through the POTW into waters of the Commonwealth in quantities or concentrations which are a cause of or significantly contribute to a violation of any requirement of the POTW's KPDES permit, including an increase in the magnitude or duration of a violation. An industrial user significantly contributes to such permit violation when it:~~

~~1. Discharges a daily pollutant loading in excess of that allowed by contract with the POTW or by applicable law;~~

~~2. Discharge wastewater which substantially differs in nature and constituents from the user's average discharge;~~

~~3. Knows or has reason to know that its discharge, alone or in conjunction with discharges from other sources, would result in a permit violation; or~~

~~4. Knows or has reason to know that the POTW is, for any reason, violating its final effluent limitations in its permit and that such industrial user's discharge either alone or in conjunction with discharges from other sources, increases the magnitude or duration of the POTW's violations.~~

~~(g) "POTW treatment plan" means that portion of the POTW which is designed to provide treatment, including recycling and reclamation of municipal sewage and industrial waste.~~

~~(h) "Pretreatment" means the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW. The reduction or alteration may be obtained by physical, chemical or biological processes, process changes or by other means except as prohibited by this section.~~

~~(i) "Pretreatment requirements" means any substantive or procedural requirements related to pretreatment, other than a national pretreatment standard, imposed on an industrial user.~~

~~(3) Local law. Nothing in this regulation is intended to affect any pretreatment requirements, including any standards or prohibitions, established by local law as long as the local requirements are not less stringent than any set forth in national pretreatment standards, or any other requirements or prohibitions established by the cabinet or by EPA.~~

~~(4) National pretreatment standards: prohibited discharges.~~

~~(a) A nondomestic source introducing pollutants into a POTW shall comply with the general and specific prohibitions set forth in 40 CFR 403.5.~~

~~(b) A POTW developing a pretreatment program pursuant to subsection (7) of this section shall develop and enforce effluent limits to implement the prohibitions of paragraph (a) of this subsection pursuant to 40 CFR 403.5.~~

~~(c) A POTW without an approved pretreatment program shall, in cases where pollutants contributed by users result in interference or pass through, and such violation is likely to recur, develop and enforcement specific effluent limits pursuant to 40 CFR 403.5.~~

~~(d) If, within thirty (30) days after notice of an interference violation has been sent by the cabinet to the POTW and to persons who have requested notice, the POTW fails to begin appropriate enforcement action, the cabinet may take appropriate enforcement action, pursuant to KRS 224.99-010 and 224.99-020.~~

~~(e) 40 CFR 403.5 is hereby incorporated by reference, revised as of July 1, 1986, as published by the Office of the Federal Register, National Archives and Register Service General Services Administration, and available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.~~

~~(5) Pretreatment standards: categorical standards.~~

~~(a) In addition to the general prohibitions in subsection (4) of this section, all indirect discharges shall comply with national pretreatment standards promulgated by EPA and codified in 40 CFR Chapter I, Subchapter N (Part 401 et seq.). Compliance shall be required within the time specified in the appropriate subpart of Subchapter N.~~

~~(b) Industrial users may request the director to provide written certification on whether an industrial user falls within a particular subcategory. The director will act upon that request in accordance with the procedures in 40 CFR Section 403.6.~~

~~(c) Limitations for industrial users will be imposed in accordance with 40 CFR Section 403.6(c) through (e).~~

~~(d) 40 CFR Chapter I, Subchapter N (Part 401 et seq.), and 40 CFR Section 403.6 are hereby incorporated by reference, revised as of July 1, 1986, as published by the Office of the Federal Register, National Archives and Register Service General Services Administration, and available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.~~

~~(6) Revision of categorical pretreatment standards to reflect POTW removal of pollutants. This subsection provides the criteria and procedures to be used by a POTW in revising the pollutant discharge limits specified in categorical pretreatment standards to reflect removal of pollutants by the POTW.~~

~~(a) Definitions. For the purpose of this subsection:~~

~~1. "Removal" means a reduction in the amount of a pollutant in the POTW's effluent or alteration of the nature of a pollutant during treatment at the POTW. The reduction or alteration can be obtained by physical, chemical or biological means and may be the result of specifically designed POTW capabilities, or it may be incidental to the operation of the treatment system. Removal does not mean dilution of a pollutant in the POTW. The demonstration of removal shall consist of data which reflect the removal achieved by the POTW for those specific pollutants of concern included on the list developed pursuant to CWA Section 307(a) (33 USC Section 1317(a)). Each categorical pretreatment standard will specify whether or not a removal allowance may be granted for indicator or surrogate pollutants regulated in that standard.~~

~~2. "Consistent removal" means the average of the lowest fifty (50) percent of the removals measured according to paragraph (d)2 of this subsection. All sample data obtained for the measured pollutant during the time period prescribed in that paragraph shall be reported and used in computing consistent removal. If a substance is measurable in the influent but not in the effluent, the effluent level may be assumed to be the limit of measurement, and these data may be used by the POTW at its discretion and subject to approval by the director. If the substance is not measurable in the influent, the data may not be used. When the number of samples with concentrations equal to or above the limit of measurement is between eight (8) and twelve (12), the average of the lowest six (6) removals shall be used.~~

If there are less than eight (8) samples with concentrations equal to or above the limit of measurement, the director may approve alternate means for demonstrating consistent removal.

3. "Measurement" refers to the ability of the analytical method or protocol to quantify as well as identify the presence of the substance in question.

4. "Overflow" means the intentional or unintentional diversion of flow from the POTW before the POTW treatment plant.

(b) Revision of categorical pretreatment standards to reflect POTW pollutant removal. A POTW receiving wastes from an industrial user to which a categorical pretreatment standard applies may, pursuant to this subsection, revise the discharge limits for a specific pollutant covered in the categorical pretreatment standard applicable to that user. Revisions shall only be made when the POTW demonstrates consistent removal of each pollutant for which the discharge limit in a categorical pretreatment standard is to be revised at a level which justifies the amount of revision to the discharge limit. In addition, revision of pollutant discharge limits in categorical pretreatment standards by a POTW may only be made as follows:

1. Application. The POTW shall apply for, and receive authorization from the director in accordance with subsections (8) and (9) of this section;

2. POTW pretreatment program. The POTW shall have a pretreatment program approved in accordance with subsections (7), (8) and (9) of this section. However, a POTW may conditionally revise the discharge limits for specific pollutants, even though a pretreatment program has not been approved, as follows. These provisions also govern the issuance of provisional authorizations under paragraph (d)2g of this subsection;

a. An industrial user wishing to receive a conditional or provisional revision of categorical pretreatment standards shall submit to the POTW the information required in subsection (10)(b)1 through 7 of this section, except that the compliance schedule is not required when a provisional allowance is requested. The submission shall indicate what additional technology, if any, will be needed to comply with the categorical pretreatment standards as revised by the POTW.

b. The POTW shall compile and submit data demonstrating removal in accordance with the requirements of paragraph (d)1 through 7 of this subsection. The POTW shall submit to the director a removal report which comports with the signatory and certification requirements of subsection (10)(l) and (m) of this section. This report shall contain a certification by any of the persons specified in subsection (10)(l) of this section or by an independent engineer, containing the following statement: "I have personally examined and am familiar with the information submitted in the attached document, and I hereby certify under penalty of law that this information was obtained in accordance with the requirements of subsection (6)(d) of this section. Moreover, based upon my inquiry of those individuals immediately responsible for obtaining the information reported herein, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

c. The POTW shall submit to the director an application for pretreatment program approval meeting the requirements of subsections (7) and (8)(a) or (b) of this section in a timely manner, not to exceed the time limitation set forth in a compliance schedule for development of a pretreatment program included in the POTW's KPDES permit.

d. If a POTW grants a conditional or provisional revision and the director subsequently makes a final determination, after notice and an opportunity for a hearing, that the POTW failed to comply with the conditions in paragraphs (b)2a or b of this subsection, or that its sludge use or disposal practices are not in compliance with the provisions of paragraph (b)4 of this subsection, the revision shall be terminated by the director and all industrial users to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical pretreatment standard within a reasonable time, not to exceed the period of time prescribed in the applicable categorical pretreatment standard as specified by the director. However, the revision will not be terminated when the POTW has not made a timely application for program approval if the POTW has made demonstrable progress towards and has demonstrated and continues to demonstrate an intention to submit an approvable pretreatment program as expeditiously as possible within an additional period of time, not to exceed one (1) year, established by the director.

e. If a POTW grants a conditional or provisional revision and the POTW or director subsequently makes a final determination after notice and an opportunity for a hearing, that the industrial user failed to comply with conditions in paragraph (b)1d of this subsection, including in the case of a conditional revision, the dates specified in the compliance schedule required by subsection (10)(b)7 of this section, the revision shall be terminated by the POTW or the director for the noncomplying industrial user and each noncomplying industrial user to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical pretreatment standards within the time period specified in that standard. The revision will not be terminated when a violation of the provisions of this subparagraph results from causes entirely outside the control of the industrial user or the industrial user has demonstrated substantial compliance.

f. The POTW shall submit to the director by December 31 of each year the name and address of each industrial user that has received a conditionally or provisionally revised discharge limit. If the revised discharge limit is revoked, the POTW shall submit the information in paragraph (b)2a of this subsection to the director.

3. Compensation for overflow. POTWs which at least once annually overflow untreated wastewater to receiving waters may claim consistent removal of a pollutant only by complying with either subparagraph a or b of this paragraph. However, this paragraph will not apply when an industrial user can demonstrate that overflow does not occur between the industrial user and the POTW treatment plant.

a. Consistent removal may be claimed if the industrial user provides containment or otherwise ceases or reduces discharges from the regulated processes which contain the pollutant for which an allowance is requested during all circumstances in which an overflow event can reasonably be expected to occur at the POTW or at a sewer to which the industrial user is connected. Discharges shall cease or be reduced, or pretreatment shall be increased, to the extent necessary to compensate for the removal not being provided by the POTW. Allowances under this provision will only be granted when the POTW submits to the director evidence that:

(i) All industrial users to which the POTW proposes to apply this provision have demonstrated the ability to contain or otherwise cease or reduce, during circumstances in which an overflow event can reasonably be expected to occur, discharges from the regulated processes which contain pollutants for which an allowance is requested;

(ii) The POTW has identified circumstances in which an overflow event can reasonably be expected to occur, and has a notification or other viable plan to insure that industrial users will learn of an impending overflow in sufficient time to contain, cease or reduce discharging to prevent untreated overflows from occurring. The POTW shall also demonstrate that it will monitor and verify the data required in subclause (iii) of this clause to insure that industrial users are containing, ceasing or reducing operations during POTW system overflow; and

(iii) All industrial users to which the POTW proposes to apply this provision have demonstrated the ability and commitment to collect and make available upon request by the POTW, director, or regional administrator daily flow reports or other data sufficient to demonstrate that all discharges from regulated processes containing the pollutant for which the allowance is requested were contained, reduced or otherwise ceased, as appropriate, during all circumstances in which an overflow event was reasonably expected to occur; or

b.(i) Consistent removal may be claimed if reduced pursuant to the following equation:

$$r_c = r_m = \frac{8760 - Z}{8760}$$

Where:

r_m = POTW's consistent removal rate for that pollutant as established under paragraphs (d)1 and (d)2 of this subsection.

r_c = removal corrected by the overflow factor.

Z = hours per year that overflow occurred between the industrial user and the POTW treatment plant, the hours either to be shown in the POTW's current NPDES permit application or the hours, as demonstrated by verifiable techniques, that a particular industrial user's discharge overflows between the industrial user and the POTW treatment plant.

(ii) After July 1, 1983, consistent removal may be claimed only when efforts to correct the conditions resulting in untreated discharges by the POTW are under way in accordance with the policy and procedures set forth in "PRM 75-34" (Program Guidance Memorandum 61) published on December 16, 1975 by EPA Office of Water Program Operations (WH-546). Revisions to discharge limits in categorical pretreatment standards may not be made when efforts have not been committed to by the POTW to minimize pollution from overflows. At a minimum, by July 1, 1983, the POTW shall have completed the analysis required by PRM 75-34 and be making an effort to implement the plan.

(iii) If, by July 1, 1983, a POTW has begun the PRM 75-34 analysis but due to circumstances beyond its control has not completed it, consistent removal, subject to the approval of the director may continue to be claimed according to the formula in subclause (i) of this clause as long as the POTW acts in a timely fashion to complete the analysis and makes an effort to implement the nonstructural cost effective measures identified by the analysis; and as long as the POTW has expressed its willingness to apply, after completing the analysis, for a construction grant necessary to implement any other cost effective overflow controls identified in the analysis should federal funds become available, so applies for such funds, and proceeds with the required construction in an expeditious manner. In addition, consistent removal may, subject to the approval of the director, continue to be claimed according to the formula in subclause (i) of this clause when the POTW has completed and the director has accepted the analysis required by PRM 75-34, and the POTW has requested inclusion in its KPDES permit of an acceptable compliance schedule providing for timely implementation of cost effective measures identified in the analysis. In considering what is timely implementation, the director will consider the availability of funds, cost of control measures, and seriousness of the water quality problem.

4. Compliance with applicable sludge requirements. A revision shall not contribute to the POTW's inability to comply with its KPDES permit or with any applicable statutes or regulations pertaining to sludge management.

(c) POTW application for authorization to revise discharge limits.

1. An application for authorization to revise discharge limits for industrial users who are or in the future may be subject to categorical pretreatment standards, or approval of discharge limits conditionally or provisionally revised for industrial users by the POTW shall be submitted by the POTW to the director.

2. A POTW may submit an application no more than once per year for:

a. Any categorical pretreatment standard promulgated in the prior eighteen (18) months;

b. Any new or modified facilities or production changes resulting in the discharge of pollutants which were not previously discharged and which are subject to promulgated categorical standards; or

c. Any significant increase in removal efficiency attributable to specific identifiable circumstances or corrective measures, such as improvements in operation and maintenance practices, new treatment or treatment capacity, or a significant change in the influent to the POTW treatment plant.

3. The director may, however, elect not to review the application upon receipt, in which case the POTW's conditionally or provisionally revised discharge limits will remain in effect until reviewed by the director. This review may occur at any time in accordance with the procedures of subsection (9) of this section, but in no event later than the time of any pretreatment program approval or any KPDES permit reissuance thereafter.

4. If the consistent removal claimed is based on an analytical technique other than the technique specified for the applicable categorical pretreatment standard, the director may require the POTW perform additional analyses.

(d) Contents of application to revise discharge limits. Requests for authorization to revise discharge limits in categorical pretreatment standards shall be supported by the following information:

1. List of pollutants. The POTW shall submit a list of pollutants for which discharge limit revisions are proposed.

2. Consistent removal data. The POTW shall submit influent and effluent operational data demonstrating consistent removal, or other information provided for in paragraph (a)2 of this subsection which demonstrates consistent removal of the pollutants for which discharge limit revisions are proposed. This data shall meet the following requirements:

a. Representative data: seasonal. The data shall be representative of yearly and seasonal conditions to which the POTW is subjected for each pollutant for which a discharge limit revision is proposed.

b. Representative data: quality and quantity. The data shall be representative of the quality and quantity of normal effluent and influent flow if that data can be obtained. If such data are unobtainable, alternate data or information may be presented for approval to demonstrate consistent removal as provided for in paragraph (a)2 of this subsection.

c. Sampling procedures: composite.

(i) The influent and effluent operational data shall be obtained through twenty four (24) hour flow proportional composite samples. Sampling may be done manually or automatically, and discretely or continuously. For discrete sampling, at least twelve (12) aliquots shall be composited. Discrete sampling may be flow proportioned either by varying the time interval between each aliquot or the volume of each aliquot. All composites must be flow proportional to either stream flow at time of collection of influent aliquot or to the total influent flow since the previous influent aliquot. Volatile pollutant aliquots must be combined in the laboratory immediately before analysis.

(ii) Twelve (12) samples shall be taken at approximately equal intervals throughout one (1) full year. Sampling must be evenly distributed over the days of the week so as to include nonworkdays as well as workdays. If the director determines that this schedule will not be most representative of the actual operation of the POTW treatment plant, an alternative sampling schedule will be approved.

(iii) Upon the director's concurrence, a POTW may utilize a historical data base amassed prior to the effective date of this subsection provided that such data otherwise meet the requirements of this subparagraph. In order for the historical data base to be approved it must present a statistically valid description of daily, weekly, and seasonal sewage treatment plant loadings and performance for at least one (1) year.

(iv) Effluent sample collection need not be delayed to compensate for hydraulic detention unless the POTW elects to include detention time compensation or unless the director requires detention time compensation. The director may require that each effluent sample be taken approximately one (1) detention time later than the corresponding influent sample when failure to do so would result in an unrepresentative portrayal of actual POTW operation. The detention period

is to be based on a twenty four (24) hour average daily flow value. The average daily flow used will be based upon the average of the daily flows during the same month of the previous year.

d. Sampling procedures: grab. When composite sampling is not an appropriate sampling is not an appropriate sampling technique, grab samples shall be taken to obtain influent and effluent operational data. Collection of influent grab samples should precede collection of effluent samples by approximately one (1) detention period. The detention period is to be based on a twenty four (24) hour average daily flow value. The average daily flow used will be based upon the average of the daily flows during the same month of the previous year. Grab samples will be required, for example, when the parameters being evaluated are these, such as cyanide and phenol, which may not be held for any extended period because of biological, chemical or physical interactions which take place after sample collection and affect the results. A grab sample is an individual sample collected over a period of time not exceeding fifteen (15) minutes.

e. Analytical methods. Sampling and an analysis of these samples shall be performed in accordance with the techniques prescribed in 40 CFR Part 136. When 40 CFR Part 136 does not contain sampling or analytical techniques for the pollutant in question, or when the director, with the concurrence of the administrator, determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis shall be performed using validated analytical methods or any other applicable sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the director.

f. Calculation of removal. All data shall be submitted to the director. Removal for a specific pollutant shall be determined either, for each sample, by measuring the difference between the concentrations of the pollutant in the influent and effluent of the POTW and expressing the difference as a percent of the influent concentration, or, when such data cannot be obtained, removal may be demonstrated using other data or procedures subject to concurrence by the director.

g. Exception to sampling data requirement: Provisional removal demonstration. For pollutants which are not currently being discharged, application may be made by the POTW for provisional authorization to revise the applicable categorical pretreatment standard prior to initial discharge of the pollutant. Consistent removal may be based provisionally on data from treatability studies or demonstrated removal at other treatment facilities when the quality and the quantity of influent are similar. In calculating and applying for provisional removal allowances, the POTW shall comply with the provision of paragraph (b)1 through 4 of this subsection. Within eighteen (18) months after the commencement of discharge of the pollutants in question, consistent removal shall be demonstrated.

3. List of industrial subcategories. The POTW shall submit a list of the industrial subcategories for which discharge limits in categorical pretreatment standards will be revised, including the number of industrial users in each subcategory and an identification of which of the pollutants on the list are discharged by each subcategory.

4. Calculation or revised discharge limits. The POTW shall submit proposed revised discharge limits for each of the subcategories of industrial users calculated in the following manner:

a. The proposed revised discharge limit for a specified pollutant shall be derived by use of the following formula:

$$Y = \frac{X}{1-r}$$

whare:

x = pollutant discharge limit specified in the applicable categorical pretreatment standard.

r = POTW's consistent removal rate for that pollutant as established under paragraphs (a)2, (d)2, and if appropriate, (b)3b(i) of this subsection (percentage expressed as a decimal).

y = revised discharge limit for the specified pollutant (expressed in same units as x).

b. In calculating revised discharge limits, the revision shall be applied equally to all existing and new industrial users in an industrial subcategory subject to categorical pretreatment standards which discharge that pollutant to the POTWs.

5. Data on sludge characteristics. The POTW shall submit data showing the concentrations and amounts in the POTW's sludge of the pollutants for which discharge limit revisions are proposed and for which EPA, the director or municipality have published sludge disposal or use criteria applicable to the POTW's current method of sludge use or disposal. These data shall meet the following requirements:

a. The data shall be obtained through a composite sample taken during the same sampling periods selected to measure consistent POTW removals in accordance with the requirements of paragraph (d)2 of this subsection. Each composite sample shall contain a minimum of twelve (12) discrete samples taken at equal time intervals over a twenty four (24) hour period. When a composite sample is not an appropriate sampling technique, grab samples shall be taken.

b. Sampling and analysis shall be performed in accordance with the sampling and analytical techniques described previously in paragraph (d)2e of this subsection.

6. Description of sludge management. The POTW shall submit a specific description of the POTW's current methods of use or disposal of its sludge and data demonstrating that the current sludge use or disposal methods comply and will continue to comply with the requirements of paragraph (b)4 of this subsection.

7. Certification statement. The POTW shall submit the certification statement required by paragraph (b)2b of this subsection stating that the pollutant removals and associated revised discharged limits have been or will be calculated in accordance with this section and any guidelines issued by EPA under CWA Section 304(g) (33 USC Section 1314(g)).

(e) Procedure for authorizing modification of standards.

1. Application for authorization to revise national pretreatment standards shall comply with subsection (8) of this section and paragraphs (c) and (d) of this subsection. Notice, public comment, and review by the director will comply with subsection (9) of this section.

2. A POTW which has received a construction grant from funds authorized for any fiscal year beginning after September 30, 1978, will only be considered for authorization to modify national standards after it has completed the analysis required by CWA Section 201(g)(5) (33 USC Section 1288(g)(5)) and demonstrated that modification of the discharge limits in national standards will not preclude the use of innovative or alternative technology. In addition, when sludge disposal or treatment technology is or will be acquired or constructed with construction grant funds, POTWs should refer to 40 CFR Section 35.917(d)(6) and Appendix A to determine the funding eligibility of sludge disposal or treatment facilities.

3. The director shall, at such time as it elects to review the submission, or at the time of POTW pretreatment program approval or KPDES permit reissuance thereafter, authorize the POTW to revise industrial user discharge limits, consistent with the provisions of this section.

4. An industrial user or other interested party may assist the POTW in preparing and presenting the information necessary to apply for authorization to revise categorical pretreatment standards.

(f) Continuation and withdrawal of authorization.

1. Monitoring and reporting of consistent removal. Following authorization to revise the discharge limits in pretreatment standards, the POTW shall continue to monitor and report on, at frequencies and over intervals specified by the director, with the concurrence of the regional administrator, but in no case less than two (2) times per year, the POTW's removal capabilities for all pollutants for which authority to revise the standards was granted. Monitoring and reporting shall

be in accordance with subsection (10)(i) and (j) of this section pertaining to pollutant removal capability reports.

2. Reevaluation of revisions. Approval of authority to revise pretreatment standards will be reexamined whenever the POTW's KPDES permit is reissued, unless the director, with the concurrence of the regional administrator determines the need to reevaluate the authority. In order to maintain a removal allowance, the POTW shall comply with all federal, state, and local statutes, regulations, and permits applicable to the POTW's selected method of sludge use or disposal. In addition, where overflows of untreated waste by the POTW continue to occur, the director, with the concurrence of the regional administrator, may condition continued authorization to revise discharge limits upon the POTW's performing additional analysis and/or implementing additional control measures as is consistent with EPA policy on POTW overflows.

3. Inclusion in POTW permit. Once authority to revise discharge limits for a specified pollutant is granted, the revised discharge limits for industrial users of the system as well as the consistent removal documented by the POTW for that pollutant and the other requirements of paragraph (b) of this subsection, shall be included in the POTW's KPDES permit upon the earliest reissuance or modification, at or following program approval, and shall become enforceable requirements of the POTW's KPDES permit.

4. Modification or withdrawal of revised limits.

a. Notice to POTW. The director shall notify the POTW if, on the basis of pollutant removal capability reports received pursuant to paragraph (f)1 of this subsection or other information available to it, the director determines:

(i) That one (1) or more of the discharge limit revisions made by the POTW, or the POTW itself, no longer meets the requirements of this subsection; or

(ii) That such discharge limit revisions are causing or significantly contributing to a violation of any conditions or limits contained in the POTW's KPDES permit. A revised discharge limit is significantly contributing to a violation of the POTW's permit if it satisfies the definitions set forth in subsection (2)(d) or (f) of this section.

b. Corrective action. If appropriate corrective action is not taken within a reasonable time, not to exceed sixty (60) days unless the POTW or the affected industrial users demonstrate that a longer time period is reasonably necessary to undertake the appropriate corrective action, the director shall either withdraw such discharge limits or require modifications in the revised discharge limits.

c. Public notice of withdrawal or modification. The director will not withdraw or modify revised discharge limits unless the director shall first have notified the POTW and all industrial users to whom revised discharge limits have been applied and made public in writing, the reasons for withdrawal or modification, and an opportunity is provided for a hearing. Following notice and withdrawal or modification, all industrial users to whom revised discharge limits had been applied shall be subject to the modified discharge limits or the discharge limits prescribed in the applicable categorical pretreatment standards, as appropriate, and shall achieve compliance with these limits within a reasonable time not to exceed the period of time prescribed in the applicable categorical pretreatment standard as may be specified by the director.

(7) POTW pretreatment programs: development by POTW.

(a) POTWs required to develop a pretreatment program. Any POTW, or combination of POTWs operated by the same authority, with a total design flow greater than 5 million gallons per day (mgd) and receiving from industrial users pollutants which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards shall be required to establish a POTW pretreatment program. The director may require that a POTW with a design flow of 5 mgd or less develop a POTW pretreatment program if it is found that the nature or volume of the industrial influent, treatment process upsets, violations of POTW affluent limitations, contamination of municipal sludge, or other circumstances so warrant. In addition, a POTW desiring to modify categorical pretreatment standards for pollutants removed by the POTW pursuant to subsection (6) of this section shall have an approved pretreatment program prior to obtaining final approval of a removal allowance, unless conditional approval of a removal allowance is granted by the director pursuant to subsection (6) of this section.

(b) Deadline for program approval. A POTW which meets the criteria of this subsection will receive approval of a POTW pretreatment program no later than three (3) years after the reissuance or modification of its existing permit but in no case later than July 1, 1983.

(c) Incorporation of approved programs in permits. A POTW may develop an approvable POTW pretreatment program any time before the time limit set forth in paragraph (b) of this subsection. The POTW's KPDES permit will be reissued or modified to incorporate the approved program conditions as enforceable conditions of the permit.

(d) Incorporation of compliance schedules in permits. If the POTW does not have an approved pretreatment program at the time the POTW's existing permit is reissued or modified, the reissued or modified permit will contain the shortest reasonable compliance schedule, not to exceed three (3) years or July 1, 1983, whichever is sooner, for the approval of the legal authority, procedures and funding required by paragraph (f) of this subsection.

(e) Cause for reissuance or modification of permits. The director may modify or revoke and reissue a POTW's permit in order to:

1. Put the POTW on a compliance schedule for the development of a POTW pretreatment program when the addition of pollutants into a POTW by an industrial user or combination of industrial users presents a substantial hazard to the functioning of the treatment works, quality of the receiving waters, human health, or the environment;

2. Coordinate the issuance of a CWA Section 201 (33 USC Section 1281) construction grant with the incorporation into a permit of a compliance schedule for POTW pretreatment program;

3. Incorporate an approved POTW pretreatment program in the POTW permit; or

4. Incorporate a compliance schedule for the development of a POTW pretreatment program in the POTW permit.

(f) POTW pretreatment program requirements. A POTW pretreatment program shall meet the following requirements:

1. Legal authority. The POTW shall operate pursuant to enforceable legal authority, which authorizes or enables the POTW to apply and to enforce the requirements of this section. The authority may be contained in a statute, ordinance, or series of contracts or joint powers agreements which the POTW is authorized to enact, enter into or implement, and which are authorized by law. At a minimum, this legal authority shall enable the POTW to:

a. Deny or condition new or increased contributions of pollutants, or changes in the nature of pollutants, to the POTW by industrial users when such contributions do not meet applicable pretreatment standards and requirements or when such contributions would cause the POTW to violate its permit;

b. Require compliance with applicable pretreatment standards and requirements by industrial users;

c. Control, through permit, contract, order or similar means, the contribution to the POTW by each industrial user to ensure compliance with applicable pretreatment standards and requirements;

d. Require the development of a compliance schedule by each industrial user for the installation of technology required to meet applicable pretreatment standards and requirements, including but not limited to the reports required in subsection (10) of this section;

e. Require the submission of all notices and self monitoring reports from industrial users as are necessary to assess and assure compliance by industrial users with pretreatment standards and requirements;

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine, independent of information supplied by

industrial users, compliance or noncompliance with applicable pretreatment standards and requirements by industrial users. Representatives of the POTW shall be authorized to enter any premises of any industrial user in which a discharge source or treatment system is located or in which records are required to be kept under subsection (12) of this section to assure compliance with pretreatment standards. Such authority shall be at least as extensive as the authority provided under CWA Section 308 (33 USC Section 1318);

g. Obtain remedies for noncompliance by any industrial user with any pretreatment standard and requirement. A POTW shall be able to seek injunctive relief for noncompliance by industrial users with pretreatment standards and requirements. A POTW shall seek and assess civil and criminal penalties, as authorized by law. A POTW may enter into contracts with industrial users to assure compliance by industrial users with pretreatment standards and requirements. A contract may provide for liquidated damages for violation of pretreatment standards and requirements and may include an agreement by the industrial user to submit to the remedy of specific performance for breach of contract;

h. Pretreatment requirements enforced through the remedies set forth in subparagraph g of this paragraph shall include but not be limited to, the duty to allow or carry out inspections, entry, or monitoring activities; any rules, regulations, or orders issued by the POTW; or any reporting requirements imposed by the POTW or this section. The POTW shall have authority and procedures to halt or prevent any discharge of pollutants to the POTW which reasonably appears to present an imminent danger to the health or welfare of persons. The POTW shall also have authority and procedure to halt or prevent any discharge to the POTW which presents or may present danger to the environment or which threatens to interfere with the operation of the POTW. The director shall have authority to seek enforcement for noncompliance by industrial users when the POTW has acted to seek such relief but has sought a penalty which the director finds to be insufficient; and

i. Comply with the confidentiality requirements set forth in subsection (11) of this section.

2. Procedures. The POTW shall develop and implement procedures to ensure compliance with the requirements of a pretreatment program. At a minimum, these procedures shall enable the POTW to:

a. Identify and locate all possible industrial users which might be subject to the POTW pretreatment program. Any compilation, index, or inventory of industrial users made under this paragraph shall be made available to the director upon request;

b. Identify the character and volume of pollutants contributed to the POTW by the industrial user identified under clause a of this subparagraph. This information shall be made available to the director upon request;

c. Notify industrial users identified under clause a of this subparagraph of applicable pretreatment standards and any other applicable requirements;

d. Receive and analyze self monitoring reports and other notices submitted by industrial users in accordance with the self monitoring requirements of subsection (10) of this section;

e. Randomly sample and analyze the effluent from industrial users and conduct surveillance and inspection activities in order to identify, independent of information supplied by industrial users, occasional and continuing noncompliance with pretreatment standards. The results of these activities shall be made available to the director upon request;

f. Investigate instances of noncompliance with pretreatment standards and requirements, as indicated in the reports and notices required by subsection (10) of this section, or indicate by analysis, inspection, and surveillance activities. Sample taking and analysis and the collection of other information shall be performed with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions; and

g. Comply with all applicable public participation requirements. These procedures shall include provision for at least annually providing public notification, in the largest daily newspaper published in the municipality in which the POTW is located, of industrial users which, during the previous twelve (12) months, were significantly violating applicable pretreatment standards or other pretreatment requirements. For the purposes of this provision, a significant violation is a violation which remains uncorrected forty five (45) days after notification of noncompliance; which is part of a pattern of noncompliance over a twelve (12) month period; which involves a failure to accurately report noncompliance; or which resulted in the POTW exercising its emergency authority.

3. Funding. The POTW shall have sufficient resources and qualified personnel to carry out all required authorities and procedures. In some limited circumstances, funding and personnel may be delayed by the director when the POTW has adequate legal authority and procedures to carry out the pretreatment program requirements and a limited aspect of the program does not need to be implemented immediately.

(8) POTW pretreatment programs and authorization to revise pretreatment standards: submission for approval.

(a) Who approves program. A POTW requesting approval of a POTW pretreatment program shall develop a program description which includes the information set forth in paragraph (b)1 through 4 of this subsection. This description shall be submitted to the director, who will make a determination on the request for program approval in accordance with procedure described in subsection (9) of this section.

(b) Contents of POTW program submission.

1. The program submission shall contain a statement from the city attorney or a city official acting in a comparable capacity, or the attorney for those POTWs which have independent legal counsel, that the POTW has authority adequate to carry out the programs described in subsection (7) of this section. This statement shall:

a. Identify the provision of the legal authority under subsection (7)(f)1 of this section which provides the basis for each procedure under subsection (7)(f)2 of this section;

b. Identify the manner in which the POTW will implement the program requirements set forth in subsection (7) of this section including the means by which pretreatment standards will be applied to individual industrial users; and

c. Identify how the POTW intends to ensure compliance with pretreatment standards and requirements, and to enforce them in the event of noncompliance by industrial users.

2. The program submission shall contain a copy of any statutes, ordinances, regulations, contracts, agreements, or other authorities relied upon by the POTW for its administration of the program. This submission shall include a statement reflecting the endorsement or approval of the local boards or bodies responsible for supervising and/or funding the POTW pretreatment program if approved.

3. The program submission shall contain a brief description, including organization charts of the POTW organization which will administer the pretreatment program. If more than one (1) agency is responsible for administration of the program the responsible agencies shall be identified, their respective responsibilities delineated and their procedures for coordination set forth.

4. The program description shall contain a description of the funding levels and full and part time manpower available to implement the program.

(c) Conditional POTW program approval. The POTW may request conditional approval of the pretreatment program pending the acquisition of funding and personnel for certain elements of the program. The request for conditional approval shall meet the requirements of paragraph (b) of this subsection except that the requirements of paragraph (b) of this subsection may be relaxed if the submission demonstrates that:

1. A limited aspect of the program does not need to be imple-

mented immediately;

2. The POTW had adequate legal authority and procedures to carry out those aspects of the program which will not be implemented immediately; and

3. Funding and personnel for the program aspects to be implemented at a later date will be available when needed. The POTW shall describe in the submission the mechanism by which this funding will be acquired. Upon receipt of a request for conditional approval, the director will establish a fixed date for the acquisition of the needed funding and personnel. If funding is not acquired by this date the conditional approval of the POTW pretreatment program and any removal allowances granted to the POTW may be modified or withdrawn.

(d) Content of removal allowance submission. The request for authority to revise categorical pretreatment standards shall contain the information required in subsection (6)(d) of this section.

(e) Approval authority action. A POTW requesting POTW pretreatment program approval shall submit to the director three (3) copies of the submission described in paragraph (b) of this subsection. Upon a preliminary determination that the submission meets the requirements of paragraph (b) of this subsection the director will:

1. Notify the POTW that the submission has been received and is under review; and

2. Commence the public notice and evaluation activities set forth in subsection (9) of this section.

(f) Notification where submission is defective. If after review of the submission as provided for in paragraph (e) of this subsection, the director determines that the submission does not comply with the requirements of paragraphs (b) or (c) and, if appropriate, (d) of this subsection, the director will provide notice in writing to the applying POTW and each person who has requested individual notice. This notification will identify any defects in the submission and advise of the means by which the POTW can comply with the applicable requirements of paragraphs (b) and (c) and, if appropriate, (d) of this subsection.

(g) Consistency with water quality management plans.

1. In order to be approved, the POTW pretreatment program shall be consistent with any approved water quality management plan developed in accordance with 40 CFR Parts 130 and 131, when the CWA Section 208 (33 USC Section 1288) plan includes management agency designations and addresses pretreatment in a manner consistent with this section. In order to assure such consistency the director will solicit the review and comment of the appropriate CWA Section 208 (33 USC Section 1288) planning agency during the public comment period provided for in subsection (9) of this section prior to approval or disapproval of the program.

2. When no 208 plan has been approved or when a plan has been approved but lacks management agency designations and/or does not address pretreatment in a manner consistent with this section, the director will solicit the review and comment of the appropriate 208 planning agency.

(9) Approval procedures for POTW pretreatment programs and POTW revision of categorical pretreatment standards. The following procedure will be adopted in approving or denying requests for approval of POTW pretreatment programs and revising categorical pretreatment standards:

(a) Deadline for review of submission. The director will have ninety (90) days from the date of public notice of a submission complying with the requirements of subsection (8) of this section, or if a removal allowance is sought with the requirements of subsection (6) of this section, to review the submission. The director will review the submission to determine compliance with the requirements of subsection (8) of this section, and when a removal allowance is sought, with subsection (6) of this section. The director may have up to an additional ninety (90) days to complete the evaluation of the submission if the public comment period provided for in paragraph (b)1a of this subsection is extended beyond thirty (30) days or if a public hearing is held as provided for in paragraph (b)2 of this subsection. In no event, however, will the time for evaluation of the submission exceed a total of 180 days from the date of public notice of a submission.

(b) Public notice and opportunity for hearing. Upon receipt of a submission the director will commence its review. Within five (5) days after making a determination that a submission meets the requirements of subsection (8)(b) of this section, and when a removal allowance is sought with subsections (6)(d) and (8)(d) of this section, the director will:

1. Issue a public notice of request for approval of the submission:

a. This public notice will be circulated in a manner designed to inform interested and potentially interested persons of the submission. Procedures for the circulation of public notice will include mailing notices of the request for approval of the submission to designated CWA Section 208 (33 USC Section 1288) planning agencies, federal and state fish, shellfish, and wildlife resource agencies; and to any other person or group who has requested individual notice, including those on appropriate mailing lists; and publication of a notice of request for approval of the submission in the largest daily newspaper within the jurisdiction served by the POTW.

b. The public notice will provide a period of not less than thirty (30) days following the date of the public notice during which time interested persons may submit their written views on the submission.

c. All written comments submitted during the thirty (30) day comment period will be retained by the director and considered in the decision on whether or not to approve the submission. The period for comment may be extended at the discretion of the director.

2. The director will also provide an opportunity for the applicant, any affected state, any interested state or federal agency, person or group of persons to request a public hearing with respect to the submission.

a. This request for public hearing shall be filed within the thirty (30) day or extended comment period described in paragraph (b)1b of this subsection and will indicate the interest of the person filing such request and the reasons why a hearing is warranted.

b. The director will hold a hearing if the POTW so requests. In addition, a hearing will be held if there is a significant public interest in issues relating to whether or not the submission should be approved.

c. Public notice of a hearing to consider a submission and sufficient to inform interested parties of the nature of the hearing and the right to participate will be published in the same newspaper as the notice of the original request. In addition notice of the hearing will be sent to these persons requesting individual notice.

3. When the director elects to defer review of a submission which authorizes a POTW to grant conditional revised discharge limits, the director will publish public notice of the election, pursuant to paragraph (b)1 of this subsection.

(c) Director's decision. At the end of the thirty (30) day or extended comment period and within the ninety (90) day or extended period provided for in paragraph (a) of this subsection, the director will approve or deny the submission based upon the evaluation in paragraph (a) of this subsection and taking into consideration comments submitted during the comment period and the record of the public hearing, if held. When the director makes a determination to deny the request, the director will so notify the POTW and each person who has requested individual notice. This notification will include suggested modification and the director may allow the requester additional time to bring the submission into compliance with applicable requirements.

(d) EPA objection to director's decision. No POTW pretreatment program will be approved by the director if following the thirty (30) day or extended evaluation period provided for in paragraph (b)1b of this subsection and any hearing held pursuant to paragraph (b)2 of this subsection, the regional administrator sets forth in writing objections to the approval of such submission and the reasons for such

objections. A copy of the regional administrator's objections will be provided to the applicant, and each person who has requested individual notice.

(e) Notice of decision. The director will notify those persons who submitted comments and participated in the public hearing, if held, of the approval or disapproval of the submission. In addition, the director will cause to be published a notice of approval or disapproval in the same newspapers as the original notice of request was published. The director will identify any authorization to modify categorical pretreatment standards by the POTW for removal of pollutants subject to the pretreatment standards.

(f) Public access to submission. The director will ensure that the submission and any comments on the submission are available to the public for inspection and copying.

(10) Reporting requirements for POTWs and industrial users.

(a) Definition. "Control authority" as it is used in this subsection means the POTW if the POTW's submission for its pretreatment program has been approved or the director if the submission has not been approved.

(b) Reporting requirement for industrial users upon effective date of categorical pretreatment standards—baseline report. Within 180 days after the effective date of a categorical pretreatment standard, or 180 days after the final administrative decision made upon a category determination submission under subsection (5)(a)4 of this section, whichever is later, existing industrial users subject to categorical pretreatment standards and currently discharging to or scheduled to discharge to a POTW shall be required to submit to the control authority a report which contains the information listed in subparagraphs 1 through 7 of this paragraph. When reports containing this information already have been submitted to the director in compliance with the requirements of 40 CFR Section 128.140(b), the industrial user will not be required to submit this information again. New sources shall be required to submit to the control authority a report which contains the information listed in subparagraphs (1) through (5) of this paragraph:

1. Identifying information. The user shall submit the name and address of the facility including the name of the operator and owner.

2. Permits. The user shall submit a list of any environmental control permits held by or for the facility.

3. Description of operations. The user shall submit a brief description of the nature, average rate of production, and standard industrial classification of the operation carried out by the industrial user. This description may include a schematic process diagram which indicates points of discharge to the POTW from the regulated processes.

4. Flow measurement. The user shall submit information showing the measured average daily and maximum daily flow in gallons per day to the POTW from regulated process streams. The control authority may allow for verifiable estimates of these flows when justified by cost or feasibility considerations.

5. Measurement of pollutants.

a. The user shall identify the pretreatment standards applicable to each regulated process;

b. The user shall submit the results of sampling and analysis identifying the nature and concentration, or mass, of regulated pollutants in the discharge from each regulated process when required by the control authority. Both daily maximum and average concentration, or mass, where required shall be reported. The sample shall be representative of daily operations;

c. When feasible samples must be obtained through the flow proportional composite sampling techniques specified in the applicable categorical pretreatment standard. When composite sampling is not feasible, a grab sample is acceptable;

d. When the flow of the stream being sampled is less than or equal to 950,000 liters/day (approximately 250,000 gpd) the user shall take three (3) samples within a two (2) week period. When the flow of the stream being sampled is greater than 950,000 liters/day, the user shall take six (6) samples within a two (2) week period;

e. Samples shall be taken immediately downstream from pretreatment facilities if such exist or immediately downstream from the regulated process if no pretreatment exists. If other wastewaters are mixed with the regulated wastewater prior to pretreatment, the user should measure the flows and concentrations necessary to allow use of the combined wastestream formula of subsection (5) of this section in order to evaluate compliance with the pretreatment standards. When an alternate concentration or mass limit has been calculated in accordance with the combined wastestream formula of subsection (5) of this section, this adjusted limit along with supporting data shall be submitted to the control authority;

f. Sampling and analysis shall be performed in accordance with the techniques prescribed in 40 CFR Part 136. When 40 CFR Part 136 does not contain sampling or analytical techniques for the pollutant in question, or when the director determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis shall be performed by using validated analytical methods, or any other applicable sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the director;

g. The control authority may allow the submission of a baseline report which utilizes only historical data so long as the data provides information sufficient to determine the need for industrial pretreatment measures;

h. The baseline report shall indicate the time, date, and place of sampling, and methods of analysis, and shall certify that such sampling and analysis is representative of normal work cycles and expected pollutant discharges to the POTW.

6. Certification. The user shall submit a statement, reviewed by an authorized representative of the industrial user and certified to be a qualified professional, indicating whether pretreatment standards are being met on a consistent basis, and, if not, whether additional operation and maintenance and/or additional pretreatment is required for the industrial user to meet the pretreatment standards and requirements.

7. Compliance schedule. If additional pretreatment and/or operation and maintenance are required to meet the pretreatment standards, the user shall submit the shortest schedule by which the industrial user will provide such additional pretreatment and/or operation and maintenance. The completion date in this schedule shall not be later than the compliance date established for the applicable pretreatment standard.

a. When the industrial user's categorical pretreatment standard has been modified by a removal allowance under subsection (6) of this section, or by a fundamentally different factors variance under Section 8 of this regulation, at the time the user submits the report required by paragraph (b) of this subsection, the information required by paragraph (b)6 and 7 of this subsection shall pertain to the modified limits.

b. If the categorical pretreatment standard is modified by a removal allowance under subsection (6) of this section or by a fundamentally different factors variance under Section 8 of this regulation, after the user submits the report required by paragraph (b) of this subsection, any necessary amendments to the information requested by paragraph (b)6 and 7 of this subsection shall be submitted by the user to the control authority within sixty (60) days after the modified limit is approved.

(c) Compliance schedule for meeting categorical pretreatment standards. The following conditions shall apply to the schedule required by paragraph (b)7 of this subsection:

1. The schedule shall contain increments of progress in the form of dates for the commencement and completion of major events leading to the construction and operation of additional pretreatment required for the industrial user to meet the applicable categorical pretreatment standards.

2. No increment referred to in paragraph (c)1 of this subsection

shall exceed nine (9) months.

3. Not later than fourteen (14) days following each date in the schedule and the final date for compliance, the industrial user shall submit a progress report to the control authority including, at a minimum, whether or not it complied with the increment of progress to be met on that date and if not, the date on which it expects to comply with this increment of progress, the reason for delay, and the steps being taken by the industrial user to return the construction to the schedule established. In no event shall more than nine (9) months elapse between such progress reports to the control authority.

(d) Report on compliance with categorical pretreatment standard deadline. Within ninety (90) days following the date for final compliance with applicable categorical pretreatment standards or in the case of a new source following commencement of the introduction of wastewater into the POTW, any industrial user subject to pretreatment standards and requirements shall submit to the control authority a report indicating the nature and concentration of all pollutants in the discharge from the regulated process which are limited by pretreatment standards and requirements and the average and maximum daily flow for these process units in the industrial user which are limited by such pretreatment standards and requirements. The report shall state whether the applicable pretreatment standards or requirements are being met on a consistent basis and, if not, what additional operation and maintenance and/or pretreatment is necessary to bring the industrial user into compliance with the applicable pretreatment standards or requirements. This statement shall be signed by an authorized representative of the industrial user and certified by a qualified professional.

(e) Periodic reports on continued compliance.

1. Any industrial user subject to a categorical pretreatment standard, after the compliance date of that pretreatment standard, or, in the case of a new source, after commencement of the discharge into the POTW, shall submit to the control authority during the months of June and December, unless required more frequently in the pretreatment standard or by the control authority, a report indicating the nature and concentration of pollutants in the effluent which are limited by such categorical pretreatment standards. In addition, this report shall include a record of measured or estimated average and maximum daily flows for the reporting period for the discharge reported in paragraph (b)4 of this subsection except that the control authority may require more detailed reporting of flows. At the discretion of the control authority and in consideration of such factors as local high or low flow rates, holidays, budget cycles, etc., the control authority may agree to alter the months during which the above reports are to be submitted.

2. When the control authority has imposed mass limitations on industrial users as provided by subsection (5)(c) of this section, the report required by paragraph (e)1 of this subsection shall indicate the mass of pollutants regulated by pretreatment standards in the discharge from the industrial user.

(f) Notice of slug loading. The industrial user shall notify the POTW immediately of any slug loading, as defined by subsection (4)(a) of this section by the industrial user.

(g) Monitoring and analysis to demonstrate continued compliance. The reports required in paragraphs (b)5, (d), and (e) of this subsection shall contain the results of sampling and analysis of the discharge, including the flow and the nature and concentration, or production and mass where requested by the control authority, of pollutants contained therein which are limited by the applicable pretreatment standards. The frequency of monitoring shall be prescribed in the applicable pretreatment standard. All sampling and analyses shall be performed in accordance with procedures established by the administrator pursuant to CWA Section 304(g) (33 USC Section 1314(g)), and set forth in 40 CFR Part 136. If 40 CFR Part 136 does not include sampling or analytical techniques for the pollutants in question, or if the director determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analyses shall be performed using validated analytical methods or any other sampling and analytical procedures, including procedures suggested by the POTW or other parties and approved by the director.

(h) Compliance schedule for POTWs. The following conditions and reporting requirements shall apply to the compliance schedule for development of an approvable POTW pretreatment program:

1. The schedule shall contain increments of progress in the form of dates for the commencement and completion of major events leading to the development and implementation of a POTW pretreatment program.

2. No increment referred to in paragraph (h)1 of this subsection shall exceed nine (9) months.

3. Not later than fourteen (14) days following each date in the schedule and the final date for compliance, the POTW shall submit a progress report to the director including, as a minimum, whether or not it complied with the increment of progress to be met on such date and, if not, the date on which it expects to comply with this increment of progress, the reason for delay, and the steps taken by the POTW to return to the schedule established. In no event shall more than nine (9) months elapse between such progress reports to the director.

(i) Initial POTW report on compliance with approved removal allowance. A POTW which has received authorization to modify categorical pretreatment standards for pollutants removed by the POTW in accordance with the requirements of subsection (6) of this section shall submit to the director within sixty (60) days after the effective date of a pretreatment standard for which authorization to modify has been approved, a report which contains all information required by subsection (6) of this section. A minimum of one (1) sample per month during the reporting period is required.

(j) Periodic reports by POTW to demonstrate continued compliance with removal allowance. The reports referred to in paragraph (i) of this subsection shall be submitted to the approval authority at six (6) month intervals beginning with the submission of the initial report referred to in paragraph (i) of this subsection unless required more frequently by the director.

(k) Signatory requirements for industrial user reports. The reports required by paragraphs (b), (d), and (e) of this section shall be signed by an authorized representative of the industrial user. An authorized representative may be:

1. A principal executive officer of at least the level of vice president, if the industrial user is a corporation.

2. A general partner or proprietor if the industrial user is a partnership or sole proprietorship respectively.

3. A duly authorized representative of the individual designated in subparagraph 1 or 2 of this paragraph if such representative is responsible for the overall operation of the facility from which the indirect discharge originates.

(l) Signatory requirements for POTW reports. Reports submitted to the approval authority by the POTW in accordance with paragraphs (h), (i), and (j) of this subsection shall be signed by a principal executive officer, ranking elected official, or other duly authorized employee if such employee is responsible for overall operation of the POTW.

(m) Provisions governing fraud and false statements. The reports required by paragraphs (b), (d), (e), (h), (i), and (j) of this subsection shall be subject to KRS 224.99-010(4) and all other state and federal laws pertaining to fraud and false statements.

(n) Recordkeeping requirements.

1. Any industrial user and POTW subject to the reporting requirements established in this subsection shall maintain records of all information resulting from any monitoring activities required by this section. Such records shall include for all samples:

a. The date, exact place, method, and time of sampling and the names of the person or persons taking the samples;

b. The dates analyses were performed;

c. Who performed the analyses;

~~d. The analytical techniques or methods used; and~~

~~e. The results of the analyses.~~

~~2. Any industrial user or POTW subject to these reporting requirements shall be required to retain for a minimum of three (3) years any records of monitoring activities and results, whether or not such monitoring activities are required by this section, and shall make such records available for inspection and copying by the director, and by the POTW in the case of an industrial user. This period of retention shall be extended during the course of any unresolved litigation regarding the industrial user or POTW or when requested by the director.~~

~~3. A POTW to which reports are submitted by an industrial user pursuant to paragraphs (b), (d), and (e) of this subsection shall retain such reports for a minimum of three (3) years and shall make such reports available for inspection and copying by the director. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the industrial user or the operation of the POTW pretreatment program or when requested by the director.~~

~~(11) Confidentiality. Any information submitted to the director in accordance with this section may be claimed confidential, as provided in 401 KAR 5:060, Section 2, except that effluent data provided to the director pursuant to this section shall be available to the public without restriction.~~

~~(12) Net/gross limitations. Categorical pretreatment standards may be adjusted to reflect the presence of pollutants in an industrial user's intake water in accordance with 40 CFR Section 403.15. 40 CFR Section 403.15 is hereby incorporated by reference, revised as of July 1, 1986, as published by the Office of the Federal Register, National Archives and Register Service, General Services Administration, and available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.~~

~~(13) Upset provision.~~

~~(a) Definition. "Upset" as used in this subsection means an exceptional incident in which there is unintentional and temporary noncompliance with categorical pretreatment standards because of factors beyond the reasonable control of the industrial user. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.~~

~~(b) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with categorical pretreatment standards if the requirements of paragraph (c) of this subsection are met.~~

~~(c) Conditions necessary for a demonstration of upset. An industrial user who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~1. An upset occurred and the industrial user can identify the specific cause of the upset;~~

~~2. The facility was at the time being operated in a prudent and workmanlike manner and in compliance with applicable operation and maintenance procedures;~~

~~3. The industrial user has submitted the following information to the POTW and control authority within twenty four (24) hours of becoming aware of the upset or if this information is provided orally, a written submission within five (5) days:~~

~~a. A description of the indirect discharge and cause of noncompliance;~~

~~b. The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue;~~

~~c. Steps being taken and/or planned to reduce, eliminate and prevent recurrence of the noncompliance.~~

~~(d) Burden of proof. In any enforcement proceeding the industrial user seeking to establish the occurrence of an upset shall have the burden of proof.~~

~~(e) Reviewability of agency consideration of claims of upset. In the usual exercise of prosecutorial discretion, cabinet enforcement personnel will review any claims that noncompliance was caused by an upset. No determinations made in the course of the review constitutes final agency action subject to judicial review under KRS 224.10-420(2). Industrial users will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with categorical pretreatment standards.~~

~~(f) User responsibility in case of upset. The industrial user shall control production or discharges to the extent necessary to maintain compliance with categorical pretreatment standards upon reduction, loss, or failure of its treatment facility until the facility is restored or an alternative method of treatment is provided. This requirement applies in the situation where, among other things, the primary source of power of the treatment facility is reduced, lost or fails.~~]

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:057. KPDES pretreatment requirements.

RELATES TO: KRS 224.10-100, 224.10-210, 224.16-050, 224.70-100, 224.70-110, 224.99-010, 40 CFR 1.25(e), 25, 128.140(b) (1977), 136, 261, 403 Appendix A, 403 Appendix D, 503, 33 USC 1251 et seq.

STATUTORY AUTHORITY: KRS [~~224.01-110,~~] 224.10-100, 224.10-110, 40 CFR 1.25(e), 25, 128.140(b) (1977), 136, 261, 403 Appendix A, 403 Appendix D, 503, 33 USC 1251 et seq.

NECESSITY AND FUNCTION: This administrative regulation implements Sections 204(b)(1)(c), 208(b)(2)(c)(iii), 301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 301(h)(5) and 301(i)(2), 304(e) and (g), 307, 308, 309, 402(b), 405, and 501(a) of the Federal Water Pollution Control Act of 1977 (PL 95-217) or "the Act." It establishes responsibilities of the Commonwealth of Kentucky, local government, industry, and the public to implement the national pretreatment program to control pollutants which pass through or interfere with treatment processes in publicly owned treatment works (POTWs) or which may contaminate sewage sludge. Its objectives are to prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge; to prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with the treatment works; and to improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

Section 1. Applicability. (1) This administrative regulation shall apply to:

(a) Pollutants from nondomestic sources which are directly or indirectly discharged into or transported by truck or rail or otherwise introduced into POTWs;

(b) POTWs which receive wastewater from sources subject to national pretreatment standards; and

(c) New or existing sources subject to pretreatment standards.

(2) This administrative regulation shall not apply to sources which lawfully discharge to a sewer which is not connected to a POTW treatment plant.

Section 2. Local Law. Nothing in this administrative regulation is

intended to affect any pretreatment requirements, including any standards or prohibitions, established by local law as long as local requirements are not less stringent than those set forth in state or national pretreatment standards, or other requirements or prohibitions established under the Act or this administrative regulation.

Section 3. Pretreatment Standards: Prohibited Discharges. (1)(a) General prohibition. A user may not introduce into a POTW any pollutant which causes pass-through or interference. This general prohibition and the specific prohibitions in subsection (2) of this section shall apply to each user introducing pollutants into a POTW whether or not the user is subject to other national pretreatment standards or national or local pretreatment requirements.

(b) Affirmative defenses. A user shall have an affirmative defense in action brought against it alleging a violation of the general prohibitions established in paragraph (a) of this subsection and the specific prohibitions in subsection (2) of this section if the user demonstrates that:

1. It did not know or have reason to know that its discharge, alone or in conjunction with discharges from other sources, would cause pass-through or interference; and

2.a. A local limit designed to prevent pass-through or interference was developed in accordance with subsection (3) of this section for each pollutant in the user's discharge that caused pass-through or interference, and the user was in compliance with each local limit directly prior to and during the pass-through or interference; or

b. If a local limit designed to prevent pass- through or interference has not been developed in accordance with subsection (3) of this section for the pollutant that caused the pass-through or interference, the user's discharge directly prior to and during the pass-through or interference did not change substantially in nature or constituents from the user's prior discharge activity when the POTW was regularly in compliance with the POTW's KPDES permit requirements and, if the violation was interference, was in compliance with applicable requirements for sewage sludge use or disposal.

(2) Specific prohibitions. In addition, the following pollutants shall not be introduced into a POTW:

(a) Pollutants which create a fire or explosion hazard in the POTW, including, but not limited to, waste streams with a closed cup flashpoint of less than 140 degrees Fahrenheit (°F) or sixty (60) degrees Celsius (°C) using the test methods specified in 40 CFR 261.21;

(b) Pollutants which may cause corrosive structural damage to the POTW, but no discharges with pH lower than five and zero-tenths (5.0), unless the POTW is specifically designed to accommodate the discharges;

(c) Solid or viscous pollutants in amounts which would cause obstruction to the flow in the POTW resulting in interference;

(d) Pollutants, including oxygen demanding pollutants (biochemical oxygen demand (BOD), etc.) released in a discharge at a flow rate or pollutant concentration which would cause interference with the POTW;

(e) Heat in amounts which would inhibit biological activity in the POTW resulting in interference, but no heat in quantities such that the temperature at the POTW treatment plant exceeds forty (40) °C (104 °F) unless the cabinet, upon request of the POTW, approves alternate temperature limits;

(f) Petroleum oil, nonbiodegradable cutting oil, or products of mineral oil origin in amounts that would cause interference or pass-through;

(g) Pollutants which result in the presence of toxic gases, vapors, or fumes within the POTW in a quality that may cause acute worker health and safety problems; or

(h) Trucked or hauled pollutants, except at discharge points designated by the POTW.

(3) The POTW shall develop specific limits under the following conditions:

(a) Each POTW developing a pretreatment program pursuant to Section 6 of this administrative regulation shall develop and enforce specific limits to implement the prohibitions listed in subsections (1) and (2) of this section. Each POTW with an approved pretreatment program shall continue to develop these limits as necessary and effectively enforce the limits.

(b) All other POTWs, if pollutants contributed by users result in interference or pass-through, and the violation is likely to recur, shall develop and enforce specific limits for industrial users, and all other users as appropriate, which, together with appropriate changes in the POTW's treatment plant's facilities or operation, are necessary to ensure renewed and continued compliance with the POTW's KPDES permit or sludge use or disposal practices.

(c) Specific effluent limits shall not be developed and enforced without individual notice to persons or groups who have requested these notices and had an opportunity to respond.

(4) Local limits. If specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW in accordance with subsection (3) of this section, the limits shall be deemed pretreatment standards for the purposes of Section 307(d) of the Act.

(5) EPA and cabinet enforcement actions under Section 309(f) of the Clean Water Act. If, within thirty (30) days after notice of an interference or pass-through violation has been sent by EPA or the cabinet to the POTW and the persons or groups who have requested these notices, the POTW fails to commence appropriate enforcement action to correct the violations, EPA or the cabinet may take appropriate enforcement action under the authority provided in Section 309(f) of the Act.

Section 4. National Pretreatment Standards: Categorical Standards. National pretreatment standards specifying quantities or concentrations of pollutants or pollutant properties which may be discharged to a POTW by existing or new industrial users in specific industrial subcategories are established as separate federal regulations under the appropriate subpart of 40 CFR Chapter I, Subchapter N. These standards, unless specifically noted otherwise, shall be in addition to all applicable pretreatment standards and requirements set forth in this administrative regulation.

(1) Category determination request.

(a) Application deadline. Within sixty (60) days after the effective date of a pretreatment standard for a subcategory under which an industrial user may be included, the industrial user or POTW may request that the cabinet provide written certification on whether the industrial user falls within that particular subcategory. If an existing industrial user adds or changes a process or operation which may be included in a subcategory, the existing industrial user shall request this certification prior to commencing discharge from the added or changed processes or operation. A new source shall request this certification prior to commencing discharge. If a request for certification is submitted by a POTW, the POTW shall notify affected industrial users of the submission. The industrial user may provide written comments on the POTW submission to the cabinet, within thirty (30) days of notification.

(b) Contents of application. Each request shall contain a statement:

1. Describing which subcategories might be applicable; and

2. Citing evidence and reasons why a particular subcategory is applicable and why others are not applicable. The person signing the application statement submitted pursuant to this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware

that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(c) Deficient requests. The cabinet shall act only on written requests for determinations that contain all of the information required. Persons who have made incomplete submissions shall be notified by the cabinet that their requests are deficient and, unless the time period is extended, will be given thirty (30) days to correct the deficiency. If the deficiency is not corrected within thirty (30) days or within an extended period allowed by the cabinet, the request for a determination shall be denied.

(d) Final decision.

1. If the cabinet receives a submittal the cabinet shall, after determining that it contains all of the information required by paragraph (b) of this subsection, consider the submission, additional evidence that may have been requested, and other available information relevant to the request. The cabinet shall then make a written determination of the applicable subcategory and state the reasons for the determination.

2. If the request is submitted to the cabinet, the cabinet shall forward the determination described in this paragraph to EPA which may make a final determination. EPA may waive receipt of these determinations. If EPA does not modify the cabinet's decision within sixty (60) days after receipt thereof, or if EPA waives receipt of the determination, the cabinet's decision shall be final.

3. If the request is submitted by the industrial user or POTW to EPA or if EPA elects to modify the cabinet's decision, EPA's decision shall be final.

4. EPA or the cabinet, as appropriate, shall send a copy of the determination to the affected industrial user and the POTW. If the final determination is made by EPA, EPA shall send a copy of the determination to the cabinet.

(e) Requests for hearing or legal decision. Within thirty (30) days following the date of receipt of notice of the final determination as provided for by paragraph (d) of this subsection, the requester may submit a petition to reconsider or contest the decision to the EPA regional administrator who shall act on the petition expeditiously and state the reasons for the determination in writing.

(2) Deadline for compliance with categorical standards. Compliance by existing sources with categorical pretreatment standards shall be within three (3) years of the date the standard is effective unless a shorter compliance time is specified in the appropriate subpart of 40 CFR Chapter I, Subchapter N. Direct dischargers with KPDES permits modified or reissued to provide a variance pursuant to Section 301(i)(2) of the Act shall meet compliance dates set in applicable categorical pretreatment standards. Existing sources which become industrial users subsequent to promulgation of an applicable categorical pretreatment standard shall be considered existing industrial users unless the sources meet the definition of a new source. New sources shall install and have in operating condition, and shall start up all pollution control equipment required to meet applicable pretreatment standards before beginning to discharge. Within the shortest feasible time, not to exceed ninety (90) days, new sources shall meet all applicable pretreatment standards.

(3)(a) Concentration and mass limits. Pollutant discharge limits in categorical pretreatment standards shall be expressed either as concentration or mass limits. If possible, if concentration limits are specified in standards, equivalent mass limits will be provided so that local, cabinet, or federal authorities responsible for enforcement may use either concentration or mass limits. Limits in categorical pretreatment standards shall apply to the effluent of the process regulated by the standard, or as otherwise specified by the standard.

(b) If the limits in a categorical pretreatment standard are expressed only in terms of mass of pollutant per unit of production, the control authority may convert the limits to equivalent limitations expressed either as mass of pollutant discharged per day or effluent concentration for purposes of calculating effluent limitations applicable to individual industrial users.

(c) A control authority calculating equivalent mass per day limitations under paragraph (b) of this subsection shall calculate the limitations by multiplying the limits in the standard by the industrial user's average rate of production. This average rate of production shall be based not upon the designed production capacity but rather upon a reasonable measure of the industrial user's actual long term daily production, such as the average daily production during a representative year. For new sources, actual production shall be estimated using projected production.

(d) A control authority calculating equivalent concentration limitations under paragraph (b) of this subsection shall calculate the limitations by dividing the mass limitations derived under paragraph (c) of this subsection by the average daily flow rate of the industrial user's regulated process wastewater. This average daily flow rate shall be based upon a reasonable measure of the industrial user's actual long term average flow rate, such as the average daily flow rate during the representative year.

(e) Equivalent limitations calculated in accordance with paragraphs (c) and (d) of this subsection shall be deemed pretreatment standards for the purposes of Section 307(d) of the Act and this administrative regulation. Industrial users shall comply with the equivalent limitations in lieu of the promulgated categorical standards from which the equivalent limitations were derived.

(f) Many categorical pretreatment standards specify one (1) limit for calculating maximum daily discharge limitations and a second limit for calculating maximum monthly average, or four (4) day average, limitations. If these standards are being applied, the same production of flow figure shall be used in calculating both types of equivalent limitations.

(g) Industrial users operating under a control mechanism incorporating equivalent mass or concentration limits calculated from a production based standard shall notify the control authority within two (2) business days after the user has a reasonable basis to know that the production level will significantly change within the next calendar month. A user not notifying the control authority of an anticipated change shall meet the mass or concentration limits in its control mechanism that were based on the original estimate of the long term average production rate.

(4) Dilution prohibited as substitute for treatment. Unless expressly authorized to do so by an applicable pretreatment standard or requirement, no industrial user shall ever increase the use of process water, or in other ways attempt to dilute a discharge as a partial or complete substitute for adequate treatment to achieve compliance with a pretreatment standard or requirement. The control authority may impose mass limitations on industrial users which are using dilution to meet applicable pretreatment standards or requirements, or in other cases if the imposition of mass limitations is appropriate.

(5) Combined waste stream formula. If process effluent is mixed prior to treatment with wastewaters other than those generated by the regulated process, fixed alternative discharge limits may be derived by the control authority, or by the industrial user with the written concurrence of the control authority. These alternative limits shall be applied to the mixed effluent. When deriving alternative categorical limits, the control authority or industrial user shall calculate both an alternative daily maximum value using the daily maximum values specified in the appropriate categorical pretreatment standards and an alternative consecutive sampling day average value using the monthly average values specified in the appropriate categorical pretreatment standards. The industrial user shall comply with the alternative daily maximum and monthly average limits fixed by the control authority until the control authority modifies the limits or approves an industrial user modification request. Modification is authorized if there is a material or significant change in the values used in the calculation to fix alternative limits for the regulated pollutant. An industrial user shall immediately report the material or significant changes to the control authority. If appropriate, new

alternative categorical limits shall be calculated within thirty (30) days.

(a) Alternative limit calculation. Either of the formulas in subparagraph 2 or 3 of this paragraph shall be used for deriving an alternative limit for a specified pollutant.

1. The average daily flow (F_D) shall be a reasonable measure of the average daily flow for a thirty (30) day period from the following sources; for new sources, flows shall be estimated using projected values:

a. Boiler blowdown streams, noncontact cooling streams, storm water streams, and demineralizer backwash streams. However, if these streams contain a significant amount of a pollutant, and the combination of these streams, prior to treatment, with an industrial user's regulated process waste streams will result in a substantial reduction of that pollutant, the control authority, upon application of the industrial user, may determine whether these streams should be classified as diluted or unregulated. In its application to the control authority, the industrial user shall provide engineering, production, sampling and analysis and other information necessary so that the control authority is able to make its determination;

b. Sanitary waste streams that are not regulated by a categorical pretreatment standard; or

c. From process waste streams which were or could have been entirely exempted from categorical pretreatment standards by the U.S. EPA for one (1) or more of the following reasons, and are listed in 40 CFR Part 403, Appendix D:

(i) The pollutants of concern are not detectable in the effluent from the industrial user;

(ii) The pollutants of concern are present only in trace amounts and are neither causing nor likely to cause toxic effects;

(iii) The pollutants of concern are present in amounts too small to be effectively reduced by technologies known to the U.S. EPA administrator; or

(iv) The waste stream contains only pollutants which are compatible with the POTW.

2. Alternative concentration limit.

$$C_T = \left(\frac{\sum_{i=1}^{N} C_i F_i}{\sum_{i=1}^{N} F_i} \right) \left(\frac{F_T - F_D}{F_T} \right)$$

where:

C_T = the alternative concentration limit for the combined waste stream.

C_i = the categorical pretreatment standard concentration limit for a pollutant in the regulated stream i.

F_i = the average daily flow, at least a thirty (30) day average, of stream i to the extent that it is regulated for the pollutant.

F_D = the average daily flow, at least a thirty (30) day average, from subparagraph 1 of this paragraph.

F_T = the average daily flow, at least a thirty (30) day average, through the combined treatment facility, including F_i, F_D and unregulated streams.

N = the total number of regulated streams.

3. Alternative mass limit.

$$M_T = \left(\sum_{i=1}^{N} M_i \right) \left(\frac{F_T - F_D}{\sum_{i=1}^{N} F_i} \right)$$

where:

M_T = the alternative mass limit for a pollutant in the combined waste stream.

M_i = the categorical pretreatment standard mass limit for a pollutant in the regulated stream i, or the categorical pretreatment mass limit multiplied by the appropriate measure of production.

F_i = the average flow, at least a thirty (30) day average, of stream i to the extent that it is regulated for the pollutant.

F_D = the average daily flow, at least a thirty (30) day average, from subparagraph 1 of this paragraph.

F_T = the average daily flow, at least a thirty (30) day average, through the combined treatment facility, including F_i, F_D and unregulated streams.

N = the total number of regulated streams.

(b) Alternate limits below detection limit. An alternative pretreatment limit from paragraph (a) of this subsection shall not be used if the alternative limit is below the analytical detection limit for any of the regulated pollutants.

(c) Self-monitoring. Self-monitoring required to insure compliance with the alternative categorical limit shall be conducted in accordance with the requirements set forth in Section 9 of this administrative regulation.

(d) Choice of monitoring location. If a treated regulated process waste stream is combined prior to treatment with wastewaters other than those generated by the regulated process, the industrial user may monitor either the segregated process waste stream or the combined waste stream for the purpose of determining compliance with applicable pretreatment standards. If the industrial user chooses to monitor the segregated process waste stream, it shall apply the applicable categorical pretreatment standard. If the user chooses to monitor the combined waste stream, it shall apply an alternative discharge limit calculated using the combined waste stream formula as provided in this section. The industrial user may change monitoring points only after receiving approval from the control authority. The control authority shall ensure that a change in an industrial user's monitoring points will not allow the user to substitute dilution for adequate treatment to achieve compliance with applicable standards.

Section 5. Removal Credits. (1)(a) General. Any POTW receiving wastes from an industrial user to which a categorical pretreatment standards applies may, subject to the conditions of this section, grant removal credits to reflect removal by the POTW of pollutants specified in the categorical pretreatment standards. The POTW may grant a removal credit equal to or less than its consistent removal rate. Upon being granted a removal credit, each affected industrial user shall calculate its revised discharge limits in accordance with paragraph (c) of this subsection. Removal credits may be given only for indicator or surrogate pollutants regulated in a categorical pretreatment standard if the categorical pretreatment standard so specifies.

(b) Conditions for authorization to give removal credits. A POTW may give removal credits only if the following conditions are met:

1. Application. The POTW applies for, and receives, authorization from the cabinet to give a removal credit in accordance with the requirements and procedures specified in subsection (5) of this section.

2. Consistent removal determination. The POTW demonstrates and continues to achieve consistent removal of the pollutant in accordance with subsection (2) of this section.

3. POTW local pretreatment program. The POTW has an approved pretreatment program in accordance with and to the extent required by this administrative regulation; except, a POTW which does not have an approved pretreatment program may, pending approval of such a program, conditionally give credits as provided in subsection (4) of this section.

4. Sludge requirements. The granting of removal credits will not cause the POTW to violate KRS Chapter 224 and administrative

regulations promulgated pursuant thereto, or the local and federal sludge requirements which apply to the sludge management method chosen by the POTW. Alternatively, the POTW may demonstrate to the cabinet that even though it is not presently in compliance with applicable sludge requirements, it will be in compliance when the industrial users to whom the removal credit would apply are required to meet their categorical pretreatment standards as modified by the removal credit. If granting removal credits forces a POTW to incur greater sludge management costs than would be incurred in the absence of granting removal credits, the additional sludge management costs shall not be eligible for EPA grant assistance. Removal credits may be made available for the following pollutants:

a.(i) For any of the pollutants listed in this clause for the use or disposal practice employed by the POTW when the requirements in 40 CFR Part 503 are met:

Pollutants	Use or Disposal Practice		
	LA[1]	SD[2]	I[3]
Arsenic	X	X	X
Beryllium			X
Cadmium	X		X
Chromium	X	X	X
Copper	X		
Lead	X		X
Mercury	X		X
Molybdenum	X		
Nickel	X	X	X
Selenium	X		
Zinc	X		
Total hydrocarbons, if the hydrocarbon is listed below.			X

where:

LA - Land application;

SD - Surface disposal site without a liner and leachate collection system; and

I - Firing of sewage sludge in a sewage sludge incinerator.

(ii) The following organic pollutants are eligible for a removal credit if the requirements for total hydrocarbons in 40 CFR Part 503, Subpart E are met when sewage sludge is fired in a sewage sludge incinerator:

i. Acrylonitrile;
ii. Aldrin or dieldrin, or both (Total);
iii. Benzene;
iv. Benzidine;
v. Benzo(a)pyrene;
vi. Bis(2-chloroethyl)ether;
vii. Bis(2-ethylhexyl)phthalate;
viii. Bromodichloromethane;
ix. Bromoethane;
x. Bromoform;
xi. Carbon tetrachloride;
xii. Chlordane;
xiii. Chloroform;
xiv. Chloromethane;
xv. DDD, DDE, DDT;
xvi. Dibromochloromethane;
xvii. Dibutyl phthalate;
xviii. 1,2-dichloroethane;
xix. 1,1-dichloroethylene;
xx. 2,4-dichlorophenol 1,3-dichloropropene;
xxi. Diethyl phthalate;
xxii. 2,4-dinitrophenol;
xxiii. 1,2-diphenylhydrazine;
xxiv. Di-n-butyl phthalate;
xxv. Endosulfan;
xxvi. Endrin;
xxvii. Ethylbenzene;
xxviii. Heptachlor;
xxix. Heptachlor epoxide;
xxx. Hexachlorobutadiene;
xxxi. Alpha-hexachlorocyclohexane;
xxxii. Betahexachlorocyclohexane;
xxxiii. Hexachlorocyclopentadiene;
xxxiv. Hexachloroethane;
xxxv. Hydrogen cyanide;
xxxvi. Isophorone;
xxxvii. Lindane;
xxxviii. Methylene chloride;
xxxix. Nitrobenzene;
xl. N-Nitrosodimethylamine;
xli. N-Nitrosodi-n-propylamine;
xlii. Pentachlorophenol;
xliii. Phenol;
xliv. Polychlorinated biphenyls;
xlv. 2,3,7,8-tetrachlorodibenzo-p-dioxin;
xlvi. 1,1,2,2,-tetrachloroethane;
xlvii. Tetrachloroethylene;
xlviii. Toluene;
il. Toxaphene;
l. Trichloroethylene;
li. 1,2,4-Trichlorobenzene;
lii. 1,1,1-Trichloroethane;
liii. 1,1,2-Trichloroethane; and
liv. 2,4,6-Trichlorophenol.

b. For any of the additional pollutants listed below for the use or disposal practice employed by the POTW when the concentration for a pollutant listed below in the sewage sludge that is used or disposed does not exceed the given concentration for that pollutant in milligrams per kilogram, dry weight basis.

Pollutant	Use or Disposal Practice			
		SD		
	LA	Unlined[1]	Lined[2]	I
Arsenic			[3]100	
Aldrin or Dieldrin or both (Total)	2.7			
Benzene	[3]16	140	3400	
Benzo(a)pyrene	15	[3]100	[3]100	
Bis(2-ethylhexyl)-phthtlate		[3]100	100	
Cadmium		[3]100	[3]100	
Chlordane	86	[3]100	[3]100	
Chromium			[3]100	
Copper		[3]46	[3]100	1400
DDD, DDE, DDT (Total)	1.2	2000	2000	
2,4 Dichlorophenoxy-acetic acid		7	7	
Fluoride	730			
Heptachlor	7.4			
Hexachlorobenzene	29			
Hexachlorobutadine	600			
Iron	[3]78			
Lead		[3]100	[3]100	
Lindane	84	[3]28	[3]28	
Malathion		0.63	0.63	
Mercury		[3]100	[3]100	
Molybdenum		40	40	
Nickel			[3]100	

N-Nitroso-dimethylamine	2.1	0.088	0.088	
Pentachlorophenol	30			
Phenol		82	82	
Polychlorinated biphenyls	4.6	<50	<50	
Selenium		4.8	4.8	4.8
Toxaphene	10	[3]26	[3]26	
Trichloroethylene	[3]10	9500	[3]10	
Zinc		4500	4500	4500

where:

LA - Land application;

SD - Surface disposal;

I - Incineration;

[1] - Sewage sludge unit without a liner and leachate collection system;

[2] - Sewage sludge unit with a liner and leachate collection system; and

[3] - Value expressed in grams per kilogram, dry weight basis.

c. For any pollutant in sewage sludge when the POTW disposes all of its sewage sludge in a municipal solid waste landfill unit that meets the criteria in 40 CFR Part 258.

5. KPDES permit limitations. The granting of removal credits will not cause a violation of the POTW's permit limitations or conditions. Alternatively, the POTW may demonstrate to the cabinet that even though it is not presently in compliance with applicable limitations and conditions in its KPDES permit, it will be in compliance when the industrial users to whom the removal credit would apply are required to meet their categorical pretreatment standards, as modified by the removal credit provision.

(c) Calculation of revised discharge limits. Revised discharge limits for a specific pollutant shall be derived by use of the following formula:

$$y = \frac{x}{1-r}$$

where:

x = pollutant discharge limit specified in the applicable categorical pretreatment standard;

r = removal credit for that pollutant as established under subsection (2) of this section; percentage removal expressed as a proportion; i.e., a number between zero and one (1); and

y = revised discharge limit for the specified pollutant, expressed in same units as x.

(2) Establishment of removal credits; demonstration of consistent removal.

(a) Consistent removal. Consistent removal shall be the average of the lowest fifty (50) percent of the removal measured according to paragraph (b) of this subsection. All sample data obtained for the measured pollutant during the time period prescribed in paragraph (b) of this subsection shall be reported and used in computing consistent removal. If a substance is measurable in the influent but not in the effluent, the effluent level may be assumed to be the limit of measurement, and those data may be used by the POTW subject to approval by the cabinet. If the substance is not measurable in the influent, the data shall not be used. If the number of samples with concentrations equal to or above the limit of measurement is between eight (8) and twelve (12), the average of the lowest six (6) removals shall be used. If there are less than eight (8) samples with concentrations equal to or above the limit of measurement, the cabinet may approve alternate means for demonstrating consistent removal. Measurement refers to the ability of the analytical method or protocol to quantify as well as identify the presence of the substance in question.

(b) Consistent removal data. Influent and effluent operational data demonstrating consistent removal or other information as provided for in paragraph (a) of this subsection, which demonstrates consistent removal of the pollutants for which discharge limit revisions are proposed shall be considered by the cabinet. These data shall meet the following requirements:

1. Representative data; seasonal. The data shall be representative of yearly and seasonal conditions to which the POTW is subjected for each pollutant for which a discharge limit revision is proposed.

2. Representative data; quality and quantity. The data shall be representative of the quality and quantity of normal effluent and influent flow if representative data can be obtained. If the data are unobtainable, alternate data or information may be presented for approval to demonstrate consistent removal as provided in paragraph (a) of this subsection.

3. Sampling procedures: composite.

a. The influent and effluent operational data shall be obtained through twenty-four (24) hour flow proportional composite samples. Sampling may be done manually or automatically, and discretely or continuously. For discrete sampling, at least twelve (12) aliquots shall be composited. Discrete sampling may be flow proportioned either by varying the time interval between each aliquot or the volume of each aliquot. All composites shall be flow proportional to each stream flow at time of collection of influent aliquot or to the total influent flow since the previous influent aliquot. Volatile pollutant aliquots shall be combined in the laboratory immediately before analysis.

b.(i) Twelve (12) samples shall be taken at approximately equal intervals throughout one (1) full year. Sampling shall be evenly distributed over the days of the week so as to include nonworkdays as well as workdays. If the cabinet determines that this schedule is not the most representative of the actual operation of the POTW treatment plant, an alternative sampling schedule will be approved.

(ii) In addition, upon the cabinet's concurrence, a POTW may utilize an historical data base amassed prior to November 5, 1987 if the data otherwise meet the requirements of this subsection. For the historical data base to be approved, it shall represent a statistically valid description of daily, weekly and seasonal sewage treatment plant loadings and performance for at least one (1) year.

c. Effluent sample collection need not be delayed to compensate for hydraulic detention unless the POTW elects to include detention time compensation or unless the cabinet requires detention time compensation. The cabinet may require that each effluent sample be taken approximately one (1) detention time later than the corresponding influent sample when failure to do so would result in an unrepresentative portrayal of actual POTW operation. The detention period shall be based on a twenty-four (24) hour average daily flow value. The average daily flow used shall be based upon the average of the daily flows during the same month of the previous year.

4. Sampling procedures: grab. If composite sampling is not an appropriate sampling technique, grab samples shall be taken to obtain influent and effluent operational data. A grab sample shall be an individual sample collected over a period of time not exceeding fifteen (15) minutes. Collection of influent grab samples shall precede collection of effluent samples by approximately one (1) detention period. The detention period shall be based on a twenty-four (24) hour average daily flow value. The average daily flow used shall be based upon the average of the daily flows during the same month of the previous year. Grab samples shall be taken for example, if the parameters being evaluated are those, such as cyanide and phenol, which may not be held for an extended period because of biological, chemical or physical interactions which take place after sample collection and affect the results.

5. Analytical methods. The sampling referred to in subparagraphs 1 to 4 of this paragraph and an analysis of these samples shall be performed in accordance with the techniques prescribed in 40 CFR

Part 136 and amendments thereto. If 40 CFR Part 136 does not contain sampling or analytical techniques for the pollutant in question, or if the cabinet or EPA determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis shall be performed using validated analytical methods or other applicable sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by EPA.

6. Calculation of removal. All data acquired under the provisions of this section shall be submitted to the cabinet. Removal for a specific pollutant shall be determined either, for each sample, by measuring the difference between the concentrations of the pollutant in the influent and effluent of the POTW and expressing the difference as a percent of the influent concentration, or, if these data cannot be obtained, removal may be demonstrated using other data or procedures subject to concurrence by the cabinet as provided for in paragraph (a) of this subsection.

(3) Provisional credits. For pollutants which are not being discharged currently (i.e., new or modified facilities, or production changes) the POTW may apply for authorization to give removal credits prior to the initial discharge of the pollutant. Consistent removal shall be based provisionally on data from treatability studies or demonstrated removal at other treatment facilities if the quality and quantity of influent are similar. Within eighteen (18) months after the commencement of discharge of pollutants in question, consistent removal shall be demonstrated pursuant to the requirements of subsection (2) of this section. If, within eighteen (18) months after the commencement of the discharge of the pollutant in question, the POTW cannot demonstrate consistent removal pursuant to the requirements of subsection (2) of this section, the authority to grant provisional removal credits shall be terminated by the cabinet and all industrial users to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical pretreatment standards within a reasonable time, not to exceed the period of time prescribed in the applicable categorical pretreatment standards, as may be specified by the cabinet.

(4) Exception to POTW pretreatment program requirement. A POTW required to develop a local pretreatment program by Section 6 of this administrative regulation may conditionally give removal credits pending approval of such a program in accordance with the following terms and conditions:

(a) All industrial users who are currently subject to categorical pretreatment standards and who wish conditionally to receive a removal credit shall submit to the POTW the information required in Section 9(1) of this administrative regulation, except that new or modified industrial users shall submit only the information required by Section 9(1)(a) to (f) of this administrative regulation, pertaining to the categorical pretreatment standard as modified by the removal credit. The industrial users shall indicate what additional technology will be needed to comply with the categorical pretreatment standards as modified by the removal credit;

(b) The POTW shall have submitted to the cabinet an application for pretreatment program approval meeting the requirements of Sections 6 and 7 of this administrative regulation in a timely manner, not to exceed the time limitation set forth in a compliance schedule for development of a pretreatment program included in the POTW's KPDES permit.

(c) The POTW shall:

1. Compile and submit data demonstrating its consistent removal in accordance with subsection (2) of this section;

2. Comply with the conditions specified in subsection (1)(b) of this section; and

3. Submit a complete application for removal credit authority in accordance with subsection (5) of this section;

(d) If a POTW receives authority to grant conditional removal credits and the cabinet subsequently makes a final determination, after appropriate notice, that the POTW failed to comply with the conditions in paragraphs (b) and (c) of this subsection, the authority to grant conditional removal credits shall be terminated by the cabinet and all industrial users to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical pretreatment standards within a reasonable time as specified by the cabinet, not to exceed the period of time prescribed in the applicable categorical pretreatment standards, as may be specified by the cabinet.

(e) If a POTW grants conditional removal credits and the POTW or the cabinet subsequently makes a final determination, after appropriate notice, that the industrial users failed to comply with the conditions in paragraph (a) of this subsection, the conditional credit shall be terminated by the POTW or the cabinet for the noncomplying industrial users and the industrial users to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical pretreatment standards within a reasonable time as specified by the cabinet, not to exceed the period of time prescribed in the applicable categorical pretreatment standards. The conditional credit shall not be terminated if a violation of the provisions of this subsection results from causes entirely outside of the control of the industrial users or the industrial users had demonstrated substantial compliance.

(f) If the cabinet does not review an application for conditional removal credit authority upon receipt of the application, the conditionally revised discharge limits shall remain in effect until reviewed by the cabinet. This review shall occur no later than the time of a pretreatment program approval or a related KPDES permit reissuance, according to procedures in Section 8 of this administrative regulation.

(5) POTW application for authorization to give removal credits and cabinet review.

(a) Who shall apply. A POTW that wants to give a removal credit shall apply for authorization from the cabinet.

(b) To whom application shall be made. An application for authorization to give removal credits or modify existing ones shall be submitted by the POTW to the cabinet.

(c) When to apply. A POTW may apply for authorization to give or modify removal credits at any time.

(d) Contents of the application. An application for authorization to give removal credits shall include the following information:

1. List of pollutants. A list of pollutants for which removal credits are proposed.

2. Consistent removal data. The data required pursuant to subsection (2) of this section.

3. Calculation of revised discharge limits. Proposed revised discharge limits for each affected subcategory of industrial users calculated in accordance with subsection (1)(c) of this section.

4. Local pretreatment program certification. A certification that the POTW has an approved local pretreatment program or qualifies for the exception to this requirement found at subsection (4) of this section.

5. Sludge management certification. A specific description of the POTW's current methods of using or disposing of its sludge and a certification that the granting of removal credits will not cause a violation of the sludge requirements identified in subsection (1)(b)4 of this section.

6. KPDES permit limit certification. A certification that the granting of removal credits will not cause a violation of the POTW's KPDES permit limits and conditions as required in subsection (1)(b)5 of this section.

(e) Cabinet's review. The cabinet shall review the POTW's application for authorization to give or modify removal credits in accordance with the procedures of Section 8 of this administrative regulation and shall not have more than 180 days from public notice of an application to complete the review.

(f) Nothing in this administrative regulation precludes an industrial user or other interested party from assisting the POTW in preparing

and presenting the information necessary to apply for authorization.

(6) Continuation and withdrawal of authorization.

(a) Effect of authorization. After a POTW has received authorization to grant removal credits for a particular pollutant regulated in a categorical pretreatment standard it may automatically extend that removal credit to the same pollutant if it is regulated in other categorical standards, unless granting the removal credit would cause the POTW to violate the sludge requirements identified in subsection (1)(b)4 of this section or its KPDES permit limits and conditions as required by subsection (1)(b)5 of this section. If a POTW elects at a later time to extend removal credits to a certain categorical pretreatment standard, industrial subcategory or one (1) or more industrial users that initially were not granted removal credits, it shall notify the cabinet.

(b) Inclusion in POTW permit. After authority is granted, the removal credits shall be included in the POTW's KPDES permit as soon as possible and shall become an enforceable requirement of the POTW's KPDES permit. The removal credits shall remain in effect for the term of the POTW's KPDES permit, if the POTW maintains compliance with the conditions specified in paragraph (d) of this subsection.

(c) Compliance monitoring. Following authorization to give removal credits, a POTW shall continue to monitor and report on the POTW's removal capabilities at intervals as specified by the cabinet, but no less than once per year. A minimum of one (1) representative sample per month during the reporting period shall be taken, and all sampling data shall be included in the POTW's compliance report.

(d) Modification or withdrawal of removal credits.

1. Notice of POTW. The cabinet shall notify the POTW if, on the basis of pollutant removal capability reports received pursuant to paragraph (c) of this subsection or other relevant information available to it, the cabinet determines:

a. That one (1) or more of the discharge limit revisions made by the POTW, or the POTW itself, no longer meets the requirements of this section; or

b. That the discharge limit revisions are causing a violation of conditions or limits contained in the POTW's KPDES permit.

2. Corrective action. If appropriate corrective action is not taken within a reasonable time, not to exceed sixty (60) days unless the POTW or the affected industrial users demonstrate that a longer time period is reasonably necessary to undertake the appropriate corrective action, the cabinet shall either withdraw the discharge limits or require modifications in the revised discharge limits.

3. Public notice of withdrawal or modification. The cabinet shall not withdraw or modify revised discharge limits unless it has first notified the POTW and all industrial users to whom revised discharge limits have been applied, and made public, in writing, the reasons for the withdrawal or modification, and an opportunity is provided for a public hearing. Following the notice and withdrawal or modification, all industrial users to whom revised discharge limits had been applied shall be subject to the modified discharge limits or the discharge limits prescribed in the applicable categorical pretreatment standards, as appropriate, and shall achieve compliance with the limits within a reasonable time as may be specified by the cabinet, not to exceed the period of time prescribed in the applicable categorical pretreatment standards.

(7) Compensation for overflow. POTWs which overflow untreated wastewater to receiving waters at least once annually may claim consistent removal of a pollutant only by complying with either paragraph (a) or (b) of this subsection. However, this subsection shall not apply if industrial users can demonstrate that overflow does not occur between the industrial users and the POTW treatment plant.

(a) The industrial user shall provide containment or otherwise shall cease or reduce discharges from the regulated processes which contain the pollutant for which an allowance is requested during all circumstances in which an overflow event can reasonably be expected to occur at the POTW or at a sewer to which the industrial user is connected. Discharges shall cease or be reduced, or pretreatment shall be increased, to the extent necessary to compensate for the removal not being provided by the POTW. Allowances under this provision shall be granted only if the POTW submits to the cabinet evidence that:

1. All industrial users to which the POTW proposes to apply this provision have demonstrated the ability to contain or otherwise cease or reduce, during circumstances in which an overflow event can reasonably be expected to occur, discharges from the regulated processes which contain pollutants for which an allowance is requested;

2. The POTW has identified circumstances in which an overflow event can reasonably be expected to occur, and has a notification or other viable plan to insure that industrial users will learn of an impending overflow in sufficient time to contain, cease or reduce discharging to prevent untreated overflows from occurring. The POTW shall also demonstrate that it will monitor and verify the data required in subparagraph 3 of this paragraph, to insure that industrial users are containing, ceasing or reducing operations during POTW system overflow; and

3. All industrial users to which the POTW proposes to apply this provision have demonstrated the ability and commitment to collect and make available, upon request by the POTW, cabinet or EPA regional administrator, daily flow reports or other data sufficient to demonstrate that all discharges from regulated processes containing the pollutant for which the allowance is requested were contained, reduced or otherwise ceased, as appropriate, during all circumstances in which an overflow event was reasonably expected to occur; or

(b)1. The consistent removal claimed shall be reduced pursuant to the following equation:

$$r_c = r_m \frac{8760 - Z}{8760}$$

where:

r_m = POTW's consistent removal rate for that pollutant as established under subsection (2)(b) of this section;

r_c = removal corrected by the overflow factor; and

Z = hours per year that overflow occurred between the industrial users and the POTW treatment plant, the hours either to be shown in the POTW's current KPDES permit application or the hours, as demonstrated by verifiable techniques, that a particular industrial user's discharge overflows between the industrial user and the POTW treatment plant.

2. After July 1, 1983, consistent removal may be claimed only if reasonable efforts to correct the conditions resulting in untreated discharges by the POTW are underway in accordance with the policy and procedures set forth in 40 CFR Part 403, Appendix A, adopted without change. Revisions to discharge limits in categorical pretreatment standards may not be made if reasonable efforts have not been committed to by the POTW to minimize pollution from overflows. At a minimum, the POTW shall have completed the analysis required by 40 CFR Part 403, Appendix A and be making a reasonable effort to implement the plan.

3. If, by July 1, 1983, a POTW has begun the 40 CFR Part 403, Appendix A analysis but due to circumstances beyond its control has not completed it, consistent removal, subject to the approval of the cabinet, may continue to be claimed according to the formula in subparagraph 1 of this paragraph if the POTW acts in a timely fashion to complete the analysis and makes an effort to implement the nonstructural cost-effective measures identified by the analysis; and if the POTW has expressed its willingness to apply, after completing the analysis, for a construction grant necessary to implement other cost-effective overflow controls identified in the analysis if federal funds become available, applies for the funds, and proceeds with the required construction in an expeditious manner. In

addition, consistent removal may, subject to the approval of the cabinet, continue to be claimed according to the formula in subparagraph 1 of this paragraph if the POTW has completed and the cabinet has accepted the analysis required by 40 CFR Part 403, Appendix A and the POTW has requested inclusion in its KPDES permit of an acceptable compliance schedule providing for timely implementation of cost-effective measures identified in the analysis. In considering what is timely implementation, the cabinet shall consider the availability of funds, cost of control measures, and seriousness of the water quality problem.

Section 6. Pretreatment Program Requirements: Development by POTW. (1) POTWs required to develop a pretreatment program. A POTW, or a combination of POTWs operated by the same authority, with a total design flow greater than five (5) million gallons per day (MGD) and receiving from industrial users pollutants which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards shall establish a pretreatment program. A POTW with a design flow of five (5) MGD or less shall develop a pretreatment program if the cabinet determines that the nature or volume of the industrial wastewater, treatment process upsets, violations of POTW effluent limitations, contamination of municipal sludge, or other circumstances warrant to prevent interference with the POTW or pass-through.

(2) Deadline for program approval. A POTW which meets the criteria of subsection (1) of this section and is identified through written notification by the cabinet shall develop and submit a pretreatment program for approval as soon as possible, but no later than one (1) year after written notification from the cabinet of the identification. The pretreatment program shall meet the criteria set forth in subsection (4) of this section and shall be administered by the POTW to ensure compliance by industrial users with applicable pretreatment standards and requirements.

(3) Incorporation of approved programs in permits. The POTW's KPDES permit will be reissued or modified by the cabinet to incorporate the approved program conditions as enforceable conditions of the permit. The modification of a POTW's KPDES permit for the purposes of incorporating a POTW pretreatment program approved in accordance with the procedures in Section 8 of this administrative regulation shall be deemed a minor permit modification subject to the procedures in 401 KAR 5:070.

(4) POTW pretreatment requirements. A POTW pretreatment program shall be based on the following legal authority and include the following procedures. These authorities and procedures shall be fully and effectively exercised and implemented.

(a) Legal authority. The POTW shall operate pursuant to legal authority enforceable in federal courts or courts of the Commonwealth, which authorizes or enables the POTW to apply and to enforce federal or state statutes and any administrative regulations implementing those statutes. The authority may be contained in statutes, ordinances, or joint powers agreements which the POTW is authorized to enact, enter into or implement, and which are authorized by state law. At a minimum, this legal authority shall enable the POTW to:

1. Deny or condition new or increased contributions of pollutants or flows, or changes in the nature of pollutants, to the POTW by industrial users if the contributions do not meet applicable pretreatment standards and requirements or if the contributions would cause the POTW to violate its KPDES permit;

2. Require compliance with applicable pretreatment standards and requirements by industrial users;

3. Control through permit, order, or similar means, the contribution to the POTW by each industrial user to ensure compliance with applicable pretreatment standards and requirements. If industrial users are identified as significant, this control shall be achieved through permits or equivalent individual control mechanisms issued to each identified user. The control mechanisms shall be enforceable and contain, at a minimum, the following conditions:

a. A statement of duration of no more than five (5) years;

b. A statement of nontransferability without, at a minimum, prior notification to the POTW and provision of a copy of the existing control mechanism to the new owner or operator;

c. Effluent limits based on applicable general pretreatment standards in this administrative regulation, categorical pretreatment standards, local limits, and state and local law, whichever is more stringent;

d. Self-monitoring, sampling, reporting, notification and record-keeping requirements, including an identification of the pollutants to be monitored, sampling location, sampling frequency, and sample type, based on the applicable general pretreatment standards in this administrative regulation, categorical pretreatment standards, local limits, and state and local law; and

e. Statement of applicable civil and criminal penalties for violation of pretreatment standards and requirements, and applicable compliance schedules. The schedules may not extend the compliance date beyond applicable federal deadlines.

4. Require the development of a compliance schedule by each industrial user for the installation of technology required to meet applicable pretreatment standards and requirements and the submission of all notices and self-monitoring reports from industrial users as are necessary to assess and assure compliance by industrial users with pretreatment standards and requirements, including but not limited to the reports required in Section 9 of this administrative regulation;

5. Carry out all inspection, surveillance and monitoring procedures necessary to determine, independent of information supplied by industrial users, compliance or noncompliance with applicable pretreatment standards and requirements by industrial users. Representatives of the POTW shall be authorized to enter a premises of an industrial user in which a discharge source or treatment system is located or in which records are required to be kept to assure compliance with pretreatment standards and requirements. The authority shall be at least as extensive as the authority provided under Section 308 of the Act;

6.a. Obtain remedies for noncompliance by an industrial user with any pretreatment standards or requirements. All POTWs shall be able to seek injunctive relief for noncompliance by industrial users with pretreatment standards or requirements. All POTWs shall also have authority to seek or assess civil or criminal penalties, as authorized by law, in at least the amount of $1,000 a day for each violation by industrial users of pretreatment standards or requirements. POTWs whose approved pretreatment programs require modification to conform to the requirements of this paragraph shall submit a request for approval of a program modification in accordance with Section 15 of this administrative regulation.

b. Pretreatment requirements which will be enforced through the remedies set forth in clause a of this subparagraph shall include but not be limited to, the duty to allow or carry out inspections, entry, or monitoring activities; rules, local regulations, or orders issued by the POTW; requirements set forth in individual control mechanisms issued by the POTW; and reporting requirements imposed by the POTW or this administrative regulation. The POTW shall have authority and procedures, after informal notice to the discharger, immediately and effectively to halt or prevent a discharge of pollutants to the POTW which reasonably appears to present an imminent danger to the health or welfare of persons. The POTW shall also have authority and procedures, which shall include notice to the affected industrial users and an opportunity to respond, to halt or prevent a discharge to the POTW which presents or may present a danger to the environment or which threatens to interfere with the operation of the POTW. The cabinet shall have authority to seek judicial relief and may also use administrative penalty authority when the POTW has sought a monetary penalty which the cabinet believes to be insufficient.

7. Comply with the confidentiality requirements set forth in Section 11 of this administrative regulation.

(b) Procedures. The POTW shall develop and implement procedures to ensure compliance with the requirements of a pretreatment program. At a minimum, these procedures shall enable the POTW to:

1. Identify and locate all possible industrial users which might be subject to the pretreatment program. A compilation, index or inventory of industrial users made under this administrative regulation shall be made available to the cabinet upon request;

2. Identify the character and volume of pollutants contributed to the POTW by the industrial users identified in subparagraph 1 of this paragraph. This information shall be made available to the cabinet upon request;

3. Notify industrial users identified according in subparagraph 1 of this paragraph of applicable pretreatment standards and applicable requirements under Sections 204(b) and 405 of the Act and Subtitles C and D of the Resource Conservation and Recovery Act. Within thirty (30) days of approval pursuant to paragraph (f) of this subsection of a list of significant industrial users, notify each significant industrial user of its status and of all requirements applicable to it as a result of that status;

4. Receive and analyze self-monitoring reports and other notices submitted by industrial users in accordance with the self-monitoring requirements in Section 9 of this administrative regulation;

5. Randomly sample and analyze the effluent from industrial users and conduct surveillance activities to identify, independent of information supplied by industrial users, occasional and continuing noncompliance with pretreatment standards. Inspect and sample the effluent from each significant industrial user at least once a year. Evaluate, at least once every two (2) years, whether each significant industrial user needs a plan to control slug discharges. For purposes of this subsection, a slug discharge shall be a discharge of a nonroutine, episodic nature, including but not limited to an accidental spill or noncustomary batch discharge. The results of these activities shall be available to the cabinet upon request. If the POTW decides that a slug control plan is needed, the plan shall contain, at a minimum, the following elements:

a. Description of discharge practices, including nonroutine batch discharges;

b. Description of stored chemicals;

c. Procedures for immediately notifying the POTW of slug discharges, including a discharge that would violate a prohibition under Section 3 of this administrative regulation, with procedures for follow-up written notification within five (5) calendar days; and

d. If necessary, procedures to prevent adverse impact from accidental spills, including inspection and maintenance of storage areas, handling and transfer of materials, loading and unloading operations, control of plant site run-off, worker training, building of containment structures or equipment, measures for containing toxic organic pollutants, including solvents, or measures and equipment necessary for emergency response.

6. Investigate instances of noncompliance with pretreatment standards and requirements, as indicated in the reports and notices required by Section 9 of this administrative regulation, or indicated by analysis, inspection, and surveillance activities described in subparagraph 5 of this paragraph. Sample taking and analysis and the collection of other information shall be performed with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions; and

7. Comply with the public participation requirements of 40 CFR Part 25, adopted without change, in the enforcement of national pretreatment standards. These procedures shall include provisions for at least annual public notification, in the largest daily newspaper published in the municipality in which the POTW is located, of industrial users which, at any time during the previous twelve (12) months, were in significant noncompliance with applicable pretreatment requirements. For the purposes of this provision, an industrial user shall be in significant noncompliance if its violation meets one (1) or more of the following criteria:

a. Chronic violations of wastewater discharge limits, which shall be those violations in which sixty-six (66) percent or more of all of the measurements taken during a six (6) month period exceed by any magnitude the daily maximum limit or the average limit for the same pollutant parameter;

b. Technical review criteria (TRC) violations, which shall be those violations in which thirty-three (33) percent or more of all of the measurements for each pollutant parameter taken during a six (6) month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC. TRC = 1.4 for BOD, total suspended solids (TSS), fats, oil, and grease, and TRC = 1.2 for all other pollutants except pH;

c. Other violations of a pretreatment effluent limit (daily maximum or longer term average) that the control authority determines has caused, alone or in combination with other discharges, interference or pass-through, including endangering the health of POTW personnel or the general public;

d. A discharge of a pollutant that has caused imminent danger to human health, to welfare or to the environment or has resulted in the POTW's exercise of its emergency authority under paragraph (a)6b of this subsection to halt or prevent such a discharge;

e. Failure to meet, within ninety (90) days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order for starting construction, completing construction, or attaining final compliance;

f. Failure to provide, within thirty (30) days after the due date, required reports such as baseline monitoring reports, ninety (90) day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance schedules;

g. Failure to accurately report noncompliance; or

h. Other violations or group of violations which the control authority determines will adversely affect the operation or implementation of the local pretreatment program.

(c) Funding. The POTW shall have sufficient resources and qualified personnel to carry out the authorities and procedures described in paragraphs (a) and (b) of this subsection. In some limited circumstances, funding and personnel may be delayed if the POTW has adequate legal authority and procedures to carry out the pretreatment program requirements described in this section; and a limited aspect of the program is not required to be implemented immediately.

(d) Local limits. The POTW shall develop local limits as required in Section 3(3)(a) of this administrative regulation or demonstrate that they are not necessary.

(e) The POTW shall develop and implement an enforcement response plan. This plan shall contain detailed procedures indicating how a POTW will investigate and respond to instances of industrial user noncompliance. The plan shall, at a minimum:

1. Describe how the POTW will investigate instances of noncompliance;

2. Describe the types of escalating enforcement responses the POTW will take in response to all anticipated types of industrial user violations and the time periods within which responses will take place;

3. Identify by title the officials responsible for each type of response; and

4. Adequately reflect the POTW's primary responsibility to enforce all applicable pretreatment requirements and standards as detailed in paragraphs (a) and (b) of this subsection.

(f) The POTW shall prepare a list of its industrial users meeting the criteria of a significant industrial user. The list shall identify the criteria applicable to each industrial user and, for industrial users meeting the criteria of a significant industrial user, shall also indicate if the POTW has made a determination that the industrial user is not a significant industrial user. This list, and subsequent modifications

thereto, shall be submitted to the cabinet as a nonsubstantial program modification pursuant to Section 15(2)(b) of this administrative regulation. Discretionary designations or de-designations by the control authority shall be deemed to be approved by the cabinet ninety (90) days after submission of the list or modifications thereto, unless the cabinet determines that a modification is in fact a substantial modification.

Section 7. Pretreatment Programs or Authorization to Revise Pretreatment Standards: Submission for Approval. (1) Who approves program. A POTW requesting approval of a pretreatment program shall develop a program description which includes the information set forth in subsection (2)(a) through (d) of this section. This description shall be submitted to the cabinet which shall make a determination on the request for program approval in accordance with the procedures described in Section 8 of this administrative regulation.

(2) Contents of POTW program submission. The program description shall contain the following information:

(a) A statement from the city attorney or legal counsel that the POTW has adequate authority to carry out the programs described in Section 6 of this administrative regulation. This statement shall:

1. Identify the provision of the legal authority which provides the basis for each procedure identified in Section 6(4)(b) of this administrative regulation;

2. Identify the manner in which the POTW will implement the program requirements set forth in Section 6 of this administrative regulation, including the means by which pretreatment standards will be applied to individual industrial users (e.g., by order, permits, ordinance, etc.); and

3. Identify how the POTW intends to ensure compliance with pretreatment standards and requirements, and to enforce them if industrial users do not comply with them;

(b) A copy of statutes, ordinances, local regulations, agreements, or other authorities relied upon by the POTW for its administration of the program. This submission shall include a statement reflecting the endorsement or approval of the local boards or bodies responsible for supervising or funding the pretreatment program if approved;

(c) A brief description, including organization charts, of the POTW organization which will administer the pretreatment program. If more than one (1) agency is responsible for administration of the program the responsible agencies shall be identified, their respective responsibilities shall be delineated, and their procedures for coordination shall be set forth; and

(d) A description of the funding levels and full-time and part-time personnel available to implement the program.

(3) Conditional program approval. The POTW may request conditional approval of the pretreatment program pending the acquisition of funding and personnel for certain elements of the program. The request for conditional approval shall meet the requirements in subsection (2) of this section, but those requirements may be relaxed if the submission demonstrates that:

(a) A limited aspect of the program does not need to be implemented immediately;

(b) The POTW had adequate legal authority and procedures to carry out those aspects of the program which will not be implemented immediately; and

(c) Funding and personnel for the program aspects to be implemented at a later date will be available when needed. The POTW shall describe in the submission the mechanism by which this funding will be acquired. Upon receipt of a request for conditional approval, the cabinet will establish a fixed date for the acquisition of the needed funding and personnel. If funding is not acquired by this date, the conditional approval of the pretreatment program and any removal allowances granted to the POTW may be modified or withdrawn.

(4) Content of removal allowance submission. The request for authority to revise categorical pretreatment standards shall contain the information required in Section 5(4) of this administrative regulation.

(5) Cabinet action. A POTW requesting pretreatment program approval shall submit to the cabinet two (2) copies of the submission described in subsection (2) of this section, and if appropriate, subsection (4) of this section. Within sixty (60) days after receiving the submission, the cabinet shall make a preliminary determination of whether the submission meets the requirements of subsection (2) of this section, and if appropriate, subsection (4) of this section. If the cabinet makes the preliminary determination that the submission meets these requirements, the cabinet shall:

(a) Notify the POTW that the submission has been received and is under review; and

(b) Commence the public notice and evaluation activities set forth in Section 8 of this administrative regulation.

(6) Notification if submission is defective. If, after review of the submission as provided for in subsection (5) of this section, the cabinet determines that the submission does not comply with the requirements of subsection (2) or (3) of this section and subsection (4) of this section, if appropriate, the cabinet shall provide notice in writing to the applying POTW and each person who has requested individual notice. This notification shall identify defects in the submission and advise the POTW and each person who has requested individual notice of the means by which the POTW can comply with the applicable requirements of subsections (2) and (3) of this section and subsection (4) of this section, if appropriate.

(7) Consistency with water quality management plans.

(a) The pretreatment program shall be consistent with approved water quality management plans developed in accordance with Section 208 of the Clean Water Act and 40 CFR Parts 130, 131, as revised, if the Section 208 plan includes management agency designations and addresses pretreatment in a manner consistent with this administrative regulation. To assure this consistency the cabinet shall solicit the review and comment of the appropriate Section 208 planning agency during the public comment period provided for in Section 8 of this administrative regulation prior to approval or disapproval of the program.

(b) If no Section 208 plan has been approved or if a plan has been approved but lacks management agency designations or does not address pretreatment in a manner consistent with this administrative regulation, the cabinet shall nevertheless solicit the review and comment of the appropriate Section 208 planning agency.

Section 8. Approval Procedures for POTW Pretreatment Programs and POTW Granting of Removal Credits. The following procedures shall apply in approving or denying requests for approval of POTW pretreatment programs and applications for removal credit authorization:

(1) Deadline for review of submission. The cabinet shall have ninety (90) days from the date of public notice of a submission complying with the requirements of Section 7 of this administrative regulation and, if removal credit authorization is sought, with Sections 5(5) and 7(4) of this administrative regulation, to review the submission. The cabinet shall review the submission to determine compliance with the requirements of Section 6(2) and (4) of this administrative regulation and if removal credit authorization is sought, with Section 5 of this administrative regulation. The cabinet may have up to an additional ninety (90) days to complete the evaluation of the submission if the public comment period provided for in subsection (2)(a) of this section is extended beyond thirty (30) days or if a public hearing is held as provided for in subsection (2)(b) of this section. The time for evaluation of the submission shall not exceed a total of 180 days from the date of public notice of a submission meeting the requirements of Section 7(2) of this administrative regulation and, if the application is a removal credit application, Sections 5(5) and 7(2) of this administrative regulation.

(2) Public notice and opportunity for hearing. Upon receipt of a

submission the cabinet shall commence its review. Within twenty (20) work days after making a determination that a submission meets the requirements of Section 7(2) of this administrative regulation and if removal allowance approval is requested, Sections 5(5) and 7(4) of this administrative regulation, the cabinet shall:

(a) Issue a public notice of request for approval of the submission.

1. This public notice shall be circulated in a manner designed to inform interested and potentially interested persons of the submission. Procedures for the circulation of public notice shall include:

a. Mailing notices of the request for approval of the submission to designated Section 208 planning agencies, federal fish, shellfish, and wildlife resource agencies; Kentucky Department of Fish and Wildlife; and to other persons or groups who have requested individual notice, including those on appropriate mailing lists; and

b. Publication of a notice of request for approval of the submission in the largest daily newspaper within the jurisdictions served by the POTW. The cost of the advertisement shall be borne by the applicant.

2. The public notice shall provide a period of not less than thirty (30) days following the date of the public notice during which time interested persons may submit their written views on the submission.

3. All written comments submitted during the thirty (30) day comment period shall be retained by the cabinet and considered in the decision on whether or not to approve the submission. The period for comment may be extended by the cabinet.

(b) Provide an opportunity for the applicant, an affected state, interested state or federal agencies, person, or group of persons to request a public hearing with respect to the submission.

1. This request for public hearing shall be filed within the thirty (30) day, or extended, comment period described in paragraph (a)2 of this subsection and shall indicate the interest of the person filing the request and the reasons why a hearing is warranted.

2. The cabinet shall hold a hearing if the POTW so requests. In addition, a hearing will be held if there is a significant public interest in issues relating to whether or not the submission should be approved. Instances of doubt should be resolved in favor of holding the hearing.

3. Public notice of a hearing to consider a submission and sufficient to inform interested parties of the nature of the hearing and the right to participate shall be published in the same newspaper as the notice of the original request for approval of the submission under paragraph (a)1 of this subsection. The cost of the advertisement shall be borne by the applicant. In addition, notice of the hearing shall be sent to those persons requesting individual notice.

(3) Cabinet decision. At the end of the thirty (30) day, or extended, comment period and within the ninety (90) day, or extended, period provided for in subsection (1) of this section, the cabinet shall approve or deny the submission based upon the evaluation described in subsection (1) of this section and taking into consideration comments submitted during the comment period and the record of the public hearing, if held. If the cabinet makes a determination to deny the request, the cabinet shall so notify the POTW and each person who has requested individual notice. This notification shall include suggested modifications and the cabinet may allow the requestor additional time to bring the submission into compliance with applicable requirements.

(4) EPA objection to cabinet's decision. No pretreatment program or authorization to grant removal allowances shall be approved by the cabinet if following the thirty (30) day, or extended, evaluation period provided for in subsection (2)(a)2 of this section and a hearing held pursuant to subsection (2)(b) of this section the regional administrator sets forth in writing objections to the approval of the submission and the reasons for the objections. A copy of the regional administrator's objections shall be provided to the applicant and each person who has requested individual notice. The regional administrator shall provide an opportunity for written comments and may convene a public hearing on its objections. Unless retracted, the regional administrator's objections shall constitute a final ruling to deny approval of a pretreatment program or authorization to grant removal allowances ninety (90) days after the date the objections are issued.

(5) Notice of decision. The cabinet shall notify those persons who submitted comments and participated in the public hearing, if held, of the approval or disapproval of the submission. In addition, the cabinet shall cause to be published a notice of approval or disapproval in the same newspapers as the original notice of request for approval of the submission was published. The cabinet shall identify in the notice of pretreatment program approval any authorization to modify categorical pretreatment standards which the POTW may make, in accordance with Section 5 of this administrative regulation, for removal of pollutants subject to pretreatment standards.

(6) Public access to submission. The cabinet shall ensure that the submission and comments upon the submission are available to the public for inspection and copying.

Section 9. Reporting Requirements for POTWs and Industrial Users. (1) Reporting requirements for industrial users upon effective date of categorical pretreatment standard baseline report. Within 180 days after the effective date of a categorical pretreatment standard, or 180 days after the final administrative decision made upon a category determination submission under Section 4 of this administrative regulation, whichever is later, existing industrial users subject to the categorical pretreatment standards and currently discharging to or scheduled to discharge to a POTW shall submit to the control authority a report which contains the information listed in this subsection, unless reports containing this information already have been submitted to the cabinet or regional administrator in compliance with 40 CFR 128.140(b) (1977). At least ninety (90) days prior to commencement of discharge, new sources, and sources that become industrial users subsequent to the promulgation of an applicable categorical standard, shall submit to the control authority a report which contains the information listed in paragraphs (a) to (e) of this subsection. New sources shall also include in this report information on the method of pretreatment the source intends to use to meet applicable pretreatment standards. New sources shall give estimates of the information requested in paragraphs (d) and (e) of this subsection.

(a) Identifying information. The user shall submit the name and address of the facility including the name of the operator and owners.

(b) Permits. The user shall submit a list of environmental control permits held by or for the facility.

(c) Description of operations. The user shall submit a brief description of the nature, average rate of production, and standard industrial classification of the operations carried out by the industrial user. This description should include a schematic process diagram which indicates points of discharge to the POTW from the regulated processes.

(d) Flow measurement. The user shall submit information showing the measured average daily and maximum daily flow, in gallons per day, to the POTW from each of the following:

1. Regulated process streams; and

2. Other streams as necessary to allow use of the combined waste stream formula of Section 4(5) of this administrative regulation, as referenced in paragraph (e)5 of this subsection. The control authority may allow for verifiable estimates of these flows if justified by cost or feasibility considerations.

(e) Measurement of pollutants.

1. The user shall identify the pretreatment standards applicable to each regulated process;

2. In addition, the user shall submit the results of sampling and analysis identifying the nature and concentration, or mass, if mass is required by the standard or control authority, of regulated pollutants in the discharge from each regulated process. Both daily maximum and average concentration, or mass, if required, shall be reported.

The sample shall be representative of daily operations; and

3. A minimum of four (4) grab samples shall be used for pH, cyanide, total phenols, oil and grease, sulfide, and volatile organics. For all other pollutants, twenty-four (24) hour composite samples shall be obtained through flow proportional composite sampling techniques if feasible. The control authority may waive flow proportional composite sampling for an industrial user that demonstrates that flow proportional sampling is not feasible. If flow sampling is not feasible, samples may be obtained through time proportional composite sampling techniques or through a minimum of four (4) grab samples if the user demonstrates that this will provide a representative sample of the effluent being discharged.

4. The user shall take a minimum of one (1) representative sample to compile that data necessary to comply with the requirements of this subsection.

5. Samples shall be taken immediately downstream from pretreatment facilities if they exist or immediately downstream from the regulated process if no pretreatment facility exists. If other wastewaters are mixed with the regulated wastewater prior to pretreatment the user should measure the flows and concentrations necessary to allow use of the combined waste stream formula of Section 4 of this administrative regulation to evaluate compliance with the pretreatment standards. If an alternate concentration or mass limit has been calculated in accordance with Section 4 of this administrative regulation, this adjusted limit and the supporting data shall be submitted to the control authority.

6. Sampling and analysis shall be performed in accordance with the techniques prescribed in 40 CFR Part 136 and amendments thereto. If 40 CFR Part 136 does not contain sampling or analytical techniques for the pollutant in question, or if the regional administrator determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis shall be performed by using validated analytical methods or other applicable sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the regional administrator;

7. The control authority may allow the submission of a baseline report which utilizes only historical data as long as the data provide information sufficient to determine the need for industrial pretreatment measures;

8. The baseline report shall indicate the time, date and place, of sampling, and methods of analysis, and shall certify that the sampling and analysis is representative of normal work cycles and expected pollutant discharges to the POTW;

(f) Certification. The user shall submit a statement, reviewed by an authorized representative of the industrial user and certified to by a qualified professional, indicating whether pretreatment standards are being met on a consistent basis, and, if not, whether additional operation and maintenance (O&M) or additional pretreatment is required for the industrial user to meet the pretreatment standards and requirements.

(g) Compliance schedule. If additional pretreatment or O&M will be required to meet the pretreatment standards, the user shall submit the shortest schedule by which the industrial user will provide the additional pretreatment or O&M. The completion date in this schedule shall not be later than the compliance date established for the applicable pretreatment standard.

1. If the industrial user's categorical pretreatment standard has been modified by a removal allowance pursuant to Section 4 of this administrative regulation, the combined waste stream formula pursuant to Section 4(5) of this administrative regulation, or a fundamentally different factors variance pursuant to Section 10 of this administrative regulation when the user submits the report required by this section, the information required by paragraph (f) of this subsection and this paragraph shall pertain to the modified limits.

2. If the categorical pretreatment standard is modified by a removal allowance pursuant to Section 5 of this administrative regulation, the combined waste stream formula pursuant to Section 4(5) of this administrative regulation, or a fundamentally different factors variance pursuant to Section 10 of this administrative regulation after the user submits the report required by this section, necessary amendments to the information requested by paragraph (f) of this subsection and this paragraph shall be submitted by the user to the control authority within sixty (60) days after the modified limit is approved.

(2) Compliance schedule for meeting categorical pretreatment standards. The following conditions shall apply to the schedule required by subsection (1)(g) of this section:

(a) The schedule shall contain increments of progress in the form of dates for the commencement and completion of major events leading to the construction and operation of additional pretreatment required for the industrial user to meet the applicable categorical pretreatment standards (e.g., hiring an engineer, completing preliminary plans, completing final plans, executing contract for major components, commencing construction, completing construction, etc.).

(b) No increment referred to in paragraph (a) of this subsection shall exceed nine (9) months.

(c) Not later than fourteen (14) days following each date in the schedule and the final date for compliance, the industrial user shall submit a progress report to the control authority including, at a minimum, whether or not it complied with the increment of progress to be met on the date and, if not, the date on which it expects to comply with this increment of progress, the reason for delay, and the steps being taken by the industrial user to return the construction to the schedule established. No more than nine (9) months shall elapse between the progress reports to the control authority.

(3) Report on compliance with categorical pretreatment standard deadline. Within ninety (90) days following the date for final compliance with applicable categorical pretreatment standards or if a new source, following commencement of the introduction of wastewater into the POTW, an industrial user subject to pretreatment standards and requirements shall submit to the control authority a report containing the information described in subsection (1)(d) to (f) of this section. For industrial users subject to equivalent mass or concentration limits established by the control authority in accordance with Section 4(3) of this administrative regulation, this report shall contain a reasonable measure of the user's long-term production rate. For all other industrial users subject to categorical pretreatment standards expressed in terms of allowable pollutant discharge per unit of production or other measure of operation, this report shall include the user's actual production during the appropriate sampling period.

(4) Periodic reports on continued compliance.

(a) An industrial user subject to a categorical pretreatment standard, after the compliance date of the pretreatment standard, or, if a new source, after commencement of the discharge into the POTW, shall submit to the control authority during the months of June and December, unless required more frequently in the pretreatment standard, by the control authority, or by the cabinet, a report indicating the nature and concentration of pollutants in the effluent which are limited by the categorical pretreatment standards. In addition, this report shall include a record of measured or estimated average and maximum daily flows for the reporting period for the discharge reported in subsection (1)(d) of this section except that the control authority may require more detailed reporting of flows. In consideration of factors such as local high or low flow rates, holidays, budget cycles, etc., the control authority may agree to alter the months during which the above reports shall be submitted.

(b) If the control authority has imposed mass limitations on industrial users as provided for by Section 4(4) of this administrative regulation, the report required by paragraph (a) of this subsection shall indicate the mass of pollutants regulated by pretreatment standards in the discharge from the industrial user.

(c) For industrial users subject to equivalent mass or concentration limits established by the control authority in accordance with

Section 4(3) of this administrative regulation, the report required by paragraph (a) of this subsection shall contain a reasonable measure of the user's long term production rate. For all other industrial users subject to categorical pretreatment standards expressed only in terms of allowable pollutant discharge per unit of production or other measure of operation, the report required by paragraph (a) of this subsection shall include the user's actual average production rate for the reporting period.

(5) Notice of potential problems, including slug loading. All categorical and noncategorical industrial users shall notify the POTW immediately of all discharges that could cause problems to the POTW, including slug loadings, by the industrial user.

(6) Monitoring and analysis to demonstrate continued compliance.

(a) The reports required in subsections (1), (3), and (4) of this section shall contain the results of sampling and analysis of the discharge, including the flow and the nature and concentration, or production and mass if requested by the control authority, of pollutants contained therein which are limited by the applicable pretreatment standards. This sampling and analysis may be performed by the control authority in lieu of the industrial user. If the POTW performs the required sampling and analysis in lieu of the industrial user, the user is not required to submit the compliance certification required under subsections (1) and (3) of this section. In addition, if the POTW itself collects all the information required for the report, including flow data, the industrial user is not required to submit the report.

(b) If sampling performed by an industrial user indicates a violation, the user shall notify the control authority within twenty-four (24) hours of becoming aware of the violation. The user shall also repeat the sampling and analysis and submit the results of the repeat analysis to the control authority within thirty (30) days after becoming aware of the violation, except the industrial user is not required to resample if:

1. The control authority performs sampling at the industrial user at a frequency of at least once per month; or

2. The control authority performs sampling at the user between the time when the user performs its initial sampling and the time when the user receives the results of this sampling.

(c) The reports required in subsection (4) of this section shall be based upon data obtained through appropriate sampling and analysis performed during the period covered by the report, which data are representative of conditions occurring during the reporting period. The control authority shall require that frequency of monitoring necessary to assess and assure compliance by industrial users with applicable pretreatment standards and requirements.

(d) All analyses shall be performed in accordance with procedures established by the administrator pursuant to Section 304(h) of the Act and contained in 40 CFR Part 136 and amendments thereto or with other test procedures approved by the administrator. Sampling shall be performed in accordance with the techniques approved by the administrator. If 40 CFR Part 136 does not include sampling or analytical techniques for the pollutants in question, or if the administrator determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analyses shall be performed using validated analytical methods or other sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the administrator.

(e) If an industrial user subject to the reporting requirement in subsection (4) of this section monitors pollutants more frequently than required by the control authority, using the procedures prescribed in paragraph (d) of this subsection, the results of this monitoring shall be included in the report.

(7) Reporting requirements for industrial users not subject to categorical pretreatment standards. The control authority shall require appropriate reporting from those industrial users with discharges that are not subject to categorical pretreatment standards. Significant noncategorical industrial users shall submit to the control authority at least once every six (6) months, on dates specified by the control authority, a description of the nature, concentration, and flow of the pollutants required to be reported by the control authority. These reports shall be based on sampling and analysis performed in the period covered by the report, and performed in accordance with the techniques described in 40 CFR Part 136 and amendments thereto. If 40 CFR Part 136 does not contain sampling and analytical techniques for the pollutant in question, or if the administrator determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis shall be performed by using validated analytical methods or other applicable sampling and analytical procedures, including procedures suggested by the POTW or other persons, approved by the administrator. This sampling and analysis may be performed by the control authority in lieu of the significant noncategorical industrial user. If the POTW itself collects all the information required for the report, the noncategorical significant industrial user is not required to submit the report.

(8) Semiannual POTW reports. POTWs with approved pretreatment programs shall provide the cabinet with a report that briefly describes the POTW's program activities, including activities of all participating agencies, if more than one (1) jurisdiction is involved in the local program. The report required by this subsection shall be submitted no later than one (1) year after approval of the POTW's pretreatment program, and at least semiannually thereafter, and shall include, at a minimum, the following:

(a) An updated list of the POTW's industrial users, including their names and addresses, or a list of deletions and additions keyed to a previously submitted list. The POTW shall provide a brief explanation of each deletion. This list shall identify which industrial users are subject to categorical pretreatment standards and specify which standards are applicable to each industrial user. The list shall indicate which industrial users are subject to local standards that are more stringent than the categorical pretreatment standards. The POTW shall also list the industrial users that are subject only to local requirements;

(b) A summary of the status of industrial user compliance over the reporting period;

(c) A summary of compliance and enforcement activities including inspections, conducted by the POTW during the reporting period; and

(d) Other relevant information requested by the cabinet.

(9) Notification of changed discharge. All industrial users shall promptly notify the POTW in advance of a substantial change in the volume or character of pollutants in their discharge, including the listed or characteristic hazardous wastes for which the industrial user has submitted initial notification under subsection (15) of this section.

(10) Compliance schedule for POTWs. The following conditions and reporting requirements shall apply to the compliance schedule for development of an approvable POTW pretreatment program required by Section 6 of this administrative regulation.

(a) The schedule shall contain increments of progress in the form of dates for the commencement and completion of major events leading to the development and implementation of a POTW pretreatment program (e.g., acquiring required authorities, developing funding mechanisms, acquiring equipment);

(b) No increment referred to in paragraph (a) of this subsection shall exceed nine (9) months;

(c) Not later than fourteen (14) days following each date in the schedule and the final date for compliance, the POTW shall submit a progress report to the cabinet including, as a minimum, whether or not it complied with the increment of progress to be met on the date and, if not, the date on which it expects to comply with this increment of progress, the reason for delay, and the steps taken by the POTW to return to the schedule established. No more than nine (9) months shall elapse between the progress reports to the cabinet.

(11) Signatory requirements for industrial user reports. The reports required by subsections (1), (3) and (4) of this section shall include the certification statement as set forth in Section 4(1)(b)2 of this administrative regulation and shall be signed as follows:

(a) By a responsible corporate officer, if the industrial user submitting the reports required by subsection (1) of this section is a corporation. For the purpose of this paragraph, a responsible corporate officer shall be:

1. A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or other person who performs similar policy or decision making functions for the corporation; or

2. The manager of one (1) or more manufacturing, production, or operation facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25,000,000 in second quarter 1980 dollars, if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(b) By a general partner or proprietor if the industrial user submitting the reports required by subsection (1), (3), or (4) of this section is a partnership or sole proprietorship respectively.

(c) By a duly authorized representative of the individual designated in paragraph (a) or (b) of this subsection if:

1. The authorization is made in writing by the individual described in paragraph (a) or (b) of this subsection;

2. The authorization specifies either an individual or a position having responsibility for the overall operation of the facility from which the industrial discharge originates, such as the position of plant manager, operator of a well, or well field superintendent, or a position of equivalent responsibility, or having overall responsibility for environmental matters for the company; and

3. The written authorization is submitted to the control authority.

(d) If an authorization in paragraph (c) of this subsection is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, or overall responsibility for environmental matters for the company, a new authorization satisfying the requirements of paragraph (c) of this subsection shall be submitted to the control authority prior to or together with reports to be signed by an authorized representative.

(12) Signatory requirements for POTW reports. Reports submitted to the cabinet by the POTW in accordance with subsection (7) of this section shall be signed by a principal executive officer, ranking elected official or other duly authorized employee if the employee is responsible for overall operation of the POTW.

(13) Provisions governing fraud and false statements. The reports and other documents required to be submitted or maintained under this section shall be subject to:

(a) The provisions of 18 USC Section 1001 relating to fraud and false statements;

(b) The provisions of Section 309(c)(4) of the Act, as amended, governing false statements, representation or certification; and

(c) The provisions of Section 309(c)(6) of the Act regarding responsible corporate officers.

(14) Recordkeeping requirements.

(a) Industrial users and POTWs subject to the reporting requirement established in this section shall maintain records of all information resulting from monitoring activities required by this section. These records shall include for all samples:

1. The date, exact place, method, and time of sampling and the names of the persons taking the samples;

2. The date analyses were performed;

3. Who performed the analyses;

4. The analytical techniques or methods used; and

5. The results of the analyses.

(b) Industrial users or POTWs subject to the reporting requirements established in this section shall retain for a minimum of three (3) years records of monitoring activities and results, whether or not the monitoring activities are required by this section, and shall make the records available for inspection and copying by the cabinet and the regional administrator and POTW, if an industrial user. This period of retention shall be extended during the course of unresolved litigation regarding the industrial user or POTW or if requested by the cabinet or the regional administrator.

(c) A POTW to which reports are submitted by an industrial user pursuant to subsections (1), (3), (4), and (7) of this section shall retain the reports for a minimum of three (3) years and shall make the reports available for inspection and copying by the cabinet and the regional administrator. This period of retention shall be extended during the course of unresolved litigation regarding the discharge of pollutants by the industrial user or the operation of the POTW pretreatment program or if requested by the cabinet or the regional administrator.

(15)(a) The industrial user shall notify the POTW, the EPA regional waste management division director, and Kentucky Division of Waste Management in writing of a discharge into the POTW of a substance, which, if otherwise disposed of, would be a hazardous waste under 40 CFR Part 261. The notification shall include the name of the hazardous waste as set forth in 40 CFR Part 261, the EPA hazardous waste number, and the type of discharge (continuous, batch, or other). If the industrial user discharges more than 100 kilograms of this waste per calendar month to the POTW, the notification shall also contain the information in subparagraphs 1 to 3 of this paragraph to the extent the information is known and readily available to the industrial user. All notifications shall have occurred within 180 days of July 24, 1990. Industrial users who commence discharging after July 24, 1990 shall provide the notification no later than 180 days after the discharge of the listed or characteristic hazardous waste. A notification under this subsection shall be submitted only once for each hazardous waste discharged. However, notifications of changed discharges shall be submitted according to subsection (9) of this section. The notification requirement in this section shall not apply to pollutants already reported under self-monitoring requirements of subsections (1), (3), and (4) of this section.

1. An identification of the hazardous constituents contained in the wastes;

2. An estimation of the mass and concentration of the constituents in the waste stream discharged during that calendar month;

3. And an estimation of the mass of constituents in the waste stream expected to be discharged during the following twelve (12) months.

(b) Dischargers shall be exempt from the requirements of paragraph (a) of this subsection during a calendar month in which they discharge no more than fifteen (15) kilograms of hazardous wastes, unless the wastes are acute hazardous wastes as specified in 40 CFR 261.30(d) and 261.33(e). Discharge of more than fifteen (15) kilograms of nonacute hazardous wastes in a calendar month, or of any quantity of acute hazardous wastes as specified in 40 CFR 261.30(d) and 261.33(e), requires a one (1) time notification. Subsequent months during which the industrial user discharges more than these quantities of hazardous waste do not require additional notification.

(c) If new federal regulations are promulgated under Section 3001 of RCRA, 42 USC 6921, identifying additional characteristics of hazardous waste or listing an additional substance as a hazardous waste, the industrial user shall notify the POTW, the EPA regional waste management division director, and Kentucky Division of Waste Management of the discharge of the substance within ninety (90) days of the effective date of the federal regulations.

(d) If a notification is made under this subsection, the industrial user shall certify that it has a program in place to reduce the volume and toxicity of hazardous wastes generated to the degree it has determined to be economically practical.

Section 10. Variances from Categorical Pretreatment Standards and Fundamentally Different Factors. (1) Purpose and scope. The U.S. EPA may, on a case-by-case basis, adjust the limits in categorical pretreatment standards, making them either more or less stringent, as they apply to a certain industrial user within an industrial

category or subcategory. This adjustment will be done only if factors fundamentally different from those considered by EPA in developing the limit at issue are indicated by data specific to that industrial user. Interested persons believing that factors relating to an industrial user are fundamentally different from the factors considered during development of a categorical pretreatment standard applicable to that user and further, that the existence of those factors justifies a different discharge limit than specified in the applicable categorical pretreatment standard, may request a fundamentally different factors variance under this section or such a variance request may be initiated by the U.S. EPA.

(2) Criteria.

(a) General criteria. A request for a variance based upon fundamentally different factors shall be approved by EPA only if:

1. There is an applicable categorical pretreatment standard which specifically controls the pollutant for which alternative limits have been requested;

2. Factors relating to the discharge controlled by the categorical pretreatment standard are fundamentally different from the factors considered by EPA in establishing the standards; and

3. The request for a variance is made in accordance with the procedural requirements in subsections (6) and (7) of this section.

(b) Criteria applicable to less stringent limits. A variance request for the establishment of limits less stringent than required by the standard shall be approved by EPA only if:

1. The alternative limit requested is no less stringent than justified by the fundamental difference;

2. The alternative limit will not result in a violation of prohibitive discharge standards prescribed by or established under Section 3 of this administrative regulation;

3. The alternative limit will not result in a nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the pretreatment standards; and

4. Compliance with the standards, either by using the technologies upon which the standards are based or by using other control alternatives, would result in either:

a. A removal cost, adjusted for inflation wholly out of proportion to the removal cost considered during development of the standards; or

b. A nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the standards.

(c) Criteria applicable to more stringent limits. A variance request for the establishment of limits more stringent than required by the standards shall be approved by EPA only if:

1. The alternative limit request is no more stringent than justified by the fundamental difference; and

2. Compliance with the alternative limit would not result in either:

a. A removal cost, adjusted for inflation wholly out of proportion to the removal cost considered during development of the standards; or

b. A nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the standards.

(3) Factors considered fundamentally different. Factors which may be considered fundamentally different are:

(a) The nature or quality of pollutant contained in the raw waste load of the user's process wastewater;

(b) The volume of the user's process wastewater and effluent discharged;

(c) Nonwater quality environmental impact of control and treatment of the user's raw waste load;

(d) Energy requirements of the application of control and treatment technology;

(e) Age, size, land availability, and configuration as they relate to the user's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology; and

(f) Cost of compliance with required control technology.

(4) Factors which shall not be considered fundamentally different. A variance request or portion of such a request under this section shall not be granted on the following grounds:

(a) The feasibility of installing the required waste treatment equipment within the time the Act allows;

(b) The assertion that the standards cannot be achieved with the appropriate waste treatment facilities installed, if the assertion is not based on factors listed in subsection (3) of this section;

(c) The user's ability to pay for the required waste treatment; or

(d) The impact of a discharge on the quality of the POTW's receiving waters.

(5) Local law. Nothing in this section shall be construed to impair the right of a locality under Section 510 of the Act to impose more stringent limitations than required by federal law or this administrative regulation.

(6) Application deadline.

(a) Requests for a variance and supporting information shall be submitted in writing to the cabinet.

(b) To be considered, a request for a variance shall be submitted no later than 180 days after the date on which a categorical pretreatment standard is published in the Federal Register.

(c) If the user has requested a categorical determination pursuant to Section 4(1) of this administrative regulation, the user may await the results of the category determination before submitting a variance request under this section. If the user so elects, the user shall submit the variance request within thirty (30) days after a final decision has been made on the categorical determination pursuant to Section 4(1)(d) of this administrative regulation.

(7) Contents submission. Written submissions for variance request made to the cabinet shall include:

(a) The name and address of the person making the request;

(b) Identification of the interest of the requester which is affected by the categorical pretreatment standard for which the variance is requested;

(c) Identification of the POTW currently receiving the waste from the industrial user for which alternative discharge limits are requested;

(d) Identification of the categorical pretreatment standards which are applicable to the industrial user;

(e) A list of each pollutant or pollutant parameter for which an alternative discharge limit is sought;

(f) The alternative discharge limits proposed by the requester for each pollutant or pollutant parameter identified in paragraph (e) of this subsection;

(g) A description of the industrial user's existing water pollution control facilities;

(h) A schematic flow representation of the industrial user's water system including water supply, process wastewater systems, and points of discharge; and

(i) A statement of facts clearly establishing why the variance request should be approved, including detailed support data, documentation, and evidence necessary to fully evaluate the merits of the request, e.g., technical and economic data collected by the EPA and used in developing each pollutant discharge limit in the pretreatment standard.

(8) Deficient requests. The cabinet will act only on written requests for variances that contain all of the information required. Persons who have made incomplete submissions will be notified by the cabinet that their requests are deficient and unless the time period is extended, will be given up to thirty (30) days to remedy the deficiency. If the deficiency is not corrected within the time period allowed by the cabinet, the request for a variance shall be denied.

(9) Public notice. Upon receipt of a complete request, the cabinet shall provide notice of receipt, opportunity to review the submission, and opportunity to comment.

(a) The public notice shall be circulated in a manner designed to inform interested and potentially interested persons of the request. Procedures for the circulation of public notice shall include mailing notices to:

1. The POTW into which the industrial user requesting the variance discharges;

2. Adjoining states whose waters may be affected; and

3. Designated Section 208 planning agencies, federal fish, shellfish and wildlife resource agencies; the Kentucky Department of Fish and Wildlife; and to other persons or groups who have requested individual notice, including those on appropriate mailing lists.

(b) The public notice shall provide for a period not less than thirty (30) days following the date of the public notice during which time interested persons may review the request and submit their written views on the request.

(c) Following the comment period, the cabinet will make a determination on the request taking into consideration comments received. Notice of this final decision shall be provided to the requester, the industrial user for which the variance is requested if different than the requester, the POTW into which the industrial user discharges, and all persons who submitted comments on the request.

(10) Review of requests by state.

(a) If the cabinet finds that fundamentally different factors do not exist, it may deny the request and notify the requester, the industrial user if they are not the same, and the POTW of the denial.

(b) If the cabinet finds that fundamentally different factors do exist, it shall forward the request, with a recommendation that the request be approved, to the regional administrator or the regional administrator's delegate.

(11) Review of requests by EPA.

(a) If the regional administrator or the regional administrator's delegate finds that fundamentally different factors do not exist, the regional administrator or delegate shall deny the request for a variance and send a copy of that determination to the cabinet, to the POTW, and to the requester and the industrial user, if they are not the same.

(b) If the regional administrator or the regional administrator's delegate finds that fundamentally different factors do exist, and that a partial or full variance is justified, the regional administrator or delegate will approve the variance. In approving the variance, the administrator or the delegate will:

1. Prepare recommended alternative discharge limits for the industrial user either more or less stringent than those prescribed by the applicable categorical pretreatment standard to the extent warranted by the demonstrated fundamentally different factors;

2. Provide the following information in the regional administrator's written determination:

a. The recommended alternative discharge limits for the industrial user concerned;

b. The rationale for the adjustment of the pretreatment standard, including the reasons for recommending that the variance be granted, and an explanation of how the recommended alternative discharge limits were derived;

c. The supporting evidence submitted to the regional administrator or the regional administrator's delegate; and

d. Other information considered by the regional administrator or the regional administrator's delegate in developing the recommended alternative discharge limits;

3. Notify the cabinet and the POTW of the regional administrator's determination; and

4. Send the information described in subparagraphs 1 and 2 of this paragraph to the requester and to the industrial user if they are not the same.

(12) Request for hearing.

(a) Within thirty (30) days following the date of receipt of the notice of the decision of the administrator's delegate on a variance request, the requester or other interested persons may submit a petition to the regional administrator for a hearing to reconsider or contest the decision. If such a request is submitted by a person other than the industrial user the person shall simultaneously serve a copy of the request on the industrial user.

(b) If the regional administrator declines to hold a hearing and the regional administrator affirms the findings of the regional administrator's delegate, the requester may submit a petition for a hearing to the Environmental Appeals Board, described in 40 CFR 1.25(e), within thirty (30) days of the regional administrator's decision.

Section 11. Confidentiality. (1) Authorities. In accordance with KRS 224.10-210 and administrative regulations promulgated pursuant thereto, information submitted to the cabinet pursuant to this administrative regulation may be claimed as confidential by the submitter.

(2) POTW. All other information submitted to the POTW shall be available to the public at least to the extent provided by KRS 61.870 to 61.882 and 61.960 to 61.975.

Section 12. Net-gross Calculation. Categorical pretreatment standards may be adjusted to reflect the presence of pollutants in the industrial user's intake water in accordance with this section.

(1) Application. Industrial users wishing to obtain credit for intake pollutants shall apply to the control authority. Upon request of the industrial user, the applicable standard will be calculated on a net basis (i.e., adjusted to reflect credit for pollutants in the intake water) if the requirements of subsections (2) and (3) of this section are met.

(2) Criteria.

(a) The industrial user shall demonstrate that the control system it proposes or uses to meet applicable categorical pretreatment standards would, if properly installed and operated, meet the standards in the absence of pollutants in the intake waters.

(b) Credit for generic pollutants such as BOD, TSS, and oil and grease shall not be granted unless the industrial user demonstrates that the constituents of the generic measure in the user's effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere.

(c) Credit shall be granted only to the extent necessary to meet the applicable categorical pretreatment standards, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with standards adjusted under this section.

(d) Credit shall be granted only if the user demonstrates that the intake water is drawn from the same body of water as that into which the POTW discharges. The control authority may waive this requirement if it finds that no environmental degradation will result.

(3) The applicable categorical pretreatment standards contained in 40 CFR Chapter I, Subchapter N specifically provide that they shall be applied on a net basis.

Section 13. Upset Provision. (1) Effect of an upset. An upset shall constitute an affirmative defense to an action brought for noncompliance with categorical pretreatment standards if the requirements of subsection (2) of this section are met.

(2) Conditions necessary for a demonstration of upset. An industrial user who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(a) An upset occurred and the industrial user can identify the causes of the upset;

(b) The facility was being operated in a prudent and workmanlike manner and was in compliance with applicable operation and maintenance procedures when the upset occurred;

(c) The industrial user has submitted the following information to the control authority within twenty-four (24) hours of becoming aware of the upset; if this information is provided orally, a written submission shall be provided within five (5) days:

1. A description of the indirect discharge and cause of noncompliance;

2. The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue; and

3. Steps being taken or planned to reduce, eliminate and prevent recurrence of the noncompliance.

(3) Burden of proof. In enforcement proceedings the industrial user seeking to establish the occurrence of an upset shall have the burden of proof.

(4) Reviewability of the cabinet's consideration of claims of upset. The cabinet shall review claims that noncompliance was caused by an upset. No determinations made in the course of the review shall constitute a final agency action subject to KRS 224.10-420. Industrial users shall have an opportunity for a hearing on claims of upset only in an enforcement action brought for noncompliance with categorical pretreatment standards.

(5) User responsibility if an upset occurs. The industrial user shall control production or all discharges to the extent necessary to maintain compliance with categorical pretreatment standards upon reduction, loss, or failure of its treatment facility until the facility is restored or an alternative method of treatment is provided. This requirement applies in the situation if, among other things, the primary source of power of the treatment facility fails or is reduced or lost.

Section 14. Bypass. An industrial user shall comply with this section in addressing bypasses.

(1) Bypass not violating applicable pretreatment standards or requirements. An industrial user may allow a bypass to occur if it will not cause pretreatment standards or requirements to be violated, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to subsections (2) and (3) of this section.

(2) Notice.

(a) If an industrial user knows in advance of the need for a bypass, it shall submit prior notice to the control authority, if possible at least ten (10) days before the date of the bypass.

(b) An industrial user shall submit oral notice of an unanticipated bypass that exceeds applicable pretreatment standards to the control authority within twenty-four (24) hours from the time the industrial user becomes aware of the bypass. A written submission shall also be provided within five (5) days of the time the industrial user becomes aware of the bypass. The written submission shall contain a description of the bypass and its cause; the duration of the bypass, including exact dates and times, and, if the bypass has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the bypass. The control authority may waive the written report on a case-by-case basis if the oral report has been received within twenty-four (24) hours.

(3) Prohibition of bypass.

(a) Bypass is prohibited, and the control authority may take enforcement action against an industrial user for a bypass, unless:

1. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

2. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and

3. The industrial user submitted notices as required under subsection (2) of this section.

(b) The control authority may approve an anticipated bypass, after considering its adverse effects, if the control authority determines that it will meet the three (3) conditions listed in paragraph (a) of this subsection.

Section 15. Modification of POTW Pretreatment Programs. (1) General.

(a) Either the cabinet or a POTW with an approved POTW pretreatment program may initiate program modifications to reflect changing conditions at the POTW. Program modification is necessary if there is a significant change in the operation of a POTW pretreatment program that differs from the information in the POTW's submission, as approved under Section 8 of this administrative regulation.

(2) Procedures. POTW pretreatment program modifications shall be accomplished as follows:

(a) For substantial modifications as described in subsection (3) of this section:

1. The POTW shall submit to the cabinet a statement of basis for the desired modification, a modified program description pursuant to Section 7(2) of this administrative regulation, or other documents the cabinet determines to be necessary under the circumstances.

2. The cabinet shall approve or disapprove the modification based on the requirements of Section 6 of this administrative regulation following the procedures in Section 8 of this administrative regulation.

3. The modification shall be incorporated into the POTW's KPDES permit after approval. The permit shall be modified to incorporate the approved modification in accordance with 401 KAR 5:070.

4. The modification shall become effective upon approval by the cabinet. Notice of approval shall be published in the same newspaper as the notice of the original request for approval of the modification under Section 8 of this administrative regulation.

(b) The POTW shall notify the cabinet of nonsubstantial modifications to its pretreatment program at least thirty (30) days prior to when they are to be implemented by the POTW in a statement similar to that provided for in paragraph (a) of this subsection. These nonsubstantial program modifications shall be deemed to be approved by the cabinet, unless the cabinet determines that a modification submitted is in fact a substantial modification, within ninety (90) days after the submission of the POTW's statement. Following approval by the cabinet, the modifications shall be incorporated into the POTW's permit in accordance with 401 KAR 5:070. If the cabinet determines that a modification reported by a POTW in its statement is in fact a substantial modification, the cabinet shall notify the POTW and initiate the procedures in paragraph (a) of this subsection.

(3) Substantial modifications.

(a) The following shall be substantial modifications for purposes of this section:

1. Changes to the POTW's legal authorities;

2. Changes to local limits, which result in less stringent local limits;

3. Change to the POTW's control mechanism, as described in Section 6 of this administrative regulation;

4. Changes to the POTW's method for implementing categorical pretreatment standards (e.g., incorporation by reference, separate promulgation, etc.);

5. A decrease in the frequency of self-monitoring or reporting required of industrial users;

6. A decrease in the frequency of industrial user inspections or sampling by the POTW;

7. Changes to the POTW's confidentiality procedures;

8. Significant reductions in the POTW's pretreatment program resources including personnel commitments, equipment, and funding levels; and

9. Changes in the POTW's sludge disposal and management practices.

(b) The cabinet may designate other specific modifications, in addition to those listed in paragraph (a) of this subsection, as substantial modifications.

(c) A modification that is not included in paragraph (a) of this subsection is nonetheless a substantial modification for purposes of this subsection if the modification:

1. Would have a significant impact on the operation of the POTW's pretreatment program;

2. Would result in an increase in pollutant loadings at the POTW; or

3. Would result in less stringent requirements being imposed on industrial users of the POTW.

Section 16. Federal Regulations Adopted Without Change. The cabinet shall be governed by the following federal regulations for the indicated subject matter; the federal regulations are hereby adopted without change. The federal regulations are available for inspection and copying, subject to copyright laws, during normal business hours of 8 a.m. to 4:30 p.m., eastern time, excluding state holidays, at the Kentucky Division of Water, 14 Reilly Road, Frankfort, Kentucky, or may be purchased from the U.S. Superintendent of Documents, Washington, D.C., except as noted:

(1) 40 CFR 1.25(e), "Environmental Appeals Review Board", as in effect on February 13, 1992, for the appeals of the U.S. EPA's granting of removal credits;

(2) 40 CFR Part 25, "Public Participation in Programs Under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act", as in effect on July 1, 1991, for public participation for enforcement of pretreatment standards;

(3) 40 CFR 128.140(b), "Pretreatment Standards; Time for compliance", as in effect on July 1, 1977, for the reporting of discharges by specified pretreatment plants. This document is available from the Kentucky Division of Water and the University of Kentucky Law School Library, Lexington, Kentucky;

(4) 40 CFR Part 136, "Test Procedures for the Analysis of Pollutants", as in effect on September 11, 1992, for sampling and analysis techniques;

(5) 40 CFR Part 261, "Identification and Listing of Hazardous Waste", as in effect on February 18, 1994, for hazardous waste determinations;

(6) 40 CFR Part 403, Appendix A, "Program Guidance Memorandum" as in effect on July 1, 1993, for claiming consistent removal for correcting conditions resulting in untreated discharges by a POTW;

(7) 40 CFR Part 403, Appendix D, "Selected Industrial Subcategories Considered Dilute for Purposes of the Combined Waste stream Formula" as in effect on July 1, 1993, for the list of process waste streams that were or could have been entirely exempted by the U.S. EPA; and

(8) 40 CFR Part 503, "Standards for the Use or Disposal of Sewage Sludge", as in effect on July 1, 1993, for the eligibility of specific pollutants for removal credits.

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:060. KPDES application requirements.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110

STATUTORY AUTHORITY: KRS ~~[224.01-110,]~~ 224.10-100

NECESSITY AND FUNCTION: KRS 224.10-100 ~~[224.033]~~ authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050 further empowers the cabinet to issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Sections 1342(b) and (d) and that any exemptions granted shall be pursuant to the Federal Water Pollution Control Act. This administrative regulation sets forth the application requirements for all KPDES permits and contains additional requirements for general and specific categories of dischargers.

Section 1. Applying for a KPDES Permit. (1) Application requirements. ~~[(a)]~~ Any person who is required to have a permit, including new applicants and permittees with expiring permits, shall complete, sign, and submit an application to the cabinet ~~[director]~~ as described in this administrative regulation and 401 KAR 5:055. On the date of KPDES program approval by EPA, all persons permitted or authorized under NPDES shall be deemed to hold a KPDES permit, including those expired permits which EPA has continued in effect according to 40 CFR Section 122.6, continuation of expiring permits. For the purpose of this section, the cabinet shall ~~[director will]~~ accept the information required under subsection (7) ~~[(4)]~~ of this section, for existing facilities, which has been submitted to EPA as part of a NPDES renewal. The applicant may be requested to update any information which is not current.

(2) Duty to apply.

(a) Any person who discharges or proposes to discharge pollutants ~~[or who owns]~~ and who does not have an effective permit, except persons covered by general permits under 401 KAR 5:055, Section 5, excluded under 401 KAR 5:055, Section 1(2), or a user of a privately owned treatment works unless the cabinet requires otherwise under 401 KAR 5:065, Section 2(12), shall submit a complete application, which shall include a BMP program if necessary under 401 KAR 5:065, Section 2(10) to the cabinet in accordance with this section.

(b) The appropriate application forms for the various discharger types are given below. The forms are incorporated by reference in Section 14 of this administrative regulation.

DISCHARGE TYPE	APPLICATION FORMS
POTWs	1 and A
Concentrated animal feeding operations and aquatic animal production facilities	1 and B
Manufacturing, commercial, mining and silvicultural discharges with process wastewater	1 and C
Manufacturing, commercial, mining and silvicultural discharges with nonprocess wastewater only	1 and Short C
Industrial storm water point source discharges	1 and F

(3) When a facility or activity is owned by one (1) person but is operated by another person, the operator shall obtain a permit.

(4) Time to apply. Any person proposing a new discharge shall submit an application at least 180 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the cabinet. Facilities proposing a new discharge of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity. Storm water discharges associated with construction activity shall submit applications at least ninety (90) days before the date on which construction is to commence. Different submittal dates may be required under the terms of applicable general permits.

Persons proposing a new discharge are encouraged to submit their applications well in advance of the ninety (90) or 180 day requirements to avoid delay.

(5) Duty to reapply.

(a) Any POTW with a currently effective permit shall submit a new application at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the cabinet. The cabinet shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(b) All other permittees with currently effective permits shall submit a new application 180 days before the existing permit expires, except that the cabinet may grant permission to submit an application later than the deadline for submission otherwise applicable, but no later than the permit expiration date.

(c) Continuation of expiring permits.

1. The conditions of an expired permit continue in force until the effective date of a new permit if:

a. The permittee has submitted a timely application under subsection (2) of this section which is a complete application for a new permit; and

b. The cabinet, through no fault of the permittee, does not issue a new permit with an effective date under 401 KAR 5:075, Section 11, on or before the expiration date of the previous permit.

2. Effect. Permits continued under this paragraph remain fully effective and enforceable until the effective date of a new permit.

3. Enforcement. When the permittee is not in compliance with the conditions of the expiring or expired permit the cabinet may [~~to~~] do any of the following:

a. Initiate enforcement action based upon the permit which has been continued;

b. Issue a notice of intent to deny the new permit under 401 KAR 5:075, Section 3(2);

c. Issue a new permit under 401 KAR 5:075 with appropriate conditions; or

d. Take other actions authorized by [~~the~~] KRS Chapter 224 and these administrative regulations.

(6) Completeness. The cabinet shall not issue a permit before receiving a complete application for a permit except for KPDES general permits. An application for a permit is complete when the cabinet receives an application form and any supplemental information which are completed to its satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity.

(7) Information requirements. All applicants for KPDES permits shall provide the following information to the cabinet, using the application form provided by the cabinet. Additional information required of applicants is set forth in Sections 2 through 5 of this administrative regulation.

(a) The activities conducted by the applicant which require it to obtain **a** [~~an~~] KPDES permit.

(b) Name, mailing address, and location of the facility for which the application is submitted.

(c) Up to four (4) SIC codes which best reflect the principal products or services provided by the facility.

(d) The owner's or operator's name, address, telephone number, ownership status, and status as federal, state, private, public, or other entity.

(e) A listing of all existing environmental permits.

(f) A topographic map, or other map if a topographic map is unavailable, extending one (1) mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

(g) A brief description of the nature of the business.

(8) KPDES permit fees. As provided for in KRS 224.70-120, KPDES applications shall include a filing fee of twenty (20) percent of the total fee applicable to the following categories:

(a) Major industry;

(b) Minor industry;

(c) Nonprocess industry;

(d) Large, nonpublicly-owned treatment works;

(e) Intermediate, nonpublicly-owned treatment works;

(f) Small, nonpublicly-owned treatment works;

(g) Agriculture; and

(h) Surface mining operation.

Section 2. Application Requirements for Manufacturing, Commercial, Mining, and Silvicultural Dischargers. Manufacturing, commercial, mining, and silvicultural dischargers applying for KPDES permits, except for those facilities subject to the requirements of Section 3 of this administrative regulation, shall provide the following information to the cabinet, using the appropriate application forms as specified in Section 1 of this administrative regulation.

(1) Outfall location. The latitude and longitude to the nearest fifteen (15) seconds and the name of the receiving water.

(2) Line drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under subsection (3) of this section. The water balance shall provide approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined (for example, for certain mining activities), the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

(3) Average flows and treatment. A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and storm water runoff; the average flow which each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations, or production areas may be described in general terms (for example, dye-making reactor or distillation tower). For a privately owned treatment works, this information shall include the identity of each user of the treatment works. The average flow of point sources composed of storm water may be estimated. The basis for the rainfall event and the method of estimation shall be indicated.

(4) Intermittent flows. If any of the discharges described in subsection (3) of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence, except for storm water runoff, spillage or leaks.

(5) Maximum production. If an effluent guideline promulgated under Section 304 of CWA applies to the applicant and is expressed in terms of production or other measure of operation, a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure shall reflect the actual production of the facility as required by 401 KAR 5:065, Section 3(2).

(6) Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement requirement, a description of the abatement project, and a listing of the required and projected final compliance dates.

(7) Effluent characteristics. Information on the discharge of pollutants specified in this subsection, except information on storm water discharges which is to be provided as specified in Section 12 of this administrative regulation.

(a) When quantitative data for a pollutant are required, the applicant shall collect a sample of effluent and analyze it for the

pollutant in accordance with analytical methods approved under 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but shall provide a description of the method. When an applicant has two (2) or more outfalls with substantially identical effluents, the cabinet may allow the applicant to test only one (1) outfall and report that the quantitative data also apply to the substantially identical outfalls. The requirements in paragraphs (f) and (g) of this subsection that an applicant shall provide quantitative data for certain pollutants known to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant shall report these pollutants as present. Grab samples shall be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform and fecal streptococcus. For all other pollutants, twenty-four (24) hour composite samples shall be used. However, a minimum of one (1) grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than twenty-four (24) hours. In addition, for discharges other than storm water discharges, the cabinet may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is not feasible and that the minimum of four (4) grab samples shall be a representative sample of the effluent being discharged. For storm water discharges, all samples shall be collected from the discharge resulting from a storm event that is greater than one-tenth (0.1) inch and at least seventy-two (72) hours from the previously measurable (greater than one-tenth (0.1) inch rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed fifty (50) percent from the average or median rainfall event in that area. For all applicants, a flow-weighted composite shall be taken for either the entire discharge or for the first three (3) hours of the discharge. The flow-weighted composite sample for a storm water discharge may be taken with a continuous sampler or as a combination of a minimum of three (3) sample aliquots taken in each hour of discharge for the entire discharge or for the first three (3) hours of the discharge, with each aliquot being separated by a minimum period of fifteen (15) minutes. Applicants submitting permit applications for storm water discharges under Section 12(3) of this administrative regulation may collect flow-weighted composite samples using different protocols with respect to the time duration between the collection of sample aliquots, subject to the approval of the cabinet. However, a minimum of one (1) grab sample may be taken for storm water discharges from holding ponds or other impoundments with a retention period greater than twenty-four (24) hours. For a flow-weighted composite sample, only one (1) analysis of the composite of aliquots is required. For storm water discharge samples taken from discharges associated with industrial activities, quantitative data shall be reported for the grab sample taken during the first thirty (30) minutes, or as soon thereafter as practicable, of the discharge for all pollutants specified in Section 12(2)(a) of this administrative regulation. For all storm water permit applicants taking flow-weighted composites, quantitative data shall be reported for all pollutants specified in Section 12 of this administrative regulation except pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. The cabinet may allow or establish appropriate site-specific sampling procedures or requirements, including sampling locations, the season in which the sampling takes place, the minimum duration between the previous measurable storm event and the storm event sampled, the minimum or maximum level of precipitation required for an appropriate storm event, the form of precipitation sampled (snow melt or rain fall), protocols for collecting samples under 40 CFR Part 136, and additional time for submitting data on a case-by-case basis. An applicant knows or has reason to know that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.

(b)1. Every applicant shall report quantitative data for every outfall for the following pollutants:

Biochemical oxygen demand (BOD)
Chemical oxygen demand
Total organic carbon
Total suspended solids
Ammonia, as N
Temperature both winter and summer
pH

2. The cabinet may waive the reporting requirements for individual point sources or for a particular industry category for one (1) or more of the pollutants listed in subparagraph 1 of this paragraph if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

(c) Each applicant with processes in one (1) or more of the following primary industry categories contributing to a discharge shall report quantitative data for the following pollutants in each outfall containing process wastewater:

1. Adhesives and sealants.
2. Aluminum forming.
3. Auto and other laundries.
4. Battery manufacturing.
5. Coal mining.
6. Coil coating.
7. Copper forming.
8. Electrical and electronic components.
9. Electroplating.
10. Explosives manufacturing.
11. Foundries.
12. Gum and wood chemicals.
13. Inorganic chemicals manufacturing.
14. Iron and steel manufacturing.
15. Leather tanning and finishing.
16. Mechanical products manufacturing.
17. Nonferrous metals manufacturing.
18. Ore mining.
19. Organic chemicals manufacturing.
20. Paint and ink formulation.
21. Pesticides.
22. Petroleum refining.
23. Pharmaceutical preparations.
24. Photographic equipment and supplies.
25. Plastics processing.
26. Plastic and synthetic materials manufacturing.
27. Porcelain enameling.
28. Printing and publishing.
29. Pulp and paper mills.
30. Rubber processing.
31. Soap and detergent manufacturing.
32. Steam electric power plants.
33. Textile mills.
34. Timber products processing.

(d) Analytical results for the organic toxic pollutants in the fractions designated in Section 8(1) of this administrative regulation for the applicant's industrial category or categories shall be provided unless the applicant qualifies as a small business under subsection (8) of this section. Section 8(2) of this administrative regulation lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromatography and mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes.

(e) Analytical results for the pollutants listed in Section 8(3) of this administrative regulation (the toxic metals, cyanide, and total phenols)

shall be provided.

(f)1. Each applicant shall indicate whether it knows or has reason to know that any of the pollutants in Section 8(4) of this administrative regulation (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant shall report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant shall either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

2. Each applicant shall indicate whether it knows or has reason to know that any of the pollutants listed in Section 8(2) or (3) of this administrative regulation (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (b) of this subsection, is discharged from each outfall. For every pollutant expected to be discharged in concentrations of ten (10) ppb or greater the applicant shall report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, where any of these four (4) pollutants are expected to be discharged in concentrations of 100 ppb or greater the applicant shall report quantitative data. For every pollutant expected to be discharged in concentrations less than ten (10) ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, in concentrations less than 100 ppb, the applicant shall either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under subsection (8) of this section is not required to analyze for pollutants listed in Section 8(2) of this administrative regulation (the organic toxic pollutants).

(g) Each applicant shall indicate whether it knows or has reason to know that any of the pollutants in Section 8(5) of this administrative regulation (certain hazardous substances and asbestos) are discharged from each outfall. For every pollutant expected to be discharged, the applicant shall briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

(h) Each applicant shall report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

1. Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5,-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,-TP); 2-(2,4,5-trichlorophenoxy) ethyl, 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

2. Knows or has reason to know that TCDD is or may be present in an effluent.

(8) Small business exemption. An applicant which qualifies as a small business under one (1) of the following criteria is exempt from the requirements in subsection (7)(b)1 or (7)(c)1 of this section to submit quantitative data for the pollutants listed in Section 8(2) of this administrative regulation (the organic toxic pollutants):

(a) For coal mines, a probable total annual production of less than 100,000 tons per year.

(b) For all other applicants, gross total annual sales averaging less than $100,000 per year (in second quarter 1980 dollars).

(9) Used or manufactured toxics. A listing of any toxic pollutant which the applicant currently uses or manufactures as an intermediate or final product or byproduct shall be provided. The cabinet may waive or modify this requirement for any applicant if the applicant demonstrates that it would be unduly burdensome to identify each toxic pollutant and the cabinet has adequate information to issue the permit.

(10) Biological toxicity tests. An identification of any biological toxicity tests which the applicant knows or has reason to know have been made within the last three (3) years on any of the applicant's discharges or on a receiving water in relation to a discharge shall be provided.

(11) Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by subsection (7) of this section, the identity of each laboratory or firm and the analyses performed shall be provided.

(12) Additional information. In addition to the information reported on the application form, applicants shall provide to the cabinet, at its request, such other information as the cabinet may reasonably require to assess the discharges of the facility and to determine whether to issue a KPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity of discharges to aquatic life and requirements to determine the cause of the toxicity.

Section 3. Application Requirements for Manufacturing, Commercial, Mining and Silvicultural Facilities which Discharge Only Nonprocess Wastewater. Except for storm water discharges, all manufacturing, commercial, mining and silvicultural dischargers applying for KPDES permits which discharge only nonprocess wastewater not regulated by an effluent limitations guideline or new source performance standard shall provide the following information to the cabinet, using application forms provided by the cabinet:

(1) Outfall location. Outfall number, latitude and longitude to the nearest fifteen (15) seconds, and the name of the receiving water.

(2) Discharge date for new dischargers. Date of expected commencement of discharge.

(3) Type of waste. An identification of the general type of waste discharged, or expected to be discharged upon commencement of operations, including sanitary wastes, restaurant or cafeteria wastes, or noncontact cooling water. An identification of cooling water additives, if any, that are used or expected to be used upon commencement of operations, along with their composition if existing composition is available.

(4) Effluent characteristics.

(a) The applicant shall provide quantitative data for the pollutants or parameters listed below, unless testing is waived by the cabinet. The quantitative data may be data collected over the past 365 days, if they remain representative of current operations, and shall include maximum daily value, average daily value, and number of measurements taken. The applicant shall collect and analyze samples in accordance with 40 CFR Part 136. Grab samples shall be used for pH, temperature, oil and grease, total residual chlorine, and fecal coliform. For all other pollutants, twenty-four (24) hour composite samples shall be used. New dischargers shall include estimates for the pollutants or parameters listed below instead of actual sampling data, along with the source of each estimate. All levels shall be reported or estimated as concentration and as total mass, except for flow, pH, and temperature.

1. Biochemical oxygen demand (BOD).

2. Total suspended solids (TSS).

3. Fecal coliform, if known to be present or if sanitary waste is or will be discharged.

4. Total residual chlorine, if chlorine is used.

5. Oil and grease.

6. Chemical oxygen demand (COD), if noncontact cooling water is or will be discharged.

7. Total organic carbon (TOC), if noncontact cooling water is or will be discharged.

8. Ammonia, as N.

9. Discharge Flow.

10. pH.

11. Temperature, winter and summer.

(b) The cabinet may waive the testing and reporting requirements for any of the pollutants or flow listed in paragraph (a) of this subsection if the applicant submits a request for such a waiver before or with the application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent

requirements.

(c) The requirements of paragraph (a) of this subsection that an applicant shall provide quantitative data or estimates of certain pollutants do not apply to pollutants present in a discharge solely as a result of their presence in intake water. However, an applicant shall report these pollutants as present. Net credit may be provided for the presence of pollutants in intake water if the requirements of 401 KAR 5:065, Section 3(7) are met.

(5) Flow. A description of the frequency of flow and duration of any seasonal or intermittent discharge, except for storm water runoff, leaks, or spills.

(6) Treatment system. A brief description of any system used or to be used.

(7) Optional information. Any additional information the applicant wishes to be considered, such as influent data for the purpose of obtaining net credits pursuant to 401 KAR 5:065, Section 3(7).

(8) Certification. Signature of certifying official under Section 9 of this administrative regulation.

Section 4. Application Requirements for Concentrated Animal Feeding Operations and Aquatic Animal Production Facilities. Concentrated animal feeding operations and concentrated aquatic animal production facilities shall provide the following information to the cabinet, using the applicable application form provided by the cabinet:

(1) For concentrated animal feeding operations:

(a) The type and number of animals in open confinement and housed under roof.

(b) The number of acres used for confinement feeding.

(c) The design basis for the runoff diversion and control system, if one (1) exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor.

(2) For concentrated aquatic animal production facilities:

(a) The maximum daily and average monthly flow from each outfall.

(b) The number of ponds, raceways, and similar structures.

(c) The name of the receiving water and the source of intake water.

(d) For each species of aquatic animals, the total yearly and maximum harvestable weight.

(e) The calendar month of maximum feeding and the total mass of food fed during that month.

Section 5. Application Requirements for New and Existing POTWs. (1) The following POTWs shall provide the results of valid whole effluent biological toxicity testing to the cabinet:

(a) All POTWs with design influent flows equal to or greater than 1,000,000 gallons per day; and

(b) All POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program;

(2) In addition to the POTWs listed in subsection (1) of this section, the cabinet may require other POTWs to submit the results of toxicity tests with their permit applications, based on consideration of the following factors:

(a) The variability of the pollutants or pollutant parameters in the POTW effluent based on chemical-specific information, the type of treatment facility, and types of industrial contributors;

(b) The seven (7) day, ten (10) year ($7Q_{10}$) low flow value of the receiving stream;

(c) Existing controls on point or nonpoint sources, including total maximum daily load calculations for the water body segment and the relative contribution of the POTW;

(d) Receiving stream characteristics, including possible or known water quality impairment, and whether the POTW discharges to a water designated as an outstanding natural resource; or

(e) Other considerations, including but not limited to the history of toxic impact and compliance problems at the POTW, which the cabinet determines could cause or contribute to adverse water quality impacts.

(3) For POTWs required under subsection (1) or (2) of this section to conduct toxicity testing, POTWs shall use EPA's methods or other established protocols which are scientifically defensible and sufficiently sensitive to detect aquatic toxicity. This testing shall have been conducted since the last KPDES permit reissuance or permit modification under 401 KAR 5:070, Section 6, whichever occurred later.

(4) All POTWs with approved pretreatment programs shall provide a written technical evaluation of the need to revise local limits under 401 KAR 5:057.

Section 6. Recordkeeping. Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under this section for a period of at least three (3) years from the date the application is signed.

Section 7. Service of Process. Every applicant and permittee shall provide the cabinet an address for receipt of any legal document for service of process. The last address provided to the cabinet pursuant to this provision shall be the address at which the cabinet may tender any legal notice including but not limited to service of process in connection with any enforcement action.

Section 8. KPDES Application Testing Requirements. (1) Table I.

Industrial category	GC-MS Fraction*			
	Volatile	Acid	Neutral	Pesticide
Adhesives & sealants	(1)	(1)	(1)	
Aluminum forming	(1)	(1)	(1)	
Auto & other laundries	(1)	(1)	(1)	(1)
Battery manufacturing	(1)		(1)	
Coal mining	(1)	(1)	(1)	(1)
Coil Coating	(1)	(1)	(1)	
Copper forming	(1)	(1)	(1)	
Electric & electronic compounds	(1)	(1)	(1)	(1)
Electroplating	(1)	(1)	(1)	
Explosives manufacturing		(1)	(1)	
Foundries	(1)	(1)	(1)	
Gum & Wood	(1)	(1)	(1)	(1)
Inorganic chemicals manufacturing	(1)	(1)	(1)	
Iron & steel manufacturing	(1)	(1)	(1)	
Leather tanning & finishing	(1)	(1)	(1)	(1)
Mechanical products manufacturing	(1)	(1)	(1)	
Nonferrous metals manufacturing	(1)	(1)	(1)	(1)
Ore mining	(1)	(1)	(1)	(1)
Organic chemicals manufacturing	(1)	(1)	(1)	(1)
Paint & ink formulation	(1)	(1)	(1)	(1)
Pesticides	(1)	(1)	(1)	(1)
Petroleum refining	(1)	(1)	(1)	(1)
Pharmaceutical preparations	(1)	(1)	(1)	
Photographic equipment & supplies	(1)	(1)	(1)	(1)
Plastic & synthetic materials manufacturing	(1)	(1)	(1)	(1)
Plastic processing	(1)			
Porcelain enameling	(1)		(1)	(1)
Printing & publishing	(1)	(1)	(1)	(1)
Pulp & paperboard mills	(1)	(1)	(1)	(1)
Rubber processing	(1)	(1)	(1)	
Soap & detergent manufacturing	(1)	(1)	(1)	
Steam electric power plants	(1)	(1)	(1)	
Textile mills	(1)	(1)	(1)	(1)
Timber products processing	(1)	(1)	(1)	(1)

[1] Testing required

[*] Pollutants listed in Table II

(2) Table II - Organic Toxic Pollutants in Each of Four (4) Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GC-MS)

Volatiles	Acid Compounds	Base/Neutral	Pesticides
1V acrolein 2V acrylonitrile 3V benzene 5V bromoform 6V carbon tetrachloride 7V chlorobenzene 8V chlorodibromomethane 9V chloroethane 10V 2-chloroethylvinyl ether 11V chloroform 12V dichlorobromomethane 14V 1,1-dichloroethane 15V 1,2-dichloroethane 16V 1,1-dichloroethylene 17V 1,2-dichloropropane 18V 1,3-dichloropropylene 19V ethylbenzene 20V methyl bromide 21V methyl chloride 22V methylene chloride 23V 1,1,2,2-tetrachloroethane 24V tetrachloroethylene 25V toluene 26V 1,2-trans-dichloroethylene 27V 1,1,1-trichloroethane 28V 1,1,2-trichloroethane 29V trichloroethylene 31V vinyl chloride	1A 2-chlorophenol 2A 2,4-dichlorophenol 3A 2,4-dimethylphenol 4A 4,6-dinitro-o-cresol 5A 2,4-dinitrophenol 6A 2-nitrophenol 7A 4-nitrophenol 8A p-chloro-m-cresol 9A pentachlorophenol 10A phenol 11A 2,4,6-trichlorophenol	1B acenaphthene 2B acenaphthylene 3B anthracene 4B benzidine 5B benzo(a)anthracene 6B benzo(a)pyrene 7B 3,4-benzofluoranthene 8B benzo(ghi)perylene 9B benzo(k)fluoranthene 10B bis(2-chloroethoxy)methane 11B bis(2-chloroisopropyl)-ether 12B bis(2-ethylhexyl)phthalate 13B 4-bromophenyl phenyl ether 14B butylbenzyl phthalate 15B 2-chloronaphthalene 16B 4-chlorophenyl phenyl ether 17B chrysene 18B dibenzo(a,h)anthracene 19B 1,2-dichlorobenzene 20B 1,3-dichlorobenzene 21B 1,4-dichlorobenzene 22B 3,3'-dichlorobenzidine 23B diethyl phthalate 24B dimethyl phthalate 25B di-n-butyl phthalate 26B 2,4-dinitrotoluene 27B 2,6-dinitrotoluene 28B di-n-octyl phthalate 29B 1,2-diphenylhydrazine (as azonbenzene) 30B fluroranthene 31B fluorene 32B hexachlorobenzene 33B hexachlorobutadiene 34B hexachlorocyclopentadiene 35B hexachloroethane 36B indneo(1,2,3-cd)pyrene 37B isophorone 38B napthalene 39B nitrobenzene 40B N-nitrosodimethylamine 41B N-nitrosodi-n-propylamine 42B N-nitrosodiphenylamine 43B phenanthrene 44B pyrene 45B 1,2,4-trichlorobenzene	1P aldrin 2P alpha-BHC 3P beta-BHC 4P gamma-BHC 5P delta-BHC 6P chlordane 7P 4,4'-DDT 8P 4,4'-DDE 9P 4,4'-DDD 10P dieldrin 11P alpha-endosulfan 12P beta-endosulfan 13P endosulfan sulfate 14P endrin 15P endrin aldehyde 16P heptachlor 17P heptachlor epoxide 18P PCB-1242 19P PCB-1254 20P PCB-1221 21P PCB-1232 22P PCB-1248 23P PCB-1260 24P PCB-1016 25P toxaphene

(3) Table III-Other Toxic Pollutants (Metals and Cyanide) and Total Phenols

Antimony, Total
Arsenic, Total
Beryllium, Total
Cadmium, Total
Chromium, Total
Copper, Total
Lead, Total
Mercury, Total
Nickel, Total
Selenium, Total
Silver, Total
Thallium, Total
Zinc, Total
Cyanide, Total
Phenols, Total

(4) Table IV-Conventional and Nonconventional Pollutants Required to Be Tested by Existing Dischargers if Expected to be present

Bromide
Chlorine, Total Residual
Color
Fecal Coliform
Fluoride
Nitrate-Nitrite
Nitrogen, Total Organic
Oil and Grease
Phosphorus, Total
Radioactivity
Sulfate
Sulfide
Sulfite
Surfactants
Aluminum, Total
Barium, Total
Boron, Total
Cobalt, Total
Iron, Total
Magnesium, Total
Molybdenum, Total
Manganese, Total
Tin, Total
Titanium, Total

(5) Table V-Toxic Pollutants and Hazardous Substances Required To Be Identified by Existing Dischargers if Expected To Be Present

Toxic Pollutants	Hazardous Substances	Hazardous Substances, continued
Asbestos	Acetaldehyde Allyl alcohol Allyl chloride Amyl acetate Aniline Benzonitrile Benzyl chloride Butyl acetate Butylamine Captan Carbaryl Carbofuran Carbon disulfide Chlorpyrifos Coumaphos Cresol Crotonaldehyde Cyclohexane 2,4-D (2,4-Dichlorophenoxy acetic acid) Diazinon Dicamba Dichlobenil Dichlone 2,2-Dichloropropionic acid Dichlorvos Diethyl amine Dimethyl amine Dintrobenzene Diquat Disultoton Diuron Epichlorohydrin Ethion Ehtylene diamine Ethylene dibromide Formaldehyde Furfural Guthion Isoprene Isopropanolamine Dodecylbenzenesulfonate Kelthane Kepone	Malathion Mercaptodimethur Methoxychlor Methyl mercaptan Methyl methacrylate Methyl parathion Mevinphos Mexacarbate Monoethyl amine Monomethyl amine Naled Napthenic acid Nitrotoluene Parathion Phenolsulfanate Phosgene Propargite Propylene oxide Pyrethrins Quinoline Resorcinol Strontium Strychnine Styrene 2,4,5-T (2,4,5-Trichlorophenoxy acetic acid) TDE (Tetrachlorodiphenylethane) 2,4,5-TP(2-2,4,5-Trichlorophenoxy)propanoic acid Trichlorofan Triethanolamine dodecylbenzenesulfonate Triethylamine

Section 9. Signatories to Permit Applications and Reports. (1) Applications. All permit applications shall be signed as follows:

(a) For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer is:

1. A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or

2. The manager of one (1) or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25,000,000 (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. A copy of that authority shall be provided to the cabinet.

(b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a federal agency includes:

1. The chief executive officer of the agency; or

2. A senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., regional administrators of EPA).

(2) All reports required by permits, and other information requested by the cabinet shall be signed by a person described in subsection (1) of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(a) The authorization is made in writing by a person described in subsection (1) of this section;

(b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility

or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position; and

(c) The written authorization is submitted to the cabinet.

(3) Changes to authorization. If an authorization under subsection (2) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of subsection (2) of this section shall be submitted to the cabinet prior to or together with any reports, information, or applications to be signed by an authorized representative.

(4) Certification. Any person signing a document under subsections (1) or (2) of this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Section 10. Concentrated Animal Feeding Operations. (1) Permit requirement. Concentrated animal feeding operations are point sources subject to the KPDES permit program.

(2) Case-by-case designation of concentrated animal feeding operations.

(a) The cabinet may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the Commonwealth. In making this designation the cabinet shall consider the following factors:

1. The size of the animal feeding operation and the amount of wastes reaching waters of the Commonwealth;

2. The location of the animal feeding operation relative to waters of the Commonwealth;

3. The means of conveyance of animal wastes and process waste waters into waters of the Commonwealth;

4. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the Commonwealth; and

5. Other relevant factors.

(b) No animal feeding operation with less than the numbers of animals defined in 401 KAR 5:001 shall be designated as a concentrated animal feeding operation unless:

1. Pollutants are discharged into waters of the Commonwealth through a manmade ditch, flushing system, or other similar manmade device; or

2. Pollutants are discharged directly into waters of the Commonwealth which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals or their wastes confined in the operation.

(c) A permit application shall not be required from a concentrated animal feeding operation designated under this subsection until the cabinet has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

Section 11. Concentrated Aquatic Animal Production Facilities. (1) Permit requirement. Concentrated aquatic animal production facilities, as set forth in this section, are point sources subject to the KPDES permit program.

(2) A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of this section if it contains, grows, or holds aquatic animals in either of the following categories:

(a) Cold water fish species or other cold water aquatic animals, including, but not limited to, the Salmonidae family of fish; e.g., trout and salmon, in ponds, raceways, or other similar structures which discharge at least thirty (30) days per year but does not include:

1. Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and

2. Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.

(b) Warm water fish species or other warm water aquatic animals, including, but not limited to, the Ameiuride, Centrarchidae and Cyprinidae families of fish; e.g., respectively, catfish, sunfish and minnows, in ponds, raceways, or other similar structures which discharge at least thirty (30) days per year, but does not include:

1. Closed ponds which discharge only during periods of excess runoff; or

2. Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.

(3) Case-by-case designation of concentrated aquatic animal production facilities.

(a) The cabinet may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the Commonwealth. In making this designation the cabinet shall consider the following factors:

1. The location and quality of the receiving waters of the Commonwealth;

2. The holding, feeding, and production capacities of the facility;

3. The quantity and nature of the pollutants reaching waters of the Commonwealth; and

4. Other relevant factors.

(b) A permit application shall not be required from a concentrated aquatic animal production facility designated under this subsection until the cabinet has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

Section 12. Storm Water Discharges. (1) Permit requirement.

(a) Prior to October 1, 1992, discharges composed entirely of storm water shall not be required to obtain a KPDES permit except:

1. A discharge with respect to which a permit has been issued prior to February 4, 1987;

2. A discharge associated with industrial activity (see also paragraph (d) of this subsection);

3. A discharge from a large municipal separate storm sewer system;

4. A discharge from a medium municipal separate storm sewer system; and

5. A discharge which the cabinet or the EPA regional administrator determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the Commonwealth. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (b) of this subsection or agricultural storm water runoff which is exempted from the definition of point source in 401 KAR 5:001. The cabinet may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the cabinet may consider the following factors:

a. The location of the discharge with respect to waters of the

Commonwealth;

b. The size of the discharge;

c. The quantity and nature of the pollutants discharged to waters of the Commonwealth; and

d. Other relevant factors.

(b) The cabinet shall not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances including but not limited to pipes, conduits, ditches, and channels, used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that has not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of these operations.

(c) Large and medium municipal separate storm sewer systems.

1. Permits shall be obtained for all discharges from large and medium municipal separate storm sewer systems.

2. The cabinet may either issue one (1) system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

3. The owner or operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system shall either:

a. Participate in a permit application, i.e., be a permittee or a copermittee, with one (1) or more other owner or operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

b. Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the owner or operator is responsible; or

c. A regional authority may be responsible for submitting a permit application under the following guidelines:

(i) The regional authority together with coapplicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time Part 1 of the application is due;

(ii) The permit applicant or coapplicants shall establish their ability to make a timely submission of Part 1 and Part 2 of the municipal application;

(iii) Each of the owners or operators of municipal separate storm sewers within the systems defined in 401 KAR 5:001, that are under the purview of the designated regional authority, shall comply with the application requirements of subsection (3) of this section.

4. One (1) permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The cabinet may issue one (1) system-wide permit covering all or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

5. Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

6. Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are owners or operators.

(d) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of subsection (2) of this section, an owner or operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the owner or operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing this discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing KPDES permit number.

(e) Other municipal separate storm sewers. The cabinet may issue permits for municipal separate storm sewers that are designated under paragraph (a)5 of this subsection on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(f) Nonmunicipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a nonmunicipal or nonpublicly owned separate storm sewer system, the cabinet may issue: a single KPDES permit, with each discharger a copermittee to a permit issued to the owner or operator of the portion of the system that discharges into waters of the Commonwealth; or, individual permits to each discharger of storm water associated with industrial activity through the nonmunicipal conveyance system.

1. All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer shall be covered by an individual permit, or a permit issued to the owner or operator of the portion of the system that discharges to waters of the Commonwealth, with each discharger to the nonmunicipal conveyance a copermittee to that permit.

2. Where there is more than one (1) owner or operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity shall submit applications.

3. Any permit covering more than one (1) owner or operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(g) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that shall obtain KPDES permits in accordance with the procedures of Section 5 of this administrative regulation and are not subject to the provisions of this section.

(h) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under Title II, Title III or Title VI of the Clean Water Act. See 40 CFR Part 35, Subpart I, Appendix A(b)H.2.j.

(2) Application requirements for storm water discharges associated with industrial activity.

(a) Individual application. Dischargers of storm water associated with industrial activity shall apply for an individual permit, apply for a permit through a group application, or seek coverage under an issued storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the cabinet is evaluating for designation under paragraph (a)5 of this subsection and is not a municipal separate storm sewer, and which are not part of a group application described under subsection (2)(b) of this section, shall submit a KPDES application in accordance with the requirements of Section 3 of this administrative regulation as modified and supplemented by the provisions of the remainder of this paragraph. Applicants for discharges composed entirely of storm water shall submit Form 1 and Form F. Applicants for discharges composed of storm water and nonstorm water shall submit Form 1, Form Short C, and Form F.

1. Except as provided in subparagraphs 2, 3, and 4 of this paragraph the owner or operator of a storm water discharge associated with industrial activity subject to this section shall provide:

a. A site map showing topography, or indicating the outline of drainage areas served by the outfalls covered in the application if a topographic map is unavailable, of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall; each past or present area used for outdoor storage or disposal of significant materials; each existing structural control measure to reduce pollutants in storm water runoff; materials loading and access areas; areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities, including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34; each well where fluids from the facility are injected underground; springs; and other surface water bodies which receive storm water discharges from the facility;

b. An estimate of the area of impervious surfaces, including paved areas and building roofs, and the total area drained by each outfall, within a mile radius of the facility, and a narrative description of the following: significant materials that in the three (3) years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of the materials; materials management practices employed, in the three (3) years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and nonstructural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

c. A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of nonstorm water discharges which are not covered by a KPDES permit; tests for these nonstorm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

d. Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three (3) years prior to the submittal of this application;

e. Quantitative data based on samples collected during storm events and collected in accordance with Section 3 of this administrative regulation from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(i) Any pollutant limited in an effluent guideline to which the facility is subject;

(ii) Any pollutant listed in the facility's KPDES permit for its process wastewater, if the facility is operating under an existing KPDES permit;

(iii) Oil and grease, pH, BOD, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(iv) Any information on the discharge required under Section 2(7)(f) and (g) of this administrative regulation;

(v) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm events sampled, and the method of flow measurement or estimation; and

(vi) The date and duration in hours of the storm events sampled, rainfall measurements or estimates of the storm event in inches which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than one-tenth (0.1) inch rainfall) storm event in hours;

f. Owners or operators of a discharge which is composed entirely of storm water are exempt from the requirements of Section 2(2), (3), (4), (5), and (7)(a), (b) and (e) of this administrative regulation; and

g. Owners or operators of new sources or new discharges which are composed in part or entirely of storm water shall include estimates for the pollutants or parameters listed in clause e of this subparagraph instead of actual sampling data, along with the source of each estimate. Owners or operators of new sources or new discharges composed in part or entirely of storm water shall provide quantitative data for the parameters listed in clause e of this subparagraph within two (2) years after commencement of discharge, unless data have already been reported under the monitoring requirements of the KPDES permit for the discharge.

2. The owner or operator of an existing or new storm water discharge that is storm water associated with construction activity, is exempt from the requirements of Section 2 of this administrative regulation and subparagraph 1 of this paragraph. The owner or operator shall provide a narrative description of:

a. The location, including a map, and the nature of the construction activity;

b. The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

c. Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable state and local erosion and sediment control requirements;

d. Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable state or local erosion and sediment control requirements;

e. An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

f. The name of the receiving water.

3. The owner or operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with subparagraph 1 of this paragraph unless the facility:

a. Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

b. Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

c. Contributes to a violation of a water quality standard.

4. The owner or operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of these operations.

5. Applicants shall provide such other information the cabinet may reasonably require under Section 2(12) of this administrative regulation to determine whether to issue a permit and may require any facility subject to subparagraph 2 of this paragraph to comply with subparagraph 1 of this paragraph.

(b) Group application for discharges associated with industrial activity. In lieu of individual applications or notice of intent to be covered by a general permit for storm water discharges associated with industrial activity, a group application may be filed by an entity representing a group of applicants, except facilities that have existing individual KPDES permits for storm water, that are part of the same subcategory (see 40 CFR Chapter I, Subchapter N, Part 405 to 471) or, where such grouping is inapplicable, are sufficiently similar as to

be appropriate for general permit coverage under 401 KAR 5:055, Section 5. The Part 1 application shall be submitted to the Office of Water Enforcement and Permits, U.S. EPA, 401 M Street, SW., Washington, DC 20460 (EN-336) for approval. Once a Part 1 application is approved, group applicants shall submit Part 2 of the group application to the Office of Water Enforcement and Permits. A group application shall consist of:

1. Part 1. Part 1 of a group application shall:

a. Identify the participants in the group application by name and location. Kentucky facilities participating in the group application are listed in precipitation zone 2 as given in Appendix E of 40 CFR Part 122.

b. Include a narrative description summarizing the industrial activities of participants of the group application and explaining why the participants, as a whole, are sufficiently similar to be a covered by a general permit;

c. Include a list of significant materials stored exposed to precipitation by participants in the group application and materials management practices employed to diminish contact by these materials with precipitation and storm water runoff;

d. Identify ten (10) percent of the dischargers participating in the group application, with a minimum of ten (10) dischargers, and either a minimum of two (2) dischargers from each precipitation zone indicated in Appendix E of 40 CFR Part 122 in which ten (10) or more members of the group are located, or one (1) discharger from each precipitation zone indicated in Appendix E of 40 CFR Part 122 in which nine (9) or fewer members of the group are located, from which quantitative data will be submitted in Part 2. If more than 1,000 facilities are identified in a group application, no more than 100 dischargers shall submit quantitative data in Part 2. Groups of between four (4) and ten (10) dischargers may be formed. However, in groups of between four (4) and ten (10), at least half the facilities shall submit quantitative data, and at least one (1) facility in each precipitation zone in which members of the group are located shall submit data. A description of why the facilities selected to perform sampling and analysis are representative of the group as a whole in terms of the information provided in **clauses** ~~[subparagraphs]~~ b and c of this **sub**paragraph, shall accompany this section of the application. Different factors impacting the nature of the storm water discharges, such as processes used and material management, shall be represented, to the extent feasible, in a manner roughly equivalent to their proportion in the group.

2. Part 2. Part 2 of a group application shall contain quantitative data (NPDES Form 2F), as modified by paragraph (a) of this subsection, so that when Part 1 and Part 2 of the group application are taken together, a complete NPDES application (Form 1, Form 2C, and Form 2F) can be evaluated for each discharger identified in subparagraph 1d of this paragraph.

(3) Application requirements for large and medium municipal separate storm sewer discharges. The owner or operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the cabinet under subsection (1)(a)5 of this section, may submit a jurisdiction-wide or system-wide permit application. If more than one (1) public entity owns or operates a municipal separate storm sewer within a geographic area including adjacent or interconnected municipal separate storm sewer systems, the owners or operators may be coapplicants to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under subsection (1)(a)5 of this section shall include:

(a) Part 1. Part 1 of the application shall consist of:

1. General information. The applicants' name, address, telephone number of contact person, ownership status and status as a state or local government entity.

2. Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (b)1 of this subsection, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

3. Source identification.

a. A description of the historic use of ordinances, guidance or other controls which limited the discharge of nonstorm water discharges to any POTW serving the same area as the municipal separate storm sewer system.

b. A USGS seven and one-half (7.5) minute topographic map, or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective, extending one (1) mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(i) The location of known municipal storm sewer system outfalls discharging to waters of the Commonwealth;

(ii) A description of the land use activities (e.g., divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten (10) year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(iii) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(iv) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a KPDES permit;

(v) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(vi) The identification of publicly owned parks, recreational areas, and other open lands.

4. Discharge characterization.

a. Monthly mean rain and snow fall estimates or summary of weather bureau data and the monthly average number of storm events.

b. Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

c. A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments and lakes, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving these discharges have been:

(i) Assessed and reported in Section 305(b) reports submitted by the Commonwealth, the basis for the assessment, evaluated or monitored, a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(ii) Listed under Section 304(l)(1)(A)(i), Section 304(l)(1)(A)(ii), or Section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(iii) Listed in state nonpoint source assessments required by Section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution, or contributing to a violation of water quality standards;

(iv) Identified and classified according to eutrophic condition of publicly owned lakes listed in state reports required under Section 314(a) of the CWA. The following shall be included: a description of those publicly owned lakes for which uses are known to be impaired;

a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into these lakes; and a description of methods and procedures to restore the quality of those lakes;

(v) Recognized by the applicant as highly valued or sensitive waters;

(vi) Defined by the U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(vii) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

d. Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two (2) grab samples shall be collected during a twenty-four (24) hour period with a minimum period of four (4) hours between samples. For all samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of nonstorm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods referenced in 40 CFR Part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls, other outfall points or any other point of access such as manholes randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(i) A grid system consisting of perpendicular north-south and east-west lines spaced one-fourth (1/4) mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(ii) All cells that contain a segment of the storm sewer system shall be identified; one (1) field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(iii) Field screening points should be located downstream of any sources of suspected illegal or illicit discharge;

(iv) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(v) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(vi) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening, unless access to the separate storm sewer system is impossible; and

(vii) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in clause d(i) through (vi) of this subparagraph, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively, or all major outfalls in the system, if less. In these circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced one-fourth (1/4) mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells. The applicant shall then select major outfalls in as many cells as possible until at least 500 major outfalls for large municipalities or 250 major outfalls for medium municipalities are selected; a field screening analysis shall be undertaken at these major outfalls.

e. Characterization plan. Information and a proposed program to meet the requirements of paragraph (b)3 of this subsection. The description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (b)3a of this subsection, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for sampling shall reflect water quality concerns (see clause c of this subparagraph to the extent practicable.

5. Management programs.

a. A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Controls may include, but are not limited to procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under state law as well as local requirements.

b. A description of the existing program to identify illicit connections to the municipal storm sewer system. The description shall include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

6. Fiscal resources. A description of the financial resources currently available to the municipality to complete Part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs shall be provided.

(b) Part 2. Part 2 of the application shall consist of:

1. Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

a. Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

b. Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

c. Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

d. Control through interagency agreements among coapplicants the contribution of pollutants from one (1) portion of the municipal system to another portion of the municipal system;

e. Require compliance with conditions in ordinances, permits, contracts or orders; and

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

2. Source identification. List the locations of any major outfalls

that discharge to waters of the Commonwealth that were not reported under paragraph (a)3b(i) of this subsection. Provide an inventory, organized by watershed of the name and address, and a description, such as SIC codes, which best reflects the principal products or services provided by each facility which may discharge to the municipal separate storm sewer, storm water associated with industrial activity;

3. Characterization data. When quantitative data for a pollutant are required under paragraph (a)3a(iii) of this subsection, the applicant shall collect a sample of effluent in accordance with Section 2(7) of this administrative regulation and analyze it for the pollutant in accordance with analytical methods referenced in 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but shall provide a description of the method. The applicant shall provide information characterizing the quality and quantity of discharges covered in the permit application, including:

a. Quantitative data from representative outfalls designated by the cabinet. Based on information received in Part 1 of the application, the cabinet shall designate between five (5) and ten (10) outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system. Where there are less than five (5) outfalls covered in the application, the cabinet shall designate all outfalls. A monitoring plan shall be developed as follows:

(i) For each outfall or field screening point designated under this clause, samples shall be collected of storm water discharges from three (3) storm events occurring at least one (1) month apart in accordance with the requirements at Section 2(7) of this administrative regulation. The cabinet may allow exemptions to sampling three (3) storm events when climatic conditions create good cause for these exemptions;

(ii) A narrative description shall be provided of the date and duration of the storm events sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous greater than one-tenth (0.1) inch rainfall storm event;

(iii) For samples collected and described under subclause (i) and (ii) of this clause, quantitative data shall be provided for the pollutants listed in Section 8(2) and (3) of this administrative regulation, and for the following pollutants:

Total suspended solids (TSS)
Total dissolved solids (TDS)
COD
BOD
Oil and grease
Fecal coliform
Fecal streptococcus
pH
Total Kjeldahl nitrogen
Nitrate plus nitrite
Dissolved phosphorus
Total ammonia plus organic nitrogen
Total phosphorus

(iv) List additional limited quantitative data required by the cabinet for determining permit conditions. The cabinet may require that quantitative data be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness;

b. Estimates of the annual pollutant load of the cumulative discharges to waters of the Commonwealth from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the Commonwealth from all identified municipal outfalls during a storm event for BOD, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

c. A proposed schedule to provide estimates for each major outfall identified in either subparagraph 2 of this paragraph or paragraph (a)3b(i) of this subsection of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under clause a of this subparagraph and

d. A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled, or the location of instream stations, why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

4. Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a system-wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs shall be considered by the cabinet when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. The programs shall be based on:

a. A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(i) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants, including floatables, in discharges from municipal separate storm sewers;

(ii) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. The plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in clause d of this subparagraph;

(iii) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(iv) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(v) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for the discharges. This program may be coordinated with the program developed under clause c of this subparagraph; and

(vi) A description of a program to reduce to the maximum extent

practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which shall include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

b. A description of a program, including a schedule, to detect and remove, or require the discharger to the municipal separate storm sewer to obtain a separate KPDES permit for, illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(i) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system. This program description shall address all types of illicit discharges, however the following category of nonstorm water discharges or flows shall be addressed where the discharges are identified by the municipality as sources of pollutants to waters of the Commonwealth: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as specified at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water. Program descriptions shall address discharges or flows from firefighting only where the discharges or flows are identified as significant sources of pollutants to waters of the Commonwealth;

(ii) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by the field screens;

(iii) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of nonstorm water. The procedures may include sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. The description shall include the location of storm sewers that have been identified for the evaluation;

(iv) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(v) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(vi) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(vii) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

c. A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to Section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(i) Identify priorities and procedures for inspections and establishing and implementing control measures for these discharges;

(ii) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in clause c of this subparagraph, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing KPDES permit for a facility; oil and grease, COD, pH, BOD, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under Section 2(7)(f) and (g) of this administrative regulation.

d. A description of a program to implement and maintain structural and nonstructural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(i) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(ii) A description of requirements for nonstructural and structural best management practices;

(iii) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(iv) A description of appropriate educational and training measures for construction site operators.

5. Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

6. Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under subparagraphs 3 and 4 of this paragraph. This analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of the funds.

7. If more than one (1) legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

8. If requirements under paragraph (a)4e of this subsection and subparagraphs 2, 3b, and 4 of this paragraph are not practicable or are not applicable, the cabinet may exclude any operator of a discharge from a municipal separate storm sewer which is designated under subsection (1)(a)5, (2)(d)2 or (2)(g)2 of this section from these requirements. The cabinet shall not exclude the owner or operator of a discharge from a municipal separate storm sewer identified in 40 CFR 122, Appendix F, G, H, or I, from any of the permit application requirements under this subparagraph except where authorized under this section.

(4) Application deadlines. Any owner or operator of a point source required to obtain a permit under subsection (1)(a) of this section that does not have an effective KPDES permit covering its storm water outfalls shall submit an application in accordance with the following deadlines:

(a) Individual applications.

1. Except as provided in subparagraph 2 of this paragraph, for any storm water discharge associated with industrial activity defined in 401 KAR 5:001 that is not part of a group application as described in subsection (2)(b) of this section or which is not authorized by a storm water general permit, a permit application made pursuant to subsection (2) of this section shall be submitted to the cabinet by October 1, 1992;

2. For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, power plant or uncontrolled sanitary landfill, permit applications are not required.

(b) For any group application submitted in accordance with subsection (2)(b) of this section:

1. Part 1.

a. Except as provided in clause b of this subparagraph, Part 1 of the application shall be submitted to the U.S. EPA Director, Office of Water Enforcement and Permits by September 30, 1991;

b. Any municipality with a population of less than 250,000 shall be required to submit a Part 1 application before May 18, 1992.

c. For any storm water discharge associated with industrial activities from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, power plant or uncontrolled sanitary landfill, permit applications are not required.

2. Based on information in the Part 1 application, the Director will approve or deny the members in the group application within sixty (60) days after receiving Part 1 of the group application.

3. Part 2.

a. Except as provided in clause b of this subparagraph, Part 2 of the application shall be submitted to the Director, Office of Water Enforcement and Permits by October 1, 1992;

b. Any municipality with a population of less than 250,000 shall not be required to submit a Part 1 application before May 17, 1993.

c. For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, power plant or uncontrolled sanitary landfill, permit applications are not required.

4. Rejected facilities.

a. Except as provided in clause b of this subparagraph, facilities that are rejected as members of a group shall submit an individual application or obtain coverage under an applicable general permit no later than twelve (12) months after the date of receipt of the notice of rejection or October 1, 1992, which ever comes first.

b. Facilities that are owned or operated by a municipality and that are rejected as members of Part I group application shall submit an individual application no later than 180 days after the date of the receipt of the notice of registration or October 1, 1992, whichever is later.

5. A facility defined as a storm water associated with industrial activity in 401 KAR 5:001 may add on to a group application submitted in accordance with subparagraph 1 of this paragraph at the discretion of the U.S. EPA Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18,1992. The addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than ten (10) percent, unless there are over 100 facilities in the group that are submitting quantitative data. Approval to become part of group application shall be obtained from the group or the trade association representing the individual facilities.

(c) For any discharge from a large municipal separate storm sewer system:

1. Part 1 of the application shall be submitted to the cabinet by November 18, 1991;

2. Based on information received in the Part 1 application the cabinet shall approve or deny a sampling plan under subsection (3)(a)4e of this section within ninety (90) days after receiving the Part 1 application;

3. Part 2 of the application shall be submitted to the cabinet by November 16, 1992.

(d) For any discharge from a medium municipal separate storm sewer system:

1. Part 1 of the application shall be submitted to the cabinet by May 18, 1992.

2. Based on information received in the Part 1 application the cabinet will approve or deny a sampling plan within ninety (90) days after receiving the Part 1 application.

3. Part 2 of the application shall be submitted to the cabinet by May 17, 1993.

(e) A permit application shall be submitted to the cabinet within sixty (60) days of notice, unless permission for a later date is granted by the cabinet for:

1. A storm water discharge which either the cabinet or the EPA Regional Administrator determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the Commonwealth (see subsection (1)(a)5 of this section); or

2. A storm water discharge subject to subsection (2)(a)5 of this section.

(f) Facilities with existing KPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. New applications shall be submitted in accordance with the requirements of Section 2 of this administrative regulation and subsection (2) of this section 180 days before the expiration of the permits.

(5) Petitions.

(a) Any owner or operator of a municipal separate storm sewer system may petition the cabinet to require a separate KPDES permit for any discharge into the municipal separate storm sewer system.

(b) Any person may petition the cabinet to require a KPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the Commonwealth.

(c) The owner or operator of a municipal separate storm sewer system may petition the cabinet to reduce the census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities or regional authorities in which combined sewers are operated, the census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the KPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(d) Any person may petition the cabinet for the designation of a large or medium municipal separate storm sewer system as defined in 401 KAR 5:001.

(e) The cabinet shall make a final determination on any petition received under this section within ninety (90) days after receiving the petition.

Section 13. Silvicultural Activities. Permit requirement. Silvicultural point sources, as defined in 401 KAR 5:001, are point sources subject to the KPDES permit program.

Section 14. KPDES Application Forms. The following permit applications forms are hereby incorporated by reference. Application forms may be obtained from or inspected at the KPDES Branch at the Division of Water, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-3410, during normal business hours of 8 a.m. to 4:30 p.m., eastern time, excluding state holidays.

(1) KPDES Form 1, revised **July** ~~[April]~~ 1994;
(2) KPDES Form A, revised **July** ~~[April]~~ 1994;
(3) KPDES Form B, revised **July** ~~[April]~~ 1994;
(4) KPDES Form C, revised **July** ~~[April]~~ 1994;
(5) KPDES Short Form C, revised **July** ~~[April]~~ 1994; and
(6) KPDES Form F, revised **July** ~~[April]~~ 1994.

~~[(b) Any person who is required to have a permit and who does not have an effective permit, shall submit a complete application to the director in accordance with this section and 401 KAR 5:075. A complete application shall include a BMP program, if necessary, under 401 KAR 5:065, Section 2(10). The following are exceptions to the application requirements:~~

~~1. Persons covered by general permits under 401 KAR 5:055,~~

Section 5;

2. Discharges excluded under 401 KAR 5:055, Section 1; and

3. Users of a privately owned treatment works unless the director requires otherwise under 401 KAR 5:065, Section 2(12).

(2) Time to apply.

(a) Any person proposing a new discharge shall submit an application at least 150 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the director.

(b) Any existing Group I storm water discharge as defined in Section 8(2)(b) of this regulation that does not have an effective permit shall submit an application by December 31, 1987. Any existing Group II storm water discharge as defined in Section 8(2)(c) of this regulation that does not have an effective permit shall submit an application by June 30, 1989. Any discharger designated under Section 8(3) of this regulation shall submit an application within six (6) months of notification of its designation. (3) Duty to apply. When a facility or activity is owned by one (1) person but is operated by another person, it is the operator's duty to obtain a permit.

(4) Duty to reapply.

(a) Any person with a currently effective permit shall submit a new application at least 150 days before the expiration date of the existing permit, unless permission for a later date has been granted by the director. The director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(b) Continuation of expiring permits.

1. The conditions of an expired permit continue in force until the effective date of a new permit if:

a. The permittee has submitted a timely application under subsection (2) of this section which is a complete application for a new permit; and

b. The director, through no fault of the permittee, does not issue a new permit with an effective date under 401 KAR 5:075, Section 11, on or before the expiration date of the previous permit.

2. Effect. Permits continued under this paragraph remain fully effective and enforceable until the effective date of a new permit.

3. Enforcement. When the permittee is not in compliance with the conditions of the expiring or expired permit the director may choose to do any or all of the following:

a. Initiate enforcement action based upon the permit which has been continued;

b. Issue a notice of intent to deny the new permit under 401 KAR 5:075, Section 3(2);

c. Issue a new permit under 401 KAR 5:075 with appropriate conditions; or

d. Take other actions authorized by the KPDES regulations.

(5) Completeness. The director will not issue a KPDES permit before receiving a complete application for a permit. A permit application is complete when the cabinet receives an application form with any supplemental information which is completed to the director's satisfaction.

(6) Information requirements. All applicants for KPDES permits shall provide the following information to the director, using the application form provided by the director:

(a) The activities being conducted which require the applicant to obtain a KPDES permit.

(b) Name, mailing address, and location of the facility for which the application is submitted.

(c) From one (1) to four (4) SIC codes which best reflect the principal products or services provided by the facility.

(d) The operator's name, address, telephone number, ownership status, and status as to federal, state, private, public, or other entity.

(e) A listing of all other relevant environmental permits, or construction approvals issued by the cabinet or other state or federal permits, as requested.

(f) A topographic map (or other map if a topographic map is unavailable) extending one (1) mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area. Group II storm water discharges, as defined in Section 8 of this regulation, are exempt from the requirements of this paragraph.

(g) A brief description of the nature of the business.

(h) For Group II storm water dischargers (as defined in Section 8 of this regulation) only, a brief narrative description of:

1. The drainage area, including an estimate of the size and nature of the area;

2. The receiving water; and

3. Any treatment applied to the discharge.

(i) Additional information may also be required of new sources, new dischargers and major facilities to determine any significant adverse environmental effects of the discharge pursuant to 401 KAR 5:080, Section 5.

(7) Recordkeeping. Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under this regulation for a period of at least three (3) years from the date the application is signed.

(8) Service of process. Every applicant and permittee shall provide the cabinet an address for receipt of any legal document for service of process. The last address provided to the cabinet pursuant to this provision shall be the address at which the cabinet may tender any legal notice including but not limited to service of process in connection with any enforcement action. Service, whether by hand or by mail, shall be complete upon tender of the notice, process or order and shall not be deemed incomplete because of refusal to accept or if the addressee is not found.

Section 2. Confidentiality of Information. (1) In accordance with KRS 224.10-210, any information submitted to the cabinet pursuant to the KPDES regulations may be claimed as confidential by the submitter. Any such claim must be asserted at the time of submission in the manner prescribed on the application form or instructions or, in the case of other submissions, by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, the cabinet may make the information available to the public without further notice. If a claim is asserted, the information will be treated in accordance with the procedures in KRS 224.035.

(2) Information, which includes effluent data, required by KPDES application forms provided by the director under Section 1 of this regulation may not be claimed confidential. Information contained in KPDES permits or permit applications may not be claimed as confidential business information.

Section 3. Signatories to Permit Applications and Reports. (1) Applications. All permit applications shall be signed as follows:

(a) For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

1. A president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision making functions for the corporation; or

2. The manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;

(b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official. For the

purpose of this section, a principal executive officer of a federal agency includes:

1. The chief executive officer of the agency; or

2. A senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (for example, Regional Administrators of EPA).

(2) Reports. All reports required by permits, other information requested by the director, and all permit applications submitted for Group II storm water discharges under Section 8 of this regulation shall be signed by a person described in subsection (1) of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(a) The authorization is made in writing by a person described in subsection (1) of this section;

(b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.)

(c) The written authorization is submitted to the director.

(3) Changes to authorization. If an authorization under subsection (2) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of subsection (2) of this section must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(4) Certification. Any person signing a document under this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Section 4. Application Requirements for Existing Manufacturing, Commercial, Mining, and Silvicultural Dischargers. Existing manufacturing, commercial, mining, and silvicultural dischargers applying for KPDES permits shall provide the following information to the director, using application forms provided by the director:

(1) Outfall location. The latitude and longitude to the nearest fifteen (15) seconds and the name of the receiving water shall be provided by the applicant.

(2) Line drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units shall be included in the application. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under subsection (3) of this section. The water balance shall show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined the applicant may provide a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

(3) Average flows and treatment. The applicant shall provide a narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and storm water run-off; the average flow which each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations or production areas may be described in general terms, for example, dye making reactor, distillation tower. For a privately owned treatment works, this information shall include the identity of each user of the treatment works.

(4) Intermittent flows. If any of the discharges described in subsection 3 of this section are intermittent or seasonal, the applicant shall provide a description of the frequency, duration and flow rate of each discharge occurrence, except for storm water run off, spillage, or leaks.

(5) Maximum production. If an EPA effluent guideline applies to the applicant and is expressed in terms of production or other measure of operation, a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline shall be included. The reported measure shall reflect the actual production of the facility as required by 401 KAR 5:065, Section 3(2).

(6) Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement requirement, a description of the abatement project, and a listing of the required and projected final compliance dates shall be included.

(7) Effluent characteristics. Information on the discharge of pollutants specified in this subsection. When quantitative data for a pollutant are required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR Part 136. When no analytical method is approved, the applicant may use any suitable method but must provide a description of the method. When an applicant has two (2) or more outfalls with substantially identical effluent, the director may allow the applicant to test only one (1) outfall and report that the quantitative data also apply to the substantially identical outfalls. The requirements in paragraphs (c) and (d) of this subsection that an applicant must provide quantitative data for certain pollutants known or believed to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, twenty four (24) hour composite samples must be used. However, a minimum of one (1) grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than twenty four (24) hours, and a minimum of one (1) to four (4) grab samples may be taken for storm water discharges depending on the duration of the discharge. One (1) grab sample shall be taken in the first hour (or less) of discharge with one (1) additional grab sample taken in each succeeding hour of discharge up to a minimum of four (4) grab samples for discharges lasting four (4) or more hours. In addition, the director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged. An applicant is assumed to know or have reason to believe that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water run off from the facility.)

(a)1. Every applicant shall report quantitative data for every outfall for the following pollutants:

a. Biochemical oxygen demand (BOD).

b. Chemical oxygen demand.

c. Total organic carbon.

d. Total suspended solids.

e. Ammonia (as N).

f. Temperature (both winter and summer).

g. pH.

2. The director may waive the reporting requirements for individual point sources or for a particular industry category for one (1) or more of the pollutants listed in subparagraph 1 of this paragraph if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

(b) Each applicant with processes in one (1) or more primary industry category, listed in Section 10 of this regulation, and contributing to a discharge, shall report quantitative data for the following pollutants in each outfall containing process wastewater:

1. The organic toxic pollutants in the fractions designated in Section 13(1) of this regulation for the applicant's industrial category or categories unless the applicant qualifies as a small business under subsection (8) of this section. Section 13(2) of this regulation lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromotography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes.

2. The pollutants listed in Section 13(3) of this regulation: the toxic metals, cyanide, and total phenols.

(c)1. Each applicant shall indicate whether it knows or has reason to believe that any of the pollutants in Section 13(4) of this regulation (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

2. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in Section 13(2) or (3) of this regulation (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (a)2 of this subsection, is discharged from each outfall. For every pollutant expected to be discharged in concentrations of ten (10) ppb or greater, the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2 methyl 4,6 dinitrophenol, where any of these four (4) pollutants are expected to be discharged in concentrations of 100 ppb or greater, the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than ten (10) ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2 methyl 4,6 dinitrophenol, in concentrations less than 100 ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under subsection (8) of this section is not required to analyze for pollutants listed in Section 13(2) of this regulation (the organic toxic pollutants).

(d) Each applicant shall indicate any knowledge or reason to believe that any of the pollutants in Section 13(5) of this regulation, certain hazardous substances and asbestos is discharged from each outfall. For every pollutant expected to be discharged, the applicant shall briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data for any pollutant.

(e) Each applicant shall report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8 tetrachlorodibenzo p dioxin (TCDD) if it:

1. Uses or manufactures 2,4,5 trichlorophenoxy acetic acid (2,4,5 T); 2 (2,4,5 trichlorophenoxy) propanoic acid (Silvex, 2,4,5 TP); 2 (2,4,5 trichlorophenoxy) ethyl 2,2 dichloropropionate (Erbon); 0,0 dimethyl 0 (2,4,5 trichlorophenyl) phosphorothioate (Ronnel); 2,4,5 trichlorophenol (TCP); or hexachlorophene (HCP); or

2. Knows or has reason to believe that TCDD is or may be present in an effluent.

(8) Small business exemption. An applicant which qualifies as a small business under one (1) of the following criteria is exempt from the requirements in paragraphs (b)1 or (c)1 of this subsection to submit quantitative data for the pollutants listed in Section 13(2) of this regulation, organic toxic pollutants:

(a) For coal mines, a probable total annual production of less than 100,000 tons per year.

(b) For all other applicants, gross total annual sales averaging less than $100,000 per year, in second quarter 1980 dollars.

(9) Used or manufactured toxics. A listing of any toxic pollutant which the applicant currently uses or manufactures as an intermediate or final product or by product. The director may waive or modify this requirement for any applicant if the applicant demonstrates that it would be unduly burdensome to identify each toxic pollutant and the director has adequate information to issue the permit.

(10) Storm water point source exemption.

(a) An applicant that qualifies as a Group II storm water discharger under Section 8(2) of this regulation is exempt from the requirements of Sections 1(6)(f) and 4 of this regulation, unless the director requests such information.

(b) For the purpose of subsection (3) of this section, storm water point sources may estimate the average flow of their discharge and must indicate the rainfall event and the method of estimation on which the estimate is based.

(c) The director may require additional information under subsection (14) of this section, and may request any Group II storm water dischargers to comply with this section.

(11) Potential discharges. The applicant shall provide a description of the expected levels of and the reasons for any discharges of pollutants which the applicant knows or has reason to believe will exceed two (2) times the values reported in subsection (7) of this section over the next five (5) years.

(12) Biological toxicity tests. The applicant shall identify any biological toxicity tests which it knows or has reason to believe have been made within the last three (3) years on any of the applicant's discharges or on a receiving water in relation to a discharge.

(13) Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by subsection (7) of this section, the identity of each laboratory or firm and the analyses performed shall be included in the application.

(14) Additional information. In addition to the information reported on the application form, applicants shall provide to the director, upon request, other information as the director may reasonably require to assess the discharges of the facility and to determine whether to issue a KPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity of discharges to aquatic life and requirements to determine the cause of the toxicity.

Section 5. Concentrated Animal Feeding Operations: Specific Application Requirements. (1) Permit required. Concentrated animal feeding operations are point sources subject to the KPDES permit program.

(2) Definitions.

(a) "Animal feeding operation" means a lot or facility, other than an aquatic animal production facility, where the following conditions are met:

1. Animals, other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained for a total of forty five (45) days or more in any twelve (12) month period; and

2. Crops, vegetation forage growth, or postharvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(b) Two (2) or more animal feeding operations under common ownership are considered, for the purposes of the KPDES regula-

tions, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

(c) "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Section 11 of this regulation or which the director designates under subsection (3) of this section.

(3) Case-by-case designation of concentrated animal feeding operations.

(a) The director may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the Commonwealth. In making this designation the director will consider the following factors:

1. The size of the animal feeding operation and the amount of wastes reaching waters of the Commonwealth;

2. The location of the animal feeding operation relative to waters of the Commonwealth;

3. The means of conveyance of animal wastes and process wastewaters into waters of the Commonwealth;

4. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the Commonwealth; and

5. Other relevant factors.

(b) No animal feeding operation with less than the numbers of animals set forth in Section 11 of this regulation will be designated as a concentrated animal feeding operation unless:

1. Pollutants are discharged into waters of the Commonwealth through a manmade ditch, flushing system, or other similar manmade device; or

2. Pollutants are discharged directly into the waters of the Commonwealth which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(c) A permit application will not be required from a concentrated animal feeding operation designated under this section until the director or an authorized representative has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the KPDES permit program.

(4) Information required. New and existing concentrated animal feeding operations shall provide the following information to the director, using the application form provided by the director:

(a) The type and number of animals in open confinement and housed under roof.

(b) The number of acres used for confinement feeding.

(c) The design basis for the run-off diversion and control system, if one exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor.

Section 6. Concentrated Aquatic Animal Production Facilities: Specific Application Requirements. (1) Permit required. Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the KPDES permit program.

(2) Definitions. "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Section 12 of this regulation or which the director designates under subsection (3) of this section.

(3) Case-by-case designation of concentrated aquatic animal production facilities.

(a) The director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to the waters of the Commonwealth. In making this designation the director will consider the following factors:

1. The location and quality of the receiving waters of the Commonwealth;

2. The holding, feeding, and production capacities of the facility;

3. The quantity and nature of the pollutants reaching waters of the Commonwealth; and

4. Other relevant factors.

(b) A permit application will not be required from a concentrated aquatic animal production facility designated under this section until the director or authorized representative has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the KPDES permit program.

(4) Information required. New and existing concentrated aquatic animal production facilities shall provide the following information to the director, using the application form provided by the director:

(a) The maximum daily and average monthly flow from each outfall.

(b) The number of ponds, raceways, and similar structures.

(c) The name of the receiving water and the source of intake water.

(d) For each species of aquatic animals, the total yearly and maximum harvestable weight.

(e) The calendar month of maximum feeding and the total mass of food fed during that month.

Section 7. Aquaculture Projects: Specific Application Requirements. (1) Permit required. Discharges into aquaculture projects, as defined in this section, are subject to the KPDES permit program and in accordance with 401 KAR 5:080, Section 2.

(2) Definitions.

(a) "Aquaculture project" means a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater plants and animals.

(b) "Designated project area" means the portions of the waters of the Commonwealth within which the permittee or permit applicant plans to confine the cultivated species, using a method or plan of operation, including, but not limited to, physical confinement, which, on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants, and be harvested within a defined geographic area.

Section 8. Storm water Discharges. (1) Permit requirement. Storm water point sources, as defined in this section, are point sources subject to the KPDES permit program. The director may issue a KPDES permit or permits for discharges into waters of the Commonwealth from a storm water point source covering all conveyances which are a part of that storm water discharge. Where there is more than own (1) owner or operator of a single system of such conveyances, any or all discharges into the storm water discharge system may be identified in the application submitted by the owner or operator of the portion of the system that discharges directly into waters of the Commonwealth. Any such application shall include all information regarding discharges into the system that would be required if the dischargers submitted separate applications. Dischargers so identified shall not require a separate permit unless the director specifies otherwise. Any permit covering more than one (1) owner or operator shall identify the effluent limitations, if any, which apply to each owner or operator. Where there is more than one (1) owner or operator, no discharger into the storm water discharge may be subject, without its consent, to a permit condition for discharges into the storm water discharge other than its own discharges into that system. All dischargers into a storm water discharge system must either be covered by an individual permit or a permit issued to the owner or operator of the portion of the system that directly discharges. (See Section 1(2)(b) of this regulation for application deadline for existing storm water point sources.)

(2) Definitions.

(a) "Storm water point source" means a conveyance or system of conveyances (including pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water run-off and

which:

1. Is located at an urbanized area as designated by the University of Louisville's Urban Studies Center consistent with the Bureau of the Census according to the criteria in 39 FR 15202 (May 1, 1975);

2. Discharges from lands or facilities used for industrial or commercial activities; or

3. Is designated under subsection (3) of this section. Conveyances that discharge storm water run-off combined with municipal sewage are point sources that must obtain KPDES permits, but are not "storm water point sources."

(b) "Group I storm water discharge" means any "storm water point source" which is:

1. Subject to effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards;

2. Designated under subsection (3) of this section; or

3. Located at an industrial plant or in plant associated areas. "Plant associated areas" means industrial plant yards, immediate access roads, drainage ponds, refuse piles, storage piles or areas, and material or products loading and unloading areas. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots.

(c) "Group II storm water discharge" means any "storm water point source" not included in paragraph (b) of this subsection. (See Section 4(10) of this regulation for exemption from certain application requirements.)

(d) A conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water run off which does not constitute a "storm water point source" under this subsection is not considered a point source subject to the requirements of CWA.

(e) Whether a system of conveyances is or is not a storm water point source for purposes of this section shall have no bearing on whether the system is eligible for funding under Title II of CWA.

(3) Case by case designation of storm water discharges. The director may designate a conveyance or system of conveyances primarily used for collecting and conveying storm water run off as a storm water point source. This designation may be made to the extent allowed or required by EPA promulgated effluent limitations guidelines for point sources in the storm water discharge category or when:

(a) A Kentucky Water Quality Management plan under CWA Section 208 (33 USC Section 1288) which contains requirements applicable to such point sources is approved; or

(b) The director determines that a storm water discharge is a significant contributer of pollution to the waters of the Commonwealth. In making this determination, the director shall consider the following factors:

1. The location of the discharge with respect to waters of the Commonwealth;

2. The size of the discharge;

3. The quantity and nature of the pollutants reaching waters of the Commonwealth; and

4. Other relevant factors.

Section 9. Silvicultural Activities: Specific Application Requirements. (1) Permit requirement. Silvicultural point sources, as defined in this section, are point sources subject to the KPDES permit program.

(2) Definitions.

(a) "Silvicultural point source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the Commonwealth. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural run off.

(b) "Rock crushing and gravel washing facilities" means facilities which process crushed and broken stone, gravel, and riprap.

(c) "Log sorting and log storage facilities" means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self contained bodies of water or stored on land where water is applied intentionally on the logs.

Section 10. Primary Industry Categories. Any KPDES permit issued to dischargers in the following categories shall include effluent limitations and a compliance schedule to meet the requirements of the KPDES regulations whether or not applicable effluent limitations guidelines have been promulgated.

(1) Adhesives and sealants.
(2) Aluminum forming.
(3) Auto and other laundries.
(4) Battery manufacturing.
(5) Coal mining.
(6) Coil coating.
(7) Copper forming.
(8) Electrical and electronic components.
(9) Electroplating.
(10) Explosives manufacturing.
(11) Foundries.
(12) Gum and wood chemicals.
(13) Inorganic chemicals manufacturing.
(14) Iron and steel manufacturing.
(15) Leather tanning and finishing.
(16) Mechanical products manufacturing.
(17) Nonferrous metals manufacturing.
(18) Ore mining.
(19) Organic chemicals manufacturing.
(20) Paint and ink formulation.
(21) Pesticides.
(22) Petroleum refining.
(23) Pharmaceutical preparations.
(24) Photographic equipment and supplies.
(25) Plastics processing.
(26) Plastic and synthetic materials manufacturing.
(27) Porcelain enameling.
(28) Printing and publishing.
(29) Pulp and paper mills.
(30) Rubber processing.
(31) Soap and detergent manufacturing.
(32) Steam electric power plants.
(33) Textile mills.
(34) Timber products processing.

Section 11. Criteria for Determining a Concentrated Animal Feeding Operation. An animal feeding operation is a concentrated animal feeding operation for purposes of Section 5 of this regulation if either of the following criteria are met:

(1) Criteria of number only. The facility meets the criteria if more than the numbers of animals specified in any of the following categories are confined:

(a) 1,000 slaughter and feeder cattle;

(b) 700 mature dairy cattle, whether milked or dry cows;

(c) 2,500 swine each weighing over twenty five (25) kilograms, approximately fifty five (55) pounds;

(d) 500 horses;

(e) 10,000 sheep or lambs;

(f) 55,000 turkeys;

(g) 100,000 laying hens or broilers, if the facility has continuous overflow watering;

(h) 30,000 laying hens or broilers, if the facility has a liquid manure handling system;

(i) 5,000 ducks; or

(j) 1,000 animal units.

(2) Criteria of number and condition of the discharge. The facility meets the criteria if more than the following number and types of animals are confined:

(a) 300 slaughter or feeder cattle;

(b) 200 mature dairy cattle, whether milker or dry cows;

(c) 750 swine each weighing over twenty five (25) kilograms, approximately fifty five (55) pounds;

(d) 150 horses;

(e) 3,000 sheep or lambs;

(f) 16,500 turkeys;

(g) 30,000 laying hens or broilers, if the facility has continuous overflow watering;

(h) 9,000 laying hens or broilers, if the facility has a liquid manure handling system;

(i) 1,500 ducks; or

(j) 300 animal units; and

(k) Either one (1) of the following conditions are met:

1. Pollutants are discharged into waters of the Commonwealth through a manmade ditch, flushing system or other similar manmade device; or

2. Pollutants are discharged directly into waters of the Commonwealth which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(3) Special provision. No animal feeding operation is a concentrated animal feeding operation as defined in subsections (1) and (2) of this section if such animal feeding operation discharges only in the event of a twenty five (25) year, twenty four (24) hour storm event.

(4) Definitions.

(a) "Animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighting over twenty five (25) kilograms (approximately fifty five (55) pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

(b) "Manmade" means constructed by man and used for the purpose of transporting wastes.

Section 12. Criteria for Determining a Concentrated Aquatic Animal Production Facility. A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of Section 6 of this regulation if it contains, grows, or holds aquatic animals in either of the following categories:

(1) Cold water aquatic animals.

(a) Cold water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least thirty (30) days per year but does not include:

1. Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and

2. Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of feed during the calendar month of maximum feeding.

(b) Cold water aquatic animals include, but are not limited to the Salmonidae family of the fish; e.g. trout and salmon.

(2) Warm water aquatic animals.

(a) Warm water fish species or other warm water aquatic animals in ponds, raceways, or other similar structures which discharge at least thirty (30) days per year, but does not include:

1. Closed ponds which discharge only during periods of excess run off; or

2. Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.

(b) "Warm water aquatic animals" include, but are not limited to, the Ictaluridae, Centrarchidae, and Cyprinidae families of fish; e.g., respectively, catfish, sunfish, and minnows.

Section 13. KPDES Permit Application Testing Requirements. (1) Table I Testing Requirements for Organic Toxic Pollutants for Industrial Category for Existing Dischargers

Industrial category	GC/MS fraction[1]			
	Volatile	Acid	Base/ neutral	Pesticide
Adhesives and sealants	(*)	(*)	(*)	
Aluminum forming	(*)	(*)	(*)	
Auto and other laundries	(*)	(*)	(*)	(*)
Battery manufacturing	(*)		(*)	
Coal mining	(*)	(*)	(*)	(*)
Coil coating	(*)	(*)	(*)	
Cooper forming	(*)	(*)	(*)	
Electric and electronic tronic components	(*)	(*)	(*)	(*)
Electroplating	(*)	(*)	(*)	
Explosives manufacturing		(*)	(*)	
Foundries	(*)	(*)	(*)	
Gum and wood chemicals	(*)	(*)	(*)	(*)
Inorganic chemicals manufacturing	(*)	(*)	(*)	
Iron and steel manufacturing	(*)	(*)	(*)	
Leather tanning and finishing	(*)	(*)	(*)	(*)
Mechanical products manufacturing	(*)	(*)	(*)	
Nonferrous metals manufacturing	(*)	(*)	(*)	(*)
Ore mining	(*)	(*)	(*)	(*)
Organic chemicals manufacturing	(*)	(*)	(*)	(*)
Paint and ink formulation	(*)	(*)	(*)	(*)
Pesticides	(*)	(*)	(*)	(*)
Petroleum refining	(*)	(*)	(*)	(*)
Pharmaceutical preparations	(*)	(*)	(*)	
Photographic equipment and supplies	(*)	(*)	(*)	(*)
Plastic and synthetic materials manufacturing	(*)	(*)	(*)	(*)
Plastic processing	(*)			
Porcelain enameling	(*)		(*)	(*)
Printing and publishing	(*)	(*)	(*)	(*)
Pulp and paper mills	(*)	(*)	(*)	(*)
Rubber processing	(*)	(*)	(*)	
Soap and detergent manufacturing	(*)	(*)	(*)	
Steam electric power plants	(*)	(*)	(*)	
Textile mills	(*)	(*)	(*)	(*)
Timber products processing	(*)	(*)	(*)	(*)

[1]The toxic pollutants in each fraction are listed in Table II.
*Testing required.

(2) Table II Organic Toxic Pollutants in Each of Four (4) Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GC/MS):

(a) Volatiles:

1V acrolein	16V 1,1 dichloroethylene
2V acrylonitrile	17V 1,2 dichlorpropane

3V benzene	18V 1,2 dichloropropylene
4V bis (chloromethyl) ether	19V ethylbenzene
5V bromoform	20V methyl bromide
6V carbon tetra chloride	21V methyl chloride
7V chlorobenzene	22V methylene chloride
8V chlorodibromo methane	23V 1,1,2,2 tetrachloro ethane
9V chloroethane	24V tetrachloroethylene
10V 2 chloroethylvinyl ether	25V toluene
11V chloroform	26V 1,2 trans dichloro ethylene
12V dichlorobromo methane	27V 1,1,1 trichloroethane
13V dichlorodifluoro methane	28V 1,1,2 trichloroethane
14V 1,1 dichloroethane	29V trichloroethylene
15V 1,2 dichloroethane	30V trichlorofluoro methane
	31V vinyl chloride

(b) Acid compounds:

1A 2 chlorophenol	6A 2 nitrophenol
2A 2,4 dichlorophenol	7A 4 nitrophenol
3A 2,4 dimethylphenol	8A p chloro m cresol
4A 4,6 dinitro o cresol	9A pentachlorophenol
5A 2,4 dinitrophenol	10A phenol
	11A 2,4,6 trichlorophenol

(c) Base/neutral:

1B acenaphthen	24B diethyl phthalate
2B acenaphthylene	25B dimethyl phthalate
3B anthracene	26B di n butyl phthalate
4B benzidine	27B 2,4 dinitrotoluene
5B benzo(a)anthracene	28B 2,6 dinitrotoluene
6B benzo(a)pyrene	29B di n octyl phthalate
7B 3,4 benzofluoranthene	30B 1,2 diphenylhydrazine (as azobenzene)
8B benzo(ghi)perylene	31B fluoranthene
9B benzo(k)fluoranthene	32B fluorene
10B bis(2 chloroethoxy)methane	33B hexachlorobenzene
11B bis(2 chloroethyl) ether	34B hexachlorobutadiene
12B bis(2 chloroisopropyl) ether	35B hexachlorocyclo pentadiene
13B bis(2 ethylhexyl)phthalate	36B hexachloroethane
14B 4 bromophenyl phenyl ether	37B indeno(1,2,3 cd) pyrene
15B butylbenzyl phthalate	38B isophorene
16B 2 chloronaphthalene	39B naphthalene
17B 4 chlorophenyl phenyl ether	40B nitrobenzene
18B chrysene amine	41B N nitrosodimethyl
19B dibenzo(a,h)anthracene	42B N nitrosodi n propyl amine
20B 1,2 dichlorobenzene	43B N nitrosodiphenylamine
21B 1,3 dichlorobenzene	44B phenanthrene
22B 1,4 dichlorobenzene	45B pyrene
23B 3,3 dichlorobenzidine	46B 1,2,4 trichloro benzene

(d) Pesticides:

1P aldrin	14P endrin
2P a BHC	15P endrin aldehyde
3P b BHC	16P heptachlor
4P y BHC	17P heptachlor epoxide
5P d BHC	18P PCB 1242
6P chlordane	19P PCB 1254
7P 4,4' DDT	20P PCB 1221
8P 4,4' DDE	21P PCB 1232
9P 4,4' DDD	22P PCB 1248
10P dieldrin	23P PCB 1260
11P a endosulfan	24P PCB 1016
12P b endosulfan	25P toxaphene
13P endosulfan sulfate	

(3) Table III Other Toxic Pollutants: (Metals, Cyanide) and Total Phenols:

(a) antimony, total
(b) arsenic, total
(c) beryllium, total
(d) cadmium, total
(e) chromium, total
(f) copper, total
(g) lead, total
(h) mercury, total
(i) nickel, total
(j) selenium, total
(k) silver, total
(l) thallium, total
(m) zinc, total
(n) cyanide, total
(o) phenols, total

(4) Table IV Conventional and Nonconventional Pollutants Required to be Tested by Existing Dischargers if Expected to be Present:

(a) bromide
(b) chlorine, total residual
(c) color
(d) fecal coliform
(e) fluoride
(f) nitrate nitrite
(g) nitrogen, total organic
(h) oil and grease
(i) phosphorus, total
(j) radioactivity
(k) sulfate
(l) sulfide
(m) sulfite
(n) surfactants
(o) aluminum, total
(p) barium, total
(q) boron, total
(r) cobalt, total
(s) iron, total
(t) magnesium, total
(u) molybdenum, total
(v) manganese, total
(w) tin, total
(x) titanium, total

(5) Table V Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present:

(a) Toxic pollutants asbestos;
(b) Hazardous substance:
1. acetaldehyde
2. allyl alcohol
3. allyl chloride
4. amyl acetate
5. aniline
6. benzonitrile
7. benzyl chloride
8. butyl acetate
9. butylamine
10. captan
11. carbaryl
12. carbofuran

13. carbon disulfide
14. chlorpyrifos
15. coumaphos
16. cresol
17. crotonaldehyde
18. cyclohexane
19. 2,4 D(2,4 dichlorophenoxy acetic acid)
20. diazinon
21. dicamba
22. dichlobenil
23. dichlone
24. 2,2 dichloropropionic acid
25. dichlorvos
26. diethyl amine
27. dimethyl amine
28. dintrobenzene
29. diquat
30. disulfoton
31. diuron
32. epichlorohydrin
33. ethanolamine
34. ethion
35. ethylene diamine
36. ethylene dibromide
37. formaldehyde
38. furfural
39. guthion
40. isoprene
41. isopropanolamine
42. kelthane
43. kepone
44. malathion
45. mercaptodimethur
46. methoxychlor
47. methyl mercaptan
48. methyl methacrylate
49. methyl parathion
50. mevinphos
51. mexacarbate
52. monethyl amine
53. monomethyl amine
54. naled
55. napthenic acid
56. nitrotoluene
57. parathion
58. phenolsulfanate
59. phosgene
60. propargite
61. propylene oxide
62. pyrethrins
63. quinoline
64. resorcinol
65. strontium
66. strychnine
67. styrene
68. 2,4,5 T(2,4,5 trichlorophenoxy acetic acid)
69. TDE(tetrachlorodiphenylethane)
70. 2,4,5 TP (2, (2,4,5 trichlorophenoxy) propanoic acid)
71. trichlorofon
72. Triethylamine
73. trimethylamine
74. uranium
75. vanadium
76. vinyl acetate
77. xylene
78. xylenol
79. zirconium

Section 14. Application Requirements of Section 4(7)(b)1 of this Regulation Exempted for Certain Categories and Subcategories of Primary Industries. Categories of dischargers for which Section 4(7)(b)1 of this regulation is exempted for categories and subcategories of the primary industries listed in Section 10 of this regulation.

(1) Coal mines.

(2) Testing and reporting for all four (4) organic fractions in the Greige Mills Subcategory of the Textile Mills industry and testing and reporting for the pesticide fraction in all other subcategories of this industrial category.

(3) Testing and reporting for the volatile, base/neutral, and pesticide fractions in the Base and Precious Metals Subcategory of the Ore Mining and Dressing industry, and testing and reporting for all four (4) fractions in all other subcategories of this industrial category.

(4) Testing and reporting for all four (4) GC/MS fractions in the Porcelain Enameling industry.

(5) Testing and reporting for the pesticide fraction in the Tall Oil Rosin Subcategory and Rosin Based Derivatives Subcategory of the Gum and Wood Chemicals industry, and testing and reporting for the pesticide and base/neutral fractions in all other subcategories of this industrial category.

(6) Testing and reporting for the pesticide fraction in the Leather Tanning and Finishing, Paint and Ink Formulation, and Photographic Supplies industrial categories.

(7) Testing and reporting for the acid, base/neutral, and pesticide fractions in the Petroleum Refining industrial category.

(8) Testing and reporting for the pesticide fraction in the Paper-grade Sulfite Subcategories of the Pulp Paper industry; testing and reporting for the base/neutral and pesticide fractions in the following subcategories: Deink Dissolving Draft and Paperboard from Waste Paper; testing and reporting for the volatile, base/neutral, and pesticide fractions in the following subcategories: BCT Bleached Kraft, Semichemical, and Nonintegrated Fine Papers; and testing and reporting for the acid, base/neutral, and pesticide fractions in the following subcategories: Fine Bleached Kraft, Dissolving Sulfite Pulp, Groundwood fine Papers, Market Bleached Kraft, Tissue from Wastepaper, and Nonintegrated tissue Papers.

(9) Testing and reporting for the base/neutral fraction in the Once-through Cooling Water, Fly Ash, and Bottom Ash Transport Water process waste streams of the Steam Electric Power Plant industrial category.

Section 15. Permit Testing Requirements for Exempted Categories and Subcategories of Primary Industries. For categories and subcategories of primary industries, the permit application testing requirements are as follows:

(1) Table I - Testing Requirements for Organic Toxic Pollutants by Industry Category:

Industrial category	GC/MS fraction[+]			
	Volatile	Acid	Base/ neutral	Pesticide
Adhesives and sealants	(*)	(*)	(*)	
Aluminum forming	(*)	(*)	(*)	
Auto and other laundries	(*)	(*)	(*)	(*)
Battery manufacturing	(*)		(*)	
Coal mining				
Coil coating	(*)	(*)	(*)	
Cooper forming	(*)	(*)	(*)	
Electric and electronic components	(*)	(*)	(*)	(*)
Electroplating	(*)	(*)	(*)	
Explosives manufacturing		(*)	(*)	

Foundries	(*)	(*)	(*)	
Gum and wood (all except tall oil, rosin, and rosin based derivatives)	(*)	(*)		
Gum and wood (tall oil rosin)	(*)	(*)	(*)	
Gum and wood (rosin based derivatives)	(*)	(*)	(*)	
Inorganic chemicals manufacturing	(*)	(*)	(*)	
Iron and steel manufacturing	(*)	(*)	(*)	
Leather tanning and finishing	(*)	(*)	(*)	
Mechanical products manufacturing	(*)	(*)	(*)	
Nonferrous metals manufacturing	(*)	(*)	(*)	(*)
Ore mining (except base and precious metals)				
Ore mining (base and precious metals)			(*)	
Organic chemicals manufacturing	(*)	(*)	(*)	(*)
Paint and ink formulation	(*)	(*)	(*)	
Pesticides	(*)	(*)	(*)	(*)
Petroleum refining	(*)			
Pharmaceutical preparations	(*)	(*)	(*)	
Photographic equipment and supplies	(*)	(*)	(*)	
Plastic and synthetic materials manufacturing	(*)	(*)	(*)	(*)
Plastic processing	(*)			
Porcelain enameling				
Printing and publishing	(*)	(*)	(*)	(*)
Pulp and paperboard mills[8]				
Rubber processing	(*)	(*)	(*)	
Soap and detergent manufacturing	(*)	(*)	(*)	
Steam electric power plants	(*)	(*)		
Textile mills (except for Greige Mills)	(*)	(*)	(*)	
Textile mills (Greige Mills)				
Timber products processing	(*)	(*)	(*)	(*)

*Testing required.
†The pollutants in each fraction are listed in Section 13(2), Table II, of this regulation.
[8]Pulp and paperboard mills are listed in paragraph (a) of this subsection.

(a) Pulp and paperboard mills:

GC/MS fraction†			
Vola Acid Base/Pesti tileneutral cide			
Unbleached kraft	(*)	(*)	
Semichemical	(*)		
Unbleached kraft neutral sulfite semichemical	(*)		
Paperboard from wastepaper(*)(*)	(*)		
Dissolving kraft(*)(*)			
Market bleached kraft(*)(*)			
BCT bleached kraft(*)(*)			
Fine bleached kraft(*)(*)			
Papergrade sulfite(*)(*)	(*)		
Dissolving sulfite pulp(*)(*)			
Groundwood chemi mechanical(*)(*)			
Groundwood thermo mechanical(*)(*)			
Groundwood CMN papers(*)(*)			
Groundwood fine papers(*)(*)			
Soda(*)(*)			
Deink(*)(*)	(*)		
Nonintegrated fine papers	(*)		
Nonintegrated tissue papers(*)(*)	(*)		
Tissue from wastepaper(*)(*)	(*)		
Papergrade sulfite(*)(*)	(*)		
Unbleached kraft and semichemical(*)(*)	(*)	(*)	
Wastepaper molded products(*)(*)	(*)	(*)	
Nonintegrated light weight papers(*)(*)	(*)	(*)	
Nonintegrated filter and nonwoven papers(*)(*)	(*)	(*)	
Nonintegrated paper board(*)(*)	(*)	(*)	

*Testing required.
Testing not required unless "reason to believe" it is discharged.
†The pollutants in each fraction are listed in Section 13(2), Table II, of this regulation.]

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:065. KPDES permit conditions.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110, 224.99-010
STATUTORY AUTHORITY: KRS [~~224.01-110,~~] 224.10-100
NECESSITY AND FUNCTION: KRS 224.10-100 authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050 further empowers the cabinet to issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et

seq.) subject to the conditions imposed in 33 USC Sections 1342(b) and (d) and that any exemptions granted shall be pursuant to the Federal Water Pollution Control Act. This administrative regulation sets forth the conditions applicable to all KPDES permits and the procedures for establishing and calculating permit conditions.

Section 1. Conditions Applicable to all KPDES Permits. All conditions applicable to KPDES permits shall [~~will~~] be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these administrative regulations shall [~~must~~] be given in the permit. In addition to conditions required in all KPDES permits, the cabinet shall [~~director will~~] establish conditions as required on a case-by-case basis under Section 2 of this administrative regulation and 401 KAR 5:070.

(1) Duty to comply.

(a) General requirement. The permittee shall comply with all conditions of this permit. Any permit noncompliance constitutes a violation of KRS Chapter 224, among which are the following remedies: enforcement action, permit revocation [~~termination~~], revocation and reissuance, or modification; or denial of a permit renewal application.

(b) Specific duties.

1. The permittee shall comply with effluent standards or prohibitions established under 40 CFR Part 129 [~~revised~~] as of July 1, 1991 [~~1986~~], as published by the Office of the Federal Register, National Archives and Register Services, General Services Administration and available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, [~~is hereby incorporated by reference,~~] for toxic pollutants within the time provided in the federal regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

2. Any person who violates a permit condition as set forth in the KPDES administrative regulations is subject to penalties under KRS 224.99-010(1) and (4).

(2) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee shall apply for and obtain a new permit as required in 401 KAR 5:060, Section 1.

(3) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(4) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

(5) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control and related appurtenances which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls, and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

(6) Permit actions. The permit may be modified, revoked and reissued, or revoked [~~terminated~~] for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or revocation [~~termination~~], or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(7) Property rights. This permit does not convey any property rights of any kind, or any exclusive privilege.

(8) Duty to provide information. The permittee shall furnish to the cabinet [~~director~~], within a reasonable time, any information which the cabinet [~~director~~] may request to determine whether cause exists for modifying, revoking and reissuing, or revoking [~~terminating~~] this permit, or to determine compliance with this permit. The permittee shall also furnish to the cabinet [~~director~~], upon request, copies of records required to be kept by this permit.

(9) Inspection and entry. The permittee shall allow the cabinet [~~director~~], or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(a) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records pertinent to the KPDES program are or may be kept;

(b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(c) Inspect at reasonable times any facilities, equipment, including monitoring and control equipment, practices, or operations regulated or required under this permit; and

(d) Sample or monitor at reasonable times, for the purposes of assuring KPDES program compliance or as otherwise authorized by KRS Chapter 224, any substances or parameters at any location.

(10) Monitoring and records.

(a) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(b) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three (3) years from the date of the sample, measurement, report, or application. This period may be extended by request of the cabinet [~~director~~] at any time.

(c) Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;

2. The individuals [~~(s)~~] who performed the sampling or measurements;

3. The dates [~~(s)~~] analyses were performed;

4. The individuals [~~(s)~~] who performed the analyses;

5. The analytical techniques or methods used; and

6. The results of the [~~such~~] analyses.

(d) Monitoring shall be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in the permit.

(e) Any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit shall, upon conviction, be subject to penalties under KRS 224.99-010(4).

(11) Signatory requirement. All applications, reports, or information submitted to the cabinet [~~director~~] shall be signed and certified as indicated in 401 KAR 5:060, Section 9 [~~3~~]. Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be subject to penalties under KRS 224.99-010(4).

(12) Reporting requirements.

(a) Planned changes. The permittee shall give notice to the cabinet [~~director~~] as soon as possible of any planned physical alteration or additions to the permitted facility. Notice is required only when:

1. The alteration or addition to a permitted facility may meet one (1) of the criteria for determining whether a facility is a new source in 401 KAR 5:080, Section 5; or

2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject either [~~neither~~] to effluent limitations in the permit, or [~~nor~~] to notification requirements under 401 KAR 5:080, Section 5.

(b) Anticipated noncompliance. The permittee shall give advance notice to the cabinet [~~director~~] of any planned changes in the permitted facility or activity which may result in noncompliance with

permit requirements.

(c) Transfers. The permit is not transferable to any person except after notice to the cabinet [~~director~~]. The cabinet [~~director~~] may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under KRS Chapter 224.

(d) Monitoring reports. Monitoring results shall be reported at the intervals specified in the permit. Monitoring results shall be reported as follows:

1. Monitoring results shall [~~must~~] be reported on a Discharge Monitoring Report (DMR).

2. If the permittee monitors any pollutant more frequently than required by the permit, using test procedures approved under 40 CFR Part 136 or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data [~~date~~] submitted in the DMR.

3. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the cabinet [~~director~~] in the permit.

(e) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than fourteen (14) days following each schedule date.

(f) Twenty-four (24) hour reporting. The permittee shall follow the provisions of 401 KAR 5:015 and shall orally report any noncompliance which may endanger health or the environment, within twenty-four (24) hours from the time the permittee becomes aware of the circumstances. This report shall be in addition to and not in lieu of any other reporting requirement applicable to the noncompliance. A written submission shall also be provided within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance. The cabinet [~~director~~] may waive the written report on a case-by-case basis if the oral report has been received within twenty-four (24) hours. The following shall be included as events which shall [~~must~~] be reported within twenty-four (24) hours:

1. Any unanticipated bypass which exceeds any effluent limitation in the permit, as indicated in subsection (13) of this section.

2. Any upset which exceeds any effluent limitation in the permit.

3. Violation of a maximum daily discharge limitation for any of the pollutants listed by the cabinet [~~director~~] in the permit to be reported within twenty-four (24) hours, as indicated in Section 2(7) of this administrative regulation.

(g) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (d), (e), and (f) of this subsection, when [~~at the time~~] monitoring reports are submitted. The reports shall contain the information listed in paragraph (f) of this subsection.

(h) Other information. Where the permittee becomes aware that it failed to submit any relevant fact in a permit application, or submitted incorrect information in a permit application or in any report to the cabinet [~~director~~], it shall promptly submit these [~~such~~] facts or information.

(13) Occurrence of a bypass.

[~~(a) Definitions.~~

~~1. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.~~

~~2. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.~~]

(a) [~~(b)~~] Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. This type of bypass is not subject to the provisions of paragraphs (b) and (c) [~~and (d)~~] of this subsection.

(b) [~~(c)~~] Notice.

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of the bypass. Compliance with this requirement constitutes compliance with 401 KAR 5:015, Section 1.

2. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in [~~paragraph (f) of~~] subsection (12)(f) of this section, twenty-four (24) hour notice. Compliance with this requirement constitutes compliance with 401 KAR 5:015, Section 4.

(c) [~~(d)~~] Prohibition of a bypass.

1. Bypassing is prohibited, and the cabinet [~~director~~] may take enforcement action against a permittee for bypass, unless:

a. The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and [~~.~~]

c. The permittee submitted notices as required under paragraph (b) [~~(c)~~] of this subsection.

2. The cabinet [~~director~~] may approve an anticipated bypass, after considering its adverse effects, if the cabinet [~~director~~] determines that it will meet the three (3) conditions listed in subparagraph 1a, b, and c of this paragraph.

(14) Occurrence of an upset.

[~~(a) Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.~~]

(a) [~~(b)~~] Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with [~~such~~] technology-based permit effluent limitations if the requirements of paragraph (b) [~~(c)~~] of this subsection are met.

(b) [~~(c)~~] Conditions necessary for a demonstration of an upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate through properly signed, contemporaneous operating logs, or [~~of~~] other relevant evidence that:

1. An upset occurred and that the permittee can identify the causes [~~(s)~~] of the upset;

2. The permitted facility was at the time being properly operated;

3. The permittee submitted notice of the upset as required in [~~paragraph (f) of~~] subsection (12)(f) of this section; and

4. The permittee complied with any remedial measures required under subsection (4) of this section.

(c) [~~(d)~~] Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

(15) Additional conditions applicable to specified categories of KPDES permits. The following conditions, in addition to others set forth in this administrative regulation, apply to all KPDES permits within the categories specified below:

(a) Existing manufacturing, commercial, mining, and silvicultural dischargers. In addition to the reporting requirements under subsections (12), (13), and (14) of this section, any existing manufacturing,

commercial, mining, and silvicultural discharger shall notify the cabinet [director] as soon as it knows or has reason to know [believe]:

1. That any activity has occurred or will occur which would result in the discharge on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

a. 100 micrograms per liter (100 ug/l [mg/1]);

b. 200 micrograms per liter (200 ug/l [mg/1]) for acrolein and acrylonitrile; 500 micrograms per liter (500 ug/l [mg/1]) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one (1) milligram per liter (1 mg/1) for antimony;

c. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 401 KAR 5:060, Section 2 [4](7);

d. The level established by the cabinet [director] in accordance with Section 2(6)[2] of this administrative regulation.

2. That any activity has occurred or will occur which would result in any discharge, on a nonroutine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

a. 500 micrograms per liter (500 ug/l);

b. One (1) milligram per liter (1 mg/l) for antimony;

c. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 401 KAR 5:060, Section 2 [4](7); or

d. The level established by the cabinet [director] in accordance with Section 2(6) of this administrative regulation.

(b) POTWs.

1. POTWs shall provide adequate notice to the cabinet [director] of the following:

a. Any new introduction of pollutants into that POTW from an indirect discharger which would be subject to the KPDES administrative regulations if it were directly discharging those pollutants; or [and]

b. Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

2. For purposes of this paragraph, adequate notice shall include information on the quality and quantity of effluent introduced into the POTWs and any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

Section 2. Establishing Permit Conditions. For the purpose of this section, permit conditions include any statutory or regulatory requirement which takes effect prior to the final administrative disposition of a permit. An applicable requirement may be any requirement which takes effect prior to the modification or revocation or reissuance of a permit, to the extent allowed in 401 KAR 5:070, Section 6. New or reissued permits, and to the extent allowed under 401 KAR 5:070, Section 6 modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in this section. In addition to the conditions established under Section 1 of this administrative regulation each KPDES permit shall [will] include conditions meeting the following requirements as applicable.

(1) Technology-based effluent limitations and standards; new source performance standards; and pretreatment requirements and standards, as required by 40 CFR Chapter I, Subchapter N (Part 401 et seq.), adopted without change [are incorporated by reference as specified] in Section 4 of this administrative regulation, or case-by-case effluent limitations and standards and pretreatment requirements or based on a combination of those standards in accordance with 401 KAR 5:080, Section 1(2) shall [will] be included, as applicable.

(2) Other effluent limitations and standards of KRS Chapter 224 shall be included as applicable. If any applicable toxic effluent standard or prohibition, including any schedule of compliance specified in the [such] effluent standard or prohibition, is promulgated by EPA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the cabinet shall [director will] institute proceedings under these administrative regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition.

(3) Reopener clause. For any discharger within a primary industry category, as listed in [401 KAR 5:060,] Section 4(2) of this administrative regulation [10,] requirements under the KPDES administrative regulations shall [will] be incorporated as applicable, as follows:

(a) On or before June 30, 1981.

1. If applicable standards or limitations have not yet been promulgated, the permit shall [will] include a condition stating that if an applicable standard or limitation is promulgated by EPA and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit, the permit shall [will] be promptly modified or revoked and reissued to conform to that effluent standard or limitation.

2. If applicable standards or limitations have been promulgated or approved, the permit shall [will] include those standards or limitations.

(b) After June 30, 1981, any permit issued shall [will] include effluent limitations and a compliance schedule to meet the applicable requirements indicated in Section 1(1)(b) of this administrative regulation, whether or not applicable effluent limitations guidelines have been promulgated or approved by EPA. These permits need not incorporate the reopener clause required by paragraph (a) of this subsection.

(c) The cabinet shall [director will] promptly modify or revoke and reissue any permit containing the clause required under paragraph (a) of this subsection to incorporate an applicable EPA effluent standard or limitation which is promulgated or approved after the permit is issued if that effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit.

(4) Water quality standards and state requirements shall be included as applicable. Any requirements in addition to or more stringent than EPA's effluent limitations guidelines or standards shall [will] be included, when necessary to:

(a) Achieve water quality standards established under KRS Chapter 224 and administrative regulations promulgated pursuant thereto, including any narrative criteria contained in 401 KAR 5:031. [;]

1. Limitations shall control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the cabinet determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard, including narrative criteria for water quality.

2. When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a water quality standard, the cabinet shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing, when evaluating whole effluent toxicity, and where appropriate, the dilution of the effluent in the receiving water.

3. When the cabinet determines, using the procedures in subparagraph 2 of this paragraph, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a numeric criteria within a water quality standard for an individual pollutant, the permit shall contain effluent limits for that pollutant.

4. When the cabinet determines, using the procedures in subparagraph 2 of this paragraph, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit shall contain effluent limits for whole effluent toxicity.

5. Except as provided in this subparagraph, when the cabinet determines, using the procedures in subparagraph 2 of this para-

graph, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable water quality standard, the permit shall contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the cabinet demonstrates in the fact sheet or statement of basis of the KPDES permit, using the procedures in subparagraph 2 of this paragraph, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative water quality standards.

6. If 401 KAR 5:031 does not specify a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable water quality standard, the cabinet shall establish effluent limits using one (1) or more or the following options:

a. Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the cabinet demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using administrative regulation interpreting the narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, September 1993, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

b. Establish effluent limits on a case-by-case basis, using water quality criteria listed in 401 KAR 5:031, supplemented where necessary by other relevant information; or

c. Establish effluent limitations on an indicator parameter for the pollutant of concern, if:

(i) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(ii) The fact sheet required by 401 KAR 5:075 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(iii) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(iv) The permit contains a reopener clause allowing the cabinet to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

7. When developing water quality-based effluent limits under this paragraph the cabinet shall ensure that:

a. The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

b. Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the cabinet;

(b) Attain or maintain a specified water quality through water quality related effluent limits established under Section 302 of CWA (33 USC Section 1312);

(c) Conform to applicable water quality requirements when the discharge affects a state other than Kentucky;

(d) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under federal or state law or administrative regulations in accordance with Section 301(b)(1)(c) of CWA (33 USC Section 1311(b)(1)c).

(e) Ensure consistency with the requirements of any Kentucky Water Quality Management Plan approved by EPA.

(f) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 401 KAR 5:080, Section 3.

(5) Toxic pollutants. Limitations established under subsections (1), (2) or (4) of this section, to control pollutants meeting the criteria listed in paragraph (a) of this subsection shall [~~will~~] be included in the permit, if applicable. Limitations shall [~~will~~] be established in accordance with paragraph (b) of this subsection. An explanation of the development of these limitations shall [~~will~~] be included in the fact sheet under 401 KAR 5:075, Section 4.

(a) Limitations shall [~~will~~] control all toxic pollutants which:

1. The cabinet [~~director~~] determines, based on information reported in a permit application under 401 KAR 5:060, Section 2(7) [~~4(7) or (11)~~], or in a notification under Section 1(15)(a) of this administrative regulation or on other information, are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under 401 KAR 5:080, Section 1(2)(c); or

2. The discharger does or may use or manufacture as an intermediate or final product or by-product.

(b) The requirement that the limitations control the pollutants meeting the criteria of paragraph (a) of this subsection shall [~~will~~] be satisfied by:

1. Limitations on those pollutants; or

2. Limitations on other pollutants which, in the judgment of the cabinet [~~director~~], will provide treatment of the pollutants under paragraph (a) of this subsection to the levels required by 401 KAR 5:080, Section 1(2)(c).

(6) Notification level. A "notification level" which exceeds the notification level of Section 1(15)(a)1a,b, or c of this administrative regulation, upon a petition from the permittee or on the cabinet's [~~director's~~] initiative shall [~~will~~] be incorporated as a permit condition, if applicable. This new notification level shall [~~may~~] not exceed the level which can be achieved by the technology-based treatment requirements appropriated to the permittee under 401 KAR 5:080, Section 1(2)(c).

(7) Twenty-four (24) hour reporting. Pollutants for which the permittee shall [~~will~~] report violations of maximum daily discharge limitations under Section 1 [~~3~~](12)(f) of this administrative regulation (twenty-four (24) hour reporting) shall be listed as such in the permit. This list shall [~~will~~] include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(8) Monitoring requirements. The permit shall [~~will~~] incorporate, as applicable in addition to Section 1(12) of this administrative regulation, the following monitoring requirements:

(a) To assure compliance with permit limitations, requirements to monitor:

1. The mass, or other measurement specified in the permit, for each pollutant limited in the permit;

2. The volume of effluent discharged from each outfall; and

3. Other measurements as appropriate; including pollutants in internal waste streams under Section 3(8) of this administrative regulation; frequency, rate of discharge, etc., for noncontinuous discharges under Section 3(5) of this administrative regulation; and pollutants subject to notification requirements under Section 1(15)(a) of this administrative regulation.

(b) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants having approved methods under the federal regulation, and according to a test procedure specified in the permit for pollutants with no approved methods.

(c) Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but not [~~in no case~~] less than once a year with the following exceptions:

1. Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the

discharge, but not less than once a year.

2. Requirements to report monitoring results for storm water discharges associated with industrial activity, other than those addressed in subparagraph 1 of this paragraph shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge shall require:

a. The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

b. The discharger to maintain for a period of three (3) years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of noncompliance;

c. The report and certification be signed in accordance with 401 KAR 5:060, Section 9; and

d. Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three (3) years by a professional engineer that the facility is in compliance with the permit, or alternative requirements.

3. Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under Section 1(12)(g) of this administrative regulation at least annually.

(9) Pretreatment program for POTWs. If applicable to the facility the permit shall [~~will~~] incorporate as a permit condition requirements for POTWs to:

(a) Identify, in terms of character and volume of pollutants, any significant indirect dischargers into the POTW subject to pretreatment standards under the KPDES administrative regulations.

(b) Submit a local program when required by and in accordance with 401 KAR 5:057 [~~5:055, Section 9~~], to assure compliance with pretreatment standards to the extent applicable in the KPDES administrative regulations. The local program shall [~~will~~] be incorporated into the permit as described in 401 KAR 5:057 [~~5:055, Section 9~~]. The program shall require all indirect dischargers to the POTW to comply with the applicable reporting requirements.

(10) Best management practices shall be included as a permit condition, as applicable, to control or abate the discharge of pollutants when:

(a) Applicable under KRS Chapter 224 and the KPDES administrative regulations for the control of toxic pollutants and hazardous substances from ancillary activities;

(b) Numeric effluent limitations are infeasible; or

(c) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of KRS Chapter 224.

(11) Reissued permits.

(a) The permit shall [~~will~~] include a condition concerning reissued permits, as applicable. When a permit is renewed or reissued, interim limitations, standards or conditions which are at least as stringent as any final limitations, standards, or conditions in the previous permit shall [~~will~~] be incorporated unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under 401 KAR 5:070, Section 6. [~~This requirement applies to those permits which were issued pursuant to CWA Section 402(a)(1) (33 USC Section 1242(a)(1)), unless one (1) of the following exceptions apply:~~]

(b) For effluent limitations established on the basis of 401 KAR 5:080, Section 1(2)(c)2, a permit shall not be renewed, revoked and reissued, or modified on the basis of effluent guidelines promulgated under CWA Section 304(b) subsequent to the original issuance of the permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

1. Exceptions. A permit to which paragraph (a) of this subsection applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if:

a. Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

b. Information is available which was not available at the time of permit issuance, other than revised regulations, guidance, or test methods, and which would have justified the application of a less stringent effluent limitation at the time of permit issuance;

c. The cabinet determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under 401 KAR 5:080, Section 1(2)(c)2;

d. A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

e. The permittee has received a permit modification under 401 KAR 5:055, Section 3; or

f. The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved, but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification.

2. Limitations. A permit to which paragraph (a) of this subsection applies shall not be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect when the permit is renewed, reissued, or modified. Such a permit to discharge into waters shall not be renewed, issued, or modified to contain less stringent effluent limitation if the implementation of the limitation would result in a violation of a water quality standard under 401 KAR 5:031 applicable to those waters.

[~~(a) If the discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the renewed or reissued permit may reflect the level of pollutant control actually achieved, but will not be less stringent than required by the subsequently promulgated effluent limitations guidelines;~~

~~(b) If the subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (BCT);~~

~~(c) If the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under 401 KAR 5:070, Section 6;~~

~~(d) If there is increased production at the facility which results in significant reduction in treatment efficiency, then the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event will permit limitations be less stringent than those required by subsequently promulgated standards and limitations.~~]

(12) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited copermittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this administrative regulation shall [~~will~~] be imposed as applicable. Alternatively, the cabinet [~~director~~] may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The cabinet's [~~director's~~] decision to issue a permit with no conditions applicable to any user, to impose conditions on one (1) or more users, to issue separate permits or to require separate applications, and the basis for that

decision shall [will] be stated in the fact sheet for the draft permit for the treatment works.

(13) Grants. Any conditions imposed in grants made by the cabinet [director] to POTWs which are reasonably necessary for the achievement of federally issued effluent limitations shall [will] be required as applicable.

(14) Sewage sludge. Requirements shall [will] be imposed, as applicable, governing the disposal of sewage sludge from publicly owned treatment works, in accordance with 40 CFR Part 503 [401 KAR 47:050].

(15) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, the permit shall [will] be conditioned as applicable. A condition that the discharge shall comply with any applicable federal regulations promulgated by the secretary of the department in which the Coast Guard is operating which establish specifications for safe transportation, handling, carriage, and storage of pollutants shall be imposed if applicable.

(16) Navigation. Any conditions that the Secretary of the United States Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with 401 KAR 5:075, Section 9, shall [will] be included as applicable.

(17) Duration of permits shall be imposed, as set forth in 401 KAR 5:070, Section 1.

Section 3. Calculating KPDES Permit Conditions. The following provisions shall [will] be used to calculate terms and conditions of the KPDES permit.

(1) Outfalls and discharge points. All permit effluent limitations, standards, and prohibitions shall [will] be established for each outfall or discharge point of the permitted facility, except as otherwise provided: under Section 2(10) of this administrative regulation; with BMPs where limitations are infeasible; and under subsection (8) of this section, limitations on internal waste streams.

(2) Production-based limitations.

(a) In the case of POTWs, permit limitations, standards, or prohibitions shall [will] be calculated based on design flow.

(b)1. Except in the case of POTWs or as provided in subparagraph 2a(ii) of this paragraph, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

2.a.(i) The cabinet [director] may include a condition establishing alternate permit limitations, standards, or prohibitions based upon anticipated increased (not to exceed maximum production capability) or decreased production levels.

(ii) For the automotive manufacturing industry only, the cabinet [director] may establish a condition under subparagraph 2a(i) of this paragraph if the applicant satisfactorily demonstrates to the cabinet [director] at the time the application is submitted that its actual production, as indicated in subparagraph 2a(i) of this paragraph, is substantially below maximum production capability and that there is a reasonable potential for an increase above actual production during the duration of the permit.

b. If the cabinet [director] establishes permit conditions under subparagraph 2a(i) of this paragraph:

(i) The permit shall require the permittee to notify the cabinet [director] at least two (2) business days prior to a month in which the permittee expects to operate at a level higher than the lowest production level identified in the permit. The notice shall specify the anticipated level and the period during which the permittee expects to operate at the alternate level. If the notice covers more than one (1) month, the notice shall specify the reasons for the anticipated production level increase. New notice of discharge at alternate levels is required to cover a period or production level not covered by prior notice or, if during two (2) consecutive months otherwise covered by a notice, the production level at the permitted facility does not in fact meet the higher level designated in the notice.

(ii) The permittee shall comply with the limitations, standards, or prohibitions that correspond to the lowest level of production specified in the permit, unless the permittee has notified the cabinet [director] under subparagraph 2b of this paragraph, then [in which case] the permittee shall comply with the lower of the actual level of production during each month or the level specified in the notice.

(iii) The permittee shall submit with the DMR the level of production that actually occurred during each month and the limitations, standards, or prohibitions applicable to that level of production.

(3) Metals. All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as described [defined] in 40 CFR Part 136 unless:

(a) An applicable effluent standard or limitation has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form; [or]

(b) In establishing permit limitations on a case-by-case basis under 401 KAR 5:080, Section 1(2), it is necessary to express the limitation on the metal in the dissolved or valent total form to carry out the provisions of KRS 224.16-050; or

(c) All approved analytical methods for the metal inherently measure only its dissolved form (e.g., hexavalent chromium).

(4) Continuous discharges. For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, unless impracticable shall [will] be stated as:

(a) Maximum daily and average monthly discharge limitations for all dischargers other than publicly owned treatment works; and

(b) Average weekly and average monthly discharge limitations for POTWs.

(5) Noncontinuous discharges. Discharges which are not continuous, as defined in 401 KAR 5:001 [5:050, Section 1(7)], shall be particularly described and limited, considering the following factors, as appropriate:

(a) Frequency: for example, a batch discharge shall not occur more than once every three (3) weeks;

(b) Total mass: for example, not to exceed 100 kilograms of zinc and 200 kilograms of chromium per batch discharge;

(c) Maximum rate of discharge of pollutants during the discharge: for example, not to exceed two (2) kilograms of zinc per minute; and

(d) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure: for example, shall not contain at any time more than 0.1 mg/l zinc or more than 250 grams (0.25 kilogram) of zinc in any discharge.

(6) Mass limitations.

(a) All pollutant limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

1. For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;

2. When applicable standards and limitations are expressed in terms of other units of measurement; or

3. If in establishing permit limitations on a case-by-case basis under 401 KAR 5:080, Section 1, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation, for example, discharges of TSS from certain mining operations, and permit conditions ensure that dilution will not be used as a substitute for treatment.

(b) Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall [will] require the permittee to comply with both limitations.

(7) Pollutants in intake water.

(a) Upon request of the discharger, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the discharger's intake water if:

1. The applicable effluent limitations and standards contained in 40 CFR Chapter I, Subchapter N, Part 401 et seq., specifically provide that they may be applied on a net basis; or

2. The discharger demonstrates that the control system it proposes or uses to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.

(b) Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) shall not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere.

(c) Credit shall be granted only to the extent necessary to meet the applicable limitations or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.

(d) Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The cabinet [~~director~~] may waive this requirement if the cabinet [~~director~~] finds that no environmental degradation will result.

(e) This subsection shall [~~of this regulation does~~] not apply to the discharge of raw water clarifier sludge generated from the treatment of intake water.

(8) Internal waste streams.

(a) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by Section 2(8) of this administrative regulation shall also be applied to the internal waste streams.

(b) Limits on internal waste streams shall [~~will~~] be imposed only when the fact sheet under 401 KAR 5:075, Section 4, sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible, for example, under ten (10) meters of water, the wastes at the point of discharge are so diluted as to make monitoring impracticable, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

(9) Disposal of pollutants into wells, into POTWs, or by land application. Permit limitations and standards shall be calculated as provided in 401 KAR 5:055, Section 6.

(10) Secondary treatment information. Permit conditions that involve secondary treatment shall [~~will~~] be written as provided in 401 KAR 5:045.

Section 4. Federal Regulations Adopted Without Change. The following federal regulations govern the subject matter of this administrative regulation and are hereby adopted without change. The federal regulations are published by the Office of the Federal Register, National Archives and Government Services, General Services Administration, and are available for inspection and copying, subject to copyright laws, during normal business hours of 8 a.m. to 4:30 p.m., excluding state holidays, at the Division of Water, 14 Reilly Road, Frankfort, Kentucky. Copies are also available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(1) Toxic Pollutant Effluent Standards, 40 CFR Part 129, revised as of July 1, 1991;

(2) Test Procedures for the Analysis of Pollutants, 40 CFR Part 136, revised as of September 11, 1992;

(3) Federal Effluent Limitations and Standards and New Source Performance Standards. [~~Incorporations. (1)~~] 40 CFR Chapter I, Subchapter N, Parts 401 et seq., revised as of July 1, 1993; and

(4) Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503, revised as of July 1993. [~~1986, as published by the Office of the Federal Register, National Archives and Register Services, General Services Administration and available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, is hereby incorporated by reference.~~

~~(2) Federal Registers incorporated. In addition to subsection (1) of this section, also incorporated by reference are additions, amendments and corrections to this codification, as published in the following Federal Registers:~~

~~Industry~~	~~40 CFR Part~~	~~Federal Register~~	~~Date~~
~~Aluminum Forming~~	~~467~~	~~48 FR 49126~~	~~10-24-83~~
		~~corrected by~~	
		~~49 FR 11629~~	~~03-27-84~~
~~Battery Manufacturing~~	~~461~~	~~49 FR 9108~~	~~03-09-84~~
		~~corrected by~~	
		~~49 FR 13879~~	~~04-09-84~~
		~~corrected by~~	
		~~49 FR 27946~~	~~07-09-84~~
~~Coal mining~~	~~434~~	~~47 FR 45382~~	~~10-13-82~~
		~~corrected by~~	
		~~48 FR 50321~~	~~11-01-83~~
		~~amended by~~	
		~~50 FR 41296~~	~~10-09-85~~
~~Coil coating (Phase I)~~	~~465~~	~~47 FR 54232~~	~~12-01-82~~
		~~amended by~~	
		~~48 FR 31403~~	~~07-08-83~~
		~~amended by~~	
		~~48 FR 41409~~	~~09-15-83~~
		~~corrected by~~	
		~~49 FR 33648~~	~~08-24-84~~
~~(Phase II, Can-making)~~	~~465~~	~~48 FR 52380~~	~~11-17-83~~
		~~amended by~~	
		~~48 FR 31403~~	~~07-08-83~~
		~~corrected by~~	
		~~49 FR 14104~~	~~04-10-84~~
~~Copper Forming~~	~~468~~	~~48 FR 36942~~	~~08-15-83~~
		~~amended by~~	
		~~48 FR 41409~~	~~09-15-83~~
		~~amended by~~	
		~~50 FR 34242~~	~~08-23-85~~
		~~amended by~~	
		~~51 FR 7568~~	~~03-05-86~~
~~Electrical/Electronic Components (Phase 1)~~	~~469~~	~~48 FR 15382~~	~~04-08-83~~
		~~amended by~~	
		~~49 FR 5921~~	~~02-16-84~~
~~(Phase II)~~	~~469~~	~~48 FR 55590~~	~~12-14-83~~
		~~corrected by~~	
		~~49 FR 1056~~	~~01-09-84~~
~~Electroplating (Pretreatment)~~	~~413~~	~~44 FR 52590~~	~~09-07-79~~
		~~amended by~~	
		~~48 FR 32462~~	~~07-15-83~~
		~~corrected by~~	
		~~48 FR 41409~~	~~09-15-83~~
		~~48 FR 43690~~	~~09-26-83~~
		~~amended by~~	
~~Inorganic Chemicals (Phase 1)~~	~~415~~	~~47 FR 28260~~	~~06-29-82~~
		~~amended by~~	
		~~47 FR 55226~~	~~12-08-82~~
~~(Phase II)~~	~~415~~	~~49 FR 33402~~	~~08-22-84~~

		corrected by 49 FR 37594 09 25 84
Iron & Steel Manufacturing	420	47 FR 23258 05 27 82 corrected by 47 FR 24554 06 07 82 corrected by 47 FR 41738 09 22 82 corrected by 48 FR 51773 11 14 83 amended by 49 FR 21024 05 17 84 corrected by 49 FR 24726 06 15 84 corrected by 49 FR 25634 06 22 84
Leather tanning and finishing	425	47 FR 52848 11 23 82 amended by 48 FR 30115 06 30 83 amended by 48 FR 31403 07 08 83 corrected by 48 FR 32346 07 15 83 corrected by 48 FR 35649 08 05 83 amended by 48 FR 41409 09 15 83
Metal Finishing	433	
	413	48 FR 32462 07 15 83 amended by 48 FR 41409 09 15 83 corrected by 48 FR 43680 09 26 83
Metal Molding and Casting	464	50 FR 45212 10 30 85
Nonferrous Metals (Phase I)	421	49 FR 8742 03 08 84 corrected by 49 FR 26738 06 29 84 corrected by 49 FR 29792 07 24 84 corrected by 50 FR 12252 03 28 85 amended by 50 FR 38276 09 02 85 corrected by 50 FR 41144 10 09 85 corrected by 50 FR 52775 12 26 85
(Phase III)	471	50 FR 34242 08 23 85 corrected by 51 FR 2884 01 22 86
Oil and Gas Extraction	435	41 FR 44942 10 13 76 amended by 44 FR 22069 04 13 79 amended by 47 FR 31554 07 21 82
Ore mining	440	47 FR 54598 12/03/82
Pesticides	455	50 FR 40672 10 04 85
Petroleum refining	419	47 FR 46434 10 18 82 amended by 50 FR 28516 07 12 85 corrected by 50 FR 32414 08 12 85
Pharmaceuticals	439	48 FR 49808 10 27 83 corrected by 48 FR 50322 11 01 83
		amended by 50 FR 18486 05 01 85
Plastics	463	49 FR 49026 12 17 84 corrected by 50 FR 18248 04 30 85
Porcelain enameling	466	47 FR 53172 11 24 82 amended by 48 FR 31403 07 08 83 amended by 48 FR 41409 09 15 83
Pulp and paper	430	
	431	47 FR 52006 11 18 82 corrected by 48 FR 13176 03 30 83 amended by 48 FR 31403 07 08 83
Steam electric	423	47 FR 52290 11 19 82 amended by 48 FR 31403 07 08 83
Textile mills	410	47 FR 33810 09 02 82 corrected by 48 FR 39624 09 01 83
Timber	429	46 FR 8260 01 26 81 amended by 46 FR 57287 11 23 81]

Section 5. Primary Industry Categories. Any KPDES permit issued to dischargers in the following categories shall include effluent limitations and a compliance schedule to meet the requirements of the KPDES administrative regulations whether or not applicable effluent limitations guidelines have been promulgated.

(1) Adhesives and sealants.
(2) Aluminum forming.
(3) Auto and other laundries.
(4) Battery manufacturing.
(5) Coal mining.
(6) Coil coating.
(7) Copper forming.
(8) Electrical and electronic components.
(9) Electroplating.
(10) Explosives manufacturing.
(11) Foundries.
(12) Gum and wood chemicals.
(13) Inorganic chemicals manufacturing.
(14) Iron and steel manufacturing.
(15) Leather tanning and finishing.
(16) Mechanical products manufacturing.
(17) Nonferrous metals manufacturing.
(18) Ore mining.
(19) Organic chemicals manufacturing.
(20) Paint and ink formulation.
(21) Pesticides.
(22) Petroleum refining.
(23) Pharmaceutical preparations.
(24) Photographic equipment and supplies.
(25) Plastics processing.
(26) Plastic and synthetic materials manufacturing.
(27) Porcelain enameling.
(28) Printing and publishing.
(29) Pulp and paper mills.
(30) Rubber processing.
(31) Soap and detergent manufacturing.
(32) Steam electric power plants.
(33) Textile mills.
(34) Timber products processing.

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994
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NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:070. Provisions of the KPDES permit.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110

STATUTORY AUTHORITY: KRS ~~[224.01-110,]~~ 224.10-100

NECESSITY AND FUNCTION: KRS 224.16-050(1) provides that the Natural Resources and Environmental Protection Cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Sections 1342(b) and (d). KRS 224.16-050(1) requires that any exemptions granted in the issuance of NPDES permits shall be pursuant to 33 USC Sections 1311, 1312, and 1326(a). Further, KRS 224.16-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this section any effluent limitation, monitoring requirement or other condition which is more stringent than the effluent limitation, monitoring requirement or other condition which would have been applicable under the federal regulation if the permit were issued by the federal government. This administrative regulation contains the basis for provisions, terms, and effect of a KPDES permit, including permit duration, schedule of compliance, and basis for permit modification or [,] revocation and reissuance.

Section 1. Duration of Permits. (1) KPDES permits shall ~~[will]~~ be effective for a fixed term not to exceed five (5) years. Except as provided in 401 KAR 5:060, Section 1(5)(c) ~~[(4)(b)]~~, the term of a permit shall ~~[will]~~ not be extended by modification beyond this maximum duration. The cabinet ~~[director]~~ may issue a permit for a duration that is less than the full five (5) year term.

(2) A permit may be issued for the full term if the permit includes effluent limitations and a compliance schedule to meet the requirements of 401 KAR 5:080, Section 1(2)~~[2c, d, and e,]~~ whether or not applicable federal effluent limitations guidelines have been promulgated or approved.

Section 2. Schedules of Compliance. (1) The permit may, when appropriate, specify a schedule of compliance leading to compliance with KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(a) Time for compliance. Any schedules of compliance under this section shall ~~[will]~~ require compliance as soon as possible. In addition, schedules of compliance shall ~~[will]~~ require compliance not later than the applicable deadline specified in 401 KAR 5:080.

(b) The first KPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.

(c) Interim dates. Except as provided in subsection (2)(a)2 of this section, if a permit establishes a schedule of compliance which exceeds one (1) year from the date of permit issuance, the schedule shall ~~[will]~~ set forth interim requirements and the dates for their achievement.

1. The time between interim dates shall ~~[will]~~ not exceed one (1) year.

2. If the time necessary for completion of any interim requirement, such as the construction of a control facility, is more than one (1) year and is not readily divisible into stages for completion, the permit shall ~~[will]~~ specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(d) Reporting. The permit shall ~~[will]~~ be written to require that no later than fourteen (14) days following each interim date and the final date of compliance, the permittee shall notify the cabinet ~~[director]~~ in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports.

(2) Alternative schedules of compliance. A KPDES permit applicant or permittee may cease conducting regulated activities, by **termination** ~~[revocation]~~ ~~[termination]~~ of direct discharge for KPDES sources, rather than continue to operate and meet permit requirements as follows:

(a) If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued:

1. The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

2. The permittee shall cease conducting permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

(b) If the decision to cease conducting regulated activities is made before issuance of a permit whose term will include the **termination** ~~[revocation]~~ ~~[termination]~~ date, the permit shall ~~[will]~~ contain a schedule leading to **termination** ~~[revocation]~~ ~~[termination]~~ which shall ~~[will]~~ ensure timely compliance no later than the statutory deadline.

(c) If the permittee is undecided whether to cease conducting regulated activities, the cabinet shall ~~[director may]~~ issue or modify a permit to contain two (2) schedules as follows:

1. Both schedules shall ~~[will]~~ contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirements in a timely manner if the decision is to continue conducting regulated activities;

2. One (1) schedule shall ~~[will]~~ lead to timely compliance no later than the deadline contained in 401 KAR 5:080;

3. The second schedule shall ~~[will]~~ lead to cessation of regulated activities by a date which shall ~~[will]~~ ensure timely compliance no later than the deadline specified in 401 KAR 5:080; and

4. Each permit containing two (2) schedules shall ~~[will]~~ include a requirement that after the permittee has made a final decision under subparagraph 1 of this paragraph it shall follow the schedule leading to compliance if the decision is to continue conducting regulated activities, and follow the schedule leading to **termination** ~~[revocation]~~ ~~[termination]~~ if the decision is to cease conducting regulated activities.

(d) The applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the cabinet ~~[director]~~, such as a resolution of the board of directors of a corporation.

Section 3. Requirements for Recording and Reporting of Monitoring Results. All permits shall ~~[will]~~ specify:

(1) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods, including biological monitoring methods when appropriate;

(2) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring; and

(3) Applicable reporting requirements based upon the impact of the regulated activity and as specified in 401 KAR 5:065, Sections 1 and 2. Reporting shall be no less frequent than specified in Section 2 of this administrative regulation.

Section 4. Effect of a Permit. (1) Except for any toxic effluent standards and prohibitions included in 401 KAR 5:065, Section 1(1)(b), compliance with a KPDES permit during its term constitutes compliance, for purposes of enforcement, with the KPDES program. However, a permit may be modified, revoked and reissued, or revoked [~~terminated~~] during its term for cause as set forth in Sections 6 and 7 of this administrative regulation.

(2) The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

(3) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or administrative regulations.

Section 5. Transfer of Permits. (1) Transfers by modification. Except as provided in subsection (2) of this section, a permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued, under Section 6 of this administrative regulation, or if a minor modification has been made to identify the new permittee and incorporate such other requirements as may be necessary under the KPDES administrative regulations.

(2) Automatic transfers. As an alternative to transfers under subsection (1) of this section, any KPDES permit may be automatically transferred to a new permittee if:

(a) The current permittee notifies the cabinet [~~director~~] at least thirty (30) days in advance of the proposed transfer date in paragraph (b) of this subsection;

(b) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and [.]

(c) The cabinet [~~director~~] does not notify the existing permittee and the proposed new permittee of an intent to modify or revoke and reissue the permit. A modification under this paragraph may also be a minor modification under Section 6(3) of this administrative regulation. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph (b) of this subsection.

[~~(3) If a new KPDES permit is prepared as a result of either subsection (1) or (2) of this section, then the new permittee shall be subject to the "duplicate permit fee" as specified in 401 KAR 5:085, Section 5.~~]

Section 6. Modification or Revocation and Reissuance of Permit. When the cabinet [~~director~~] receives any information, the cabinet [~~director~~] may determine whether or not one (1) or more of the causes, listed in subsections (1) and (2) of this section for modification or revocation and reissuance or both, exist. If cause exists, the cabinet [~~director~~] may modify or revoke and reissue the permit accordingly, and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. If cause does not exist under this section, the cabinet [~~director~~] shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in subsection (3) of this section for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit shall [~~must~~] be prepared and other procedures in 401 KAR 5:075 shall [~~must~~] be followed.

(1) Causes for modification. The following are causes for modification but not revocation and reissuance of permits unless the permittee agrees to revocation and reissuance as well as modification of a permit.

(a) Alterations. If there are material and substantial alterations or additions made to the permitted facility or activity which occurred after permit issuance, the [~~such~~] alterations may justify the application of permit conditions that are different or absent in the existing permit.

(b) Information. If the cabinet [~~director~~] has received information, cause may exist for modification. KPDES permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance, except for revised administrative regulations, guidance, or test methods which would have justified application of different conditions at the time of permit issuance. In addition, the applicant shall [~~must~~] show that the information would have justified the application of different permit conditions at the time of issuance. For KPDES general permits this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

(c) New administrative regulations. If the standards or administrative regulations on which the permit was based have been changed by promulgation of amended standards or administrative regulations or by judicial decision after the permit was issued, then cause may exist for modification. However, the permit shall [~~may~~] be modified only as follows:

1. For promulgation of amended standards or administrative regulations, when:

a. The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards of 401 KAR 5:031, or the secondary treatment administrative regulations of 401 KAR 5:045;

b. EPA has revised, withdrawn, or modified that portion of the federal regulation or effluent limitation guideline or has approved a cabinet action with regard to a water quality standard on which the permit condition was based; and

c. A permittee requests modification in accordance with 401 KAR 5:075, Section 2, within ninety (90) days after the amendment, revision, or withdrawal is promulgated.

2. For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated effluent limitation guidelines, if the remand and stay concern that portion of the guidelines on which the permit condition was based and a request is filed by the permittee in accordance with 401 KAR 5:075, Section 2, within ninety (90) days of judicial remand.

(d) Compliance schedules. A permit may be modified if the cabinet [~~director~~] determines good cause exists for modification of a compliance schedule, based on an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, [~~in no case will~~] a KPDES compliance schedule shall not be modified to extend beyond an applicable statutory deadline in 401 KAR 5:080.

(e) In addition the cabinet [~~director~~] may modify a permit:

1. When the permittee has filed a request for any variance under 401 KAR 5:055, Section 7, or [~~for "fundamentally different factors" within the time specified in~~] 401 KAR 5:080, Section 3, and the cabinet [~~director~~] processes the request under the applicable provisions.

2. When required to incorporate [~~as~~] applicable toxic effluent standard or prohibition under 401 KAR 5:065, Section 2(2).

3. When required by the "reopener" conditions in a permit, which are established in the permit under 401 KAR 5:065, Section 2(3), for toxic effluent limitations, or 401 KAR 5:065, Section 2 (40 CFR Section 403.10(e), pretreatment program).

4. Upon request of a permittee who qualifies for a change in effluent limitations based on pollutants in intake water under 401 KAR 5:065, Section 3(7).

5. When a discharger is no longer eligible for net limitations, as provided in 401 KAR 5:065, Section 3(7).

6. As necessary under EPA effluent limitations guidelines concerning compliance schedule for development of a pretreatment program.

7. When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee

under 401 KAR 5:080, Section 1(2)(c).

8. When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant which was not reported in the permit application under 401 KAR 5:060, Section 2 [4].

9. To establish a "notification level" as provided in 401 KAR 5:065, Section 2(6).

10. To modify a schedule of compliance to reflect the time lost during the construction of an innovative or alternative facility, in the case of the POTW which has received a grant under CWA Section 202(a)(3) (33 USC Section 1282(a)(3)) for 100 percent of the cost to modify or replace facilities constructed with a grant for innovative or alternative wastewater technology under CWA Section 202(a)(2) (33 USC Section 1282(a)(2)). In no case shall [will] the compliance schedule be modified to extend beyond an applicable statutory deadline for compliance indicated in 401 KAR 5:080.

11. Upon failure of the cabinet [director] to notify an affected state whose waters may be affected by a discharge from Kentucky.

12. When the permit becomes final and effective on or after August 19, 1981, if the permittee shows a good cause for the modification, to conform to changes respecting the following administrative regulation: 401 KAR 5:065, Section 1(3) and (4).

[13. When the permittee's effluent limitations were imposed under 401 KAR 5:080, Section 1 and CWA Section 402(a)(1)) (33 USC Section 1342(a)(1)) and the permittee demonstrates operation and maintenance costs that are totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline, but in no case may the limitations be made less stringent than the subsequent guideline.]

13. [14.] To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.

14. [15.] When the discharger has installed the treatment technology considered by the cabinet [permit writer] in setting [settling] effluent limitations imposed under 401 KAR 5:080, Section 1 and CWA Section 402(a)(1) (33 USC Section 1342(a)(1)) and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline).

15. [16.] When the permit becomes final and effective on or after March 9, 1982, and the permittee applies for the modification no later than January 24, 1985, if the permittee shows good cause in its request and that it qualifies for the modification, to conform to changes respecting the following administrative regulations: [401 KAR 5:065, Section 3(2), 401 KAR 5:065, Section 3(3), and] 401 KAR 5:055, Section 6(2) and 401 KAR 5:065, Section 3(2) and (3).

(2) Causes for modification or revocation and reissuance. The following are causes to modify or, alternatively revoke and [or] reissue a permit:

(a) Cause exists for revocation [termination] under Section 7 of this administrative regulation and the cabinet [director] determines that modification or revocation and reissuance is appropriate.

(b) The cabinet [director] has received notification of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer but shall [will] not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

(3) Minor modifications of permits. Upon the consent of the permittee, the cabinet shall [director may] modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of 401 KAR 5:075. Any permit modification not processed as a minor modification under this section shall [will] be made for cause and with a 401 KAR 5:075 draft permit and public notice as required under this section. Minor modifications may only:

(a) Correct typographical errors;

(b) Require more frequent monitoring or reporting by the permittee;

(c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirements;

(d) Allow for a change in ownership or operational control of a facility where the cabinet [director] determines that no other change in the permit is necessary, if [provided that] a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the cabinet [director];

(e) Change the construction schedule for a discharger which is a new source; [or]

(f) Delete a point source outfall when the discharge from that outfall is **terminated** [revoked] [terminated] and does not result in discharge of pollutants from other outfalls except in accordance with permit limits; or

(g) Incorporate conditions of a POTW pretreatment program that has been approved in accordance with the procedures in 401 KAR 5:057 or a modification thereto that has been approved in accordance with the procedures in 401 KAR 5:057 as enforceable conditions of the POTW's permits.

Section 7. Revocation [Termination] of Permit. (1) The following are causes for revoking [terminating] a permit during its term, or for denying a renewal application:

(a) Noncompliance by the permittee with any condition of the permit;

(b) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant fact at any time; or

(c) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation [termination].

(2) KPDES permits may be modified or revoked [terminated] when there is a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit for example, plant closure or termination of discharge by connection to a POTW.

(3) The cabinet shall [director will] follow the applicable procedures of 401 KAR 5:075 in revoking [terminating] a KPDES permit under this section.

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
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NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:075. Cabinet review procedures for KPDES permits.

RELATES TO: KRS 224.01-010, 224.10-100, 224.10-420, 224.10-440, 224.10-470, 224.16-050, 224.70-100, **224.70-110**

STATUTORY AUTHORITY: KRS [224.01-110,] 224.10-100

NECESSITY AND FUNCTION: KRS 224.10-100 authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050(1) establishes that the

cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Section 1342(b) and (d). This administrative regulation sets forth the procedures through which the cabinet will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits.

Section 1. Review of the Application. (1) Any person who requires a permit under the KPDES program shall complete, sign, and submit to the cabinet [~~director~~] an application for the permit as required under 401 KAR 5:060, Section 1. Applications are not required for KPDES general permits. However, operators who elect to be covered by a general permit shall submit written notification to the cabinet [~~director~~] at such time as the cabinet [~~director~~] indicates in Section 3 of this administrative regulation.

(2) The cabinet shall [~~director will~~] not begin the processing of a permit until the applicant has fully complied with the application requirements for the permit, as required by 401 KAR 5:060, Section 1.

(3) Permit applications shall comply with the signature and certification requirements of 401 KAR 5:060, Section 9 [~~3~~].

(4) The cabinet shall [~~director will~~] review for completeness every application for a KPDES permit. Each application submitted by a KPDES new source or KPDES new discharger shall [~~will~~] be reviewed for completeness by the cabinet [~~director~~] within thirty (30) days of its receipt. Each application for a KPDES permit submitted by an existing source shall [~~will~~] be reviewed for completeness within sixty (60) days of receipt. Upon completing the review, the cabinet shall [~~director will~~] notify the applicant in writing whether the application is complete. If the application is incomplete, the cabinet shall [~~director will~~] list the information necessary to make the application complete. If [~~When~~] the application is for an existing source, the cabinet shall [~~director will~~] specify in the notice of deficiency a date for submitting the necessary information. The cabinet shall [~~director will~~] notify the applicant that the application is complete upon receiving this information. After the application is completed, the cabinet [~~director~~] may request additional information from an applicant when necessary to clarify, modify, or supplement previously submitted material. Requests for the [~~such~~] additional information shall [~~will~~] not render an application incomplete.

(5) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(6) If the cabinet [~~director~~] decides that a site visit is necessary for any reason in conjunction with the processing of an application, the cabinet shall [~~director will~~] notify the applicant and a date will be scheduled.

(7) The effective date of an application is the date on which the cabinet [~~director~~] notifies the applicant that the application is complete as provided in subsection (4) of this section.

(8) For each application from a major facility new source, or major facility new discharger, the cabinet shall [~~director will~~] no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule will specify target dates by which the cabinet [~~director~~] intends to:

(a) Prepare a draft permit;

(b) Give public notice;

(c) Complete the public comment period, including any public hearing;

(d) Issue a final permit; and

(e) Complete any formal proceedings under this administrative regulation.

(9) Conflicts of interest.

(a) Any person [~~The director~~] who issues a permit will be subject to the conflict of interest provisions of KRS 11A.020 and 11A.030 [~~KPDES policy memorandum concerning conflicts of interest~~]. **The director of the Division of Water shall not receive or have received during the previous two (2) years, a significant portion of income directly or indirectly from permit holders or applicants for a permit.**

(b) Any person aggrieved by the issuance of a permit under the KPDES administrative regulations may challenge the permit pursuant to Section 13 of this administrative regulation if paragraph (a) of this subsection [~~the policy memorandum~~] has been violated.

(c) The hearing officer shall [~~will~~] remand any permit issued in violation of paragraph (a) of this subsection [~~the policy memorandum~~] to the cabinet for reconsideration.

(d) Following remand, any cabinet employee who reconsiders the permit shall [~~will~~] be subject to the conflict of interest provisions [~~policy memorandum~~] set forth in paragraph (a) of this subsection. The reconsideration shall [~~will~~] require a new public comment period and public hearing only if information offered during earlier permit proceedings was excluded by the cabinet [~~director~~] as a direct result of a conflict of interest.

Section 2. Review Procedures for Permit Modification, Revocation and Reissuance, or Revocation [~~Termination~~]. (1) Permits may be modified, revoked and reissued, or revoked [~~terminated~~] either at the request of any interested person, including the permittee, or upon the cabinet's [~~director's~~] initiative. However, permits may only be modified, revoked and reissued, or revoked [~~terminated~~] for the reasons specified in 401 KAR 5:070, Sections 6 or 7. All requests shall be in writing and shall contain facts or reasons supporting the request.

(2) If the cabinet [~~director~~] decides the request is not justified, the cabinet shall [~~director will~~] send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or revocation [~~termination~~] are not subject to public notice, comment, or hearings.

(3) If the cabinet [~~director~~] tentatively decides to modify or revoke and reissue a permit under 401 KAR 5:070, Section 6, the cabinet [~~director~~] shall prepare a draft permit under Section 3 of this administrative regulation incorporating the proposed changes. The cabinet [~~director~~] may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the cabinet shall [~~director will~~] require the submission of a new application.

(a) In a permit modification under this section, only those conditions to be modified shall [~~will~~] be reopened when a new draft permit is prepared. All other aspects of the existing permit shall [~~will~~] remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(b) "Minor modifications" as described [~~defined~~] in 401 KAR 5:070, Section 6(3) shall [~~are~~] not be subject to the requirements of this section.

(4) If the cabinet preliminarily [~~director tentatively~~] decides to revoke [~~terminate~~] a permit under 401 KAR 5:070, Section 7, the cabinet shall [~~director will~~] issue a notice of intent to revoke [~~terminate~~]. A notice of intent to revoke [~~terminate~~] is a type of draft permit which follows the same procedure as any draft permit prepared under Section 3 of this administrative regulation.

Section 3. Draft Permits. (1) Once an application is complete, the cabinet shall preliminarily [~~director will tentatively~~] decide whether to prepare a draft permit or to deny the application.

(2) If the cabinet [~~director~~] makes a preliminary decision to deny the permit application, the cabinet shall [~~director will~~] issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedure as any draft permit prepared under this section. If the cabinet's [~~director's~~]

determination under Section 11 of this administrative regulation is that the preliminary decision to deny the permit application was incorrect, the cabinet shall [director will] withdraw the notice of intent to deny and proceed to prepare a draft permit under subsection (4) of this section.

(3) If the cabinet [director] makes a preliminary decision to issue a KPDES general permit, the cabinet shall [director will] prepare a draft general permit in accordance with subsection (4) of this section.

(4) If the cabinet [director] decides to prepare a draft permit, the cabinet shall [director will] prepare a draft permit that contains the following information:

(a) All conditions under 401 KAR 5:065, Section 1;

(b) All compliance schedules under 401 KAR 5:070, Section 2;

(c) All monitoring requirements under 401 KAR 5:070, Section 3; and

(d) Effluent limitations, standards, prohibitions, and conditions under 401 KAR 5:057, 401 KAR 5:060, 401 KAR 5:065, 401 KAR 5:070, 401 KAR 5:075, and 401 KAR 5:080 and all variances that are to be included.

(5) All draft permits prepared by the cabinet under this section shall [will] be accompanied by a fact sheet and shall [will] be based on the administrative record, publicly noticed, and made [make] available for public comment. The cabinet shall [director will] give notice of opportunity for a public hearing, issue a final decision, and respond to comments. A demand for a hearing may be made pursuant to KRS 224.10-420 and Section 13 of this administrative regulation following the issuance of a final decision.

Section 4. Fact Sheets. (1) A fact sheet shall [will] be prepared for every draft permit for a major KPDES facility or activity, for every KPDES general permit, for every KPDES draft permit that incorporates a variance or requires an explanation under subsection (3) [(4)] of this section, and for every draft permit which the cabinet [director] finds is the subject of widespread public interest or raises major issues. The fact sheet will briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The cabinet shall [director will] send this fact sheet to the applicant and, on request, to any other persons.

(2) The fact sheet shall [will] include, when applicable:

(a) A brief description of the type of facility or activity which is the subject of the draft permit;

(b) A quantitative and qualitative description of the discharges described in the application;

(c) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(d) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(e) A description of the procedures for reaching a final decision on the draft permit including:

1. The beginning and ending dates of the comment period under Section 5 of this administrative regulation and the address where comments will be received;

2. Procedures for requesting a hearing and the nature of that hearing;

3. Any other procedures under KRS 224.10-420 and Section 13 of this administrative regulation by which the public may participate in the final decision; [and]

(f) Name and telephone number of a person to contact for additional information; and [.]

(g) [(3)] Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guidelines or performance standard provisions, and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed. [;]

(3) [(4)](a) When the draft permit contains any of the following conditions, an explanation of the reasons why the [such] conditions are applicable:

1. Limitations to control toxic pollutants under 401 KAR 5:065, Section 2(5);

2. Limitations on internal waste streams under 401 KAR 5:065, Section 3(8); or

3. Limitations on indicator pollutants under 401 KAR 5:080, Section 1(2)(a).

(b) For every permit to be issued to a treatment works owned by a person other than the Commonwealth or its subdivisions [a municipality], an explanation of the cabinet's [director's] decision on regulation of users under 401 KAR 5:065, Section 2(12).

(4) [(5)] When appropriate, a sketch or detailed description of the location of the discharge described in the application.

Section 5. Public Notice of Permit Actions and Public Comment Period. (1) Scope.

(a) The cabinet shall [director will] give public notice that the following actions have occurred:

1. A permit application has been preliminarily [tentatively] denied under Section 3(2) of this administrative regulation;

2. A draft permit has been prepared under Section 3(4) of this administrative regulation;

3. A hearing has been scheduled under Section 7 of this administrative regulation; or [and]

4. A KPDES new source determination has been made in accordance with the definition in 401 KAR 5:001 [401 KAR 5:050].

(b) No public notice is required when a request for permit modification, revocation and reissuance, or revocation [termination] is denied under Section 2 of this administrative regulation. Written notice of that denial shall [will] be given to the requester and to the permittee.

(c) Public notices may describe more than one (1) permit or permit action.

(2) Timing.

(a) Public notice of the preparation of a draft permit, including a notice of intent to deny a permit application, required under subsection (1) of this section shall [will] allow at least thirty (30) days for public comment.

(b) Public notice of a public hearing shall [will] be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two (2) notices may be combined.

(3) Methods. Public notice of activities described in subsection (1)(a) of this section shall [will] be given by the following methods:

(a) The cabinet shall [will] mail a notice to the persons listed in subparagraphs 1 through 5 of this paragraph. Any person otherwise entitled to receive notice under this paragraph may waive their rights to receive notice for any classes and categories of permits.

1. The applicant, except for KPDES general permittees, and Region IV, EPA.

2. Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, the Advisory Council on Historic Preservation, Kentucky Historical Society and other appropriate government authorities, including any affected states [sates];

3. The U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

4. Any user identified in the permit application of a privately owned treatment works; and

5. Persons on a mailing list developed by:

a. Including those who request in writing to be on the list;

b. Soliciting persons for area lists from participants in past permit proceedings in that area; and

c. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as newsletters, environmental bulletins, or state law journals. The cabinet may update the mailing list from time to time by

requesting written indication of continued interest from those listed. The cabinet may delete from the list the name of any person who fails to respond to such a request.

(b) For major permits and KPDES general permits, the cabinet shall [~~will~~] publish a notice in a daily or weekly newspaper within the area affected by the facility or activity;

(c) In a manner constituting legal notice to the public under Kentucky law; and

(d) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(4) Contents.

(a) All public notices. All public notices issued under this administrative regulation shall [~~will~~] contain the following minimum information:

1. Name and address of the office processing the permit action for which notice is being given;

2. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of KPDES draft general permits under 401 KAR 5:055, Section 5;

3. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for KPDES general permits when there is no application;

4. Name, address, and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit as the case may be, fact sheet, and the application;

5. A brief description of the comment procedures required by Sections 6 and 7 of this administrative regulation and the time and place of any hearing that will be held, including a statement of procedures to request a hearing, unless a hearing has already been scheduled, and other procedures by which the public may participate in the final permit decision;

6. A general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement shall [~~will~~] be satisfied by a map or description of the permit area; and

7. Any additional information considered necessary or proper.

(b) Public notices for hearings. In addition to the general public notice described in paragraph (a) of this subsection, the public notice for a permit hearing under Section 7 of this administrative regulation shall [~~will~~] contain the following information:

1. Reference to the date of previous public notices, relating to the permit;

2. Date, time, and place of the hearing; and

3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(c) Requests under 401 KAR 5:055, Section 7(4). In addition to the information required under subsection (4)(a) of this section, public notice of a KPDES draft permit for a discharge when a 401 KAR 5:055, Section 7(4) request has been filed under 401 KAR 5:055, Section 3, shall [~~will~~] include:

1. A statement that the thermal component of the discharge is subject to effluent limitations under 401 KAR 5:065, Section 2(1) and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under CWA Sections 301 or 306 (33 USC Sections 1311 or 1316); and

2. A statement that a 401 KAR 5:055, Section 7(4), request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge and a brief description, including a quantitative statement, of the alternative effluent limitations, if any, included in the request.

(5) In addition to the general public notice described in subsection (4)(a) of this section all persons identified in subsection (3)(a)1, 2, 3, and 4 of this section shall [~~will~~] be mailed a copy of the fact sheet, the permit application (if any) and the draft permit (if any).

Section 6. Public Comments and Requests for Public Hearings. During the public comment period provided under Section 5 of this administrative regulation, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall [~~will~~] be considered in making the final decision and shall be answered as provided in Section 12 of this administrative regulation.

Section 7. Public Hearings. (1) The cabinet shall [~~director will~~] hold a public hearing when a significant degree of public interest in a draft permit is found on the basis of requests. The cabinet [~~director~~] also may hold a public hearing [~~at his or her discretion,~~] whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

(2) Public notice of the hearing shall [~~will~~] be given as specified in Section 5 of this administrative regulation.

(3) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under Section 5 of this administrative regulation shall [~~will~~] automatically be extended to the close of any public hearing under this section. The cabinet [~~hearing officer~~] may also extend the comment period by so stating at the hearing.

(4) A tape recording or written transcript of the hearing shall be made available to the public.

Section 8. Obligation to Raise Issues and Provide Information During the Public Comment Period. All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the cabinet's [~~director's~~] preliminary decision to deny an application, revoke [~~terminate~~] a permit, or prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period including any public hearing under Section 5 of this administrative regulation. All supporting materials shall be included in full and may not be incorporated by reference, unless they consist of state or federal statutes and regulations, EPA or the cabinet's documents of general applicability, or other generally available reference materials. Commenters shall make supporting material not already included in the record available to the cabinet as directed by the cabinet [~~director~~]. A comment period longer than thirty (30) days may be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods, which may be established under Section 5 of this administrative regulation. Nothing in this section shall [~~will~~] be construed to prevent any person aggrieved by a final permit decision from filing a demand for a hearing under KRS 224.10-420 and Section 13 of this administrative regulation.

Section 9. Conditions Requested by the Corps of Engineers and Other Government Agencies. (1) If during the comment period for a KPDES draft permit, the district engineer of the Corps of Engineers advises the cabinet [~~director~~] in writing that anchorage and navigation of any of the waters of the Commonwealth would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the district engineer advises the cabinet [~~director~~] that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the cabinet shall [~~director will~~] include the specified conditions in the permit. Review or appeal of denial of a permit or of

conditions specified by the district engineer shall be made through the applicable procedures of the Corps of Engineers, and shall [may] not be made through the procedures provided in this administrative regulation. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall [will] be considered stayed in the KPDES permit for the duration of that stay.

(2) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other state or federal agency with jurisdiction over fish, wildlife, or public health advises the director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the cabinet [director] may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of KRS Chapter 224.

(3) In appropriate cases the cabinet [director] may consult with one (1) or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

Section 10. Reopening of the Public Comment Period. (1) If any data information or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the cabinet [director] may take one (1) or more of the following actions:

(a) Prepare a new draft permit, appropriately modified, under Section 3 of this administrative regulation;

(b) Prepare a revised fact sheet under Section 4 of this administrative regulation and reopen the comment period; or

(c) Reopen and extend the comment period under Section 5 of this administrative regulation to give interested persons the opportunity to comment on the information or arguments submitted.

(2) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under Section 5 of this administrative regulation shall [should] define the scope of the reopening.

(3) Public notice of any of the above actions will be issued under Section 5 of this administrative regulation.

Section 11. Issuance and Effective Date of Permit. (1) After the close of the public comment period under Section 5 of this administrative regulation, the cabinet shall [director will] issue, deny, modify, revoke and [,] reissue, or revoke [terminate] a permit. The cabinet shall [director will] notify the applicant and each person who has submitted written comments or requested notice of that determination. This notice shall [will] include reference to the procedures for appealing the decision. For the purpose of this section, a final permit decision shall mean a final decision to issue, deny, modify, revoke and reissue, or revoke [terminate] a permit.

(2) A final permit decision shall [will] become effective thirty (30) days after the service of notice of the decision under subsection (1) of this section, unless:

(a) A later effective date is specified in the decision; [or]

(b) A stay is granted pursuant to KRS 224.10-420(2) and Section 13 of this administrative regulation; or

(c) No comments requested a change in the draft permit, in which case the permit shall [will] become effective immediately upon issuance.

(3) The [order or] determination which is a condition precedent to demanding a hearing under KRS 224.10-420(2) and Section 13 of this administrative regulation shall be the final permit decision. The thirty (30) day appeal period shall begin on the date the determination [order] is entered by the cabinet [director] and shall not begin on the date the permit decision becomes effective.

Section 12. Response to Comments. (1) When [At the time that] any final permit decision is issued under Section 11 of this administrative regulation the cabinet [director] shall issue a response to comments. This response shall [will]:

(a) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(b) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing. This response shall [will] fully consider all comments resulting from any hearing conducted under this administrative regulation.

(2) The response to comments shall [will] be available to the public. Any demand for a hearing on this response shall be filed according to procedures specified in KRS 224.10-420, 224.10-440, 224.10-470 and any administrative regulations promulgated pursuant thereto.

Section 13. Hearings under KRS 224.10-420. (1) A determination under Section 11 of this administrative regulation when issued by the cabinet shall [director will] be subject to a demand for a hearing pursuant to KRS 224.10-420(2).

(2) Any person aggrieved by the issuance of a final permit may demand a hearing pursuant to KRS 224.10-420(2).

(3) Any hearing held pursuant to this section shall [will] be subject to the provisions of KRS 224.10-440 and 224.10-470.

(4) Failure to raise issued pursuant to Section 8 of this administrative regulation shall [will] not preclude an aggrieved person from making a demand for a hearing pursuant to KRS 224.10-420(2).

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:080. Criteria and standards for the Kentucky Pollutant Discharge Elimination System.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110

STATUTORY AUTHORITY: KRS [224.01-110,] 224.10-100

NECESSITY AND FUNCTION: KRS 224.10-100 authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050 provides that the cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Section 1342(b) and (d). This section further provides that any exemptions granted in the issuance of KPDES permits shall be pursuant to 33 USC Sections 1311, 1312, and 1326(a). This administrative regulation sets forth the criteria and standards for the KPDES permitting system.

Section 1. Criteria and Standards for Technology-based Treatment Requirements. (1) Purpose and scope. This section establishes criteria and standards for the imposition of technology-based treatment requirements in KPDES permits including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations.

(2) Compliance with technology-based treatment requirements in KPDES permits.

(a) General. Technology-based treatment requirements represent the minimum level of control that shall [~~will~~] be imposed in a KPDES permit. Permits shall [~~will~~] contain the following technology-based treatment requirements in accordance with the deadlines indicated herein:

1. For POTWs effluent limitations based upon:

a. Secondary treatment as required by CWA Section 301(b)(1)(B) (33 USC Section 1311(b)(1)(B)) - from date of permit issuance; and

b. The best practicable waste treatment technology as required by CWA Section 301(b)(1)(A) (33 USC Section (b)(1)(A)) - not later than July 1, 1983; and

2. For dischargers other than POTWs, except as otherwise provided in the KPDES administrative regulations, effluent limitations requiring:

a. The best practicable control technology currently available (BPT):

(i) For effluent limitations promulgated under CWA Section 304(b) after January 1, 1982 and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before this date, compliance as expeditiously as practicable but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b) and not later than March 31, 1989;

(ii) For effluent limitations established on a case-by-case basis based on best professional judgment (BPJ) under paragraph (c)2 of this subsection in a permit issued after February 4, 1987, compliance as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989; or

(iii) For all other BPT effluent limitations compliance is required from the date of permit issuance.

b. For conventional pollutants, the best conventional pollutant control technology (BCT):

(i) For effluent limitations promulgated under CWA Section 304(b), as expeditiously as practicable but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b), and not later than March 31, 1989; or

(ii) For effluent limitations established on a case-by-case basis based on BPJ under paragraph (c)2 of this subsection, in a permit issued after February 4, 1987, compliance as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989;

c. For all toxic pollutants referred to in Section 6 of this administrative regulation the best available technology economically achievable (BAT):

(i) For effluent limitations established under CWA Section 304(b), as expeditiously as practicable but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b), and not later than March 31, 1989; or

(ii) For permits issued on a case-by-case basis based on BPJ under paragraph (c)2 of this subsection after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but not later than three (3) years after the date the limitations are established, and not later than March 31, 1989.

d. For all toxic pollutants other than those listed in Section 6 of this administrative regulation, effluent limitations based on BAT:

(i) For effluent limitations promulgated under CWA Section 304(b) compliance is required as expeditiously as practicable, but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b) and not later than March 31, 1989; or

(ii) For permits issued on a case-by-case BPJ basis under paragraph (c)2 of this subsection after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989.

e. For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT.

(i) For effluent limitations promulgated under CWA Section 304(b) compliance is required as expeditiously as practicable, but not later than three (3) years after the date the limitations are established and not later than March 31, 1989; or

(ii) For permits issued on a case-by-case BPJ basis under paragraph (c)2 of this subsection after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989.

[~~a. The best practicable control technology currently available (BPT) as required by CWA Section 301(b)(1)(A) (33 USC Section 1311(b)(1)(A)) from date of permit issuance;~~

~~b. For conventional pollutants, the best conventional pollutant control technology (BCT) not later than July 1, 1984;~~

~~c. For all toxic pollutants referred to in Section 5 of this regulation as required by CWA Section 301(b)(2)(A) (33 USC Section 1311(b)(2)(A)) the best available technology economically achievable (BAT) not later than July 1, 1984;~~

~~d. For all toxic pollutants other than those listed in Section 5 of this regulation effluent limitations based on the BAT not later than three (3) years after the date such effluent limitations are incorporated into a KPDES permit; and~~

~~e. For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three (3) years after the date such effluent limitations are incorporated into a KPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.~~]

(b) Variances and extensions.

1. The following variance from technology-based treatment requirements is authorized by KRS Chapter 224 and may be applied for under 401 KAR 5:055. For dischargers other than POTWs:

a. Economic variance from BAT, as indicated in 401 KAR 5:055, Section 7(1);

b. Thermal variance from BPT, BCT, and BAT, under Section 4 of this administrative regulation, may be authorized.

2. An extension of the BAT deadline may be applied for under 401 KAR 5:055, Section 7(3) for dischargers other than POTWs, for use of innovative technology.

(c) Methods of imposing technology-based treatment requirements in permits. Technology-based treatment requirements may be imposed through one (1) of the following three (3) methods:

1. Application of EPA-promulgated effluent limitations to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been withdrawn by EPA or remanded. In the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under 401 KAR 5:055, and Section 3 of this administrative regulation.

2. On a case-by-case basis under CWA Section 402(a)(1) (33 USC Section 1342(a)(1)), to the extent that EPA-promulgated effluent limitations are inapplicable. The cabinet [~~permit writer~~] shall apply the appropriate factors listed in paragraph (d) of this subsection and shall consider:

a. The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

b. Any unique factors relating to the applicant.

3. Through a combination of the methods in paragraph (c)1 and 2 of this subsection. Where EPA-promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to administrative regulation on a case-by-case basis in order to carry out the provisions of KRS Chapter 224.

4. Limitations developed under paragraph (c)2 of this subsection may be expressed, where appropriate, in terms of toxicity if it is shown that the limits reflect the appropriate requirements of KRS Chapter 224.

(d) In setting case-by-case limitations pursuant to paragraph (c) of this subsection, the cabinet shall [~~permit writer must~~] consider the following factors:

1. For BPT requirements:

a. The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

b. The age of equipment and facilities involved;

c. The process employed;

d. The engineering aspects of the application of various types of control techniques;

e. Process changes; and

f. Nonwater quality environmental impact (including energy requirements).

2. For BCT requirements:

a. The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

b. The comparison of the cost and level of reduction of the [~~such~~] pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of the [~~such~~] pollutants from a class or category of industrial sources;

c. The age of equipment and facilities involved;

d. The process employed;

e. The engineering aspects of the application of various types of control techniques;

f. Process changes; and

g. Nonwater quality environmental impact (including energy requirements).

3. For BAT requirements:

a. The age of equipment and facilities involved;

b. The process employed;

c. The engineering aspects of the application of various types of control techniques;

d. Process changes;

e. The cost of achieving such effluent reduction; and

f. Nonwater quality environmental impact (including energy requirements).

(e) Technology-based treatment requirements are applied prior to or at the point of discharge.

(f) Technology-based treatment requirements shall not [~~cannot~~] be satisfied through the use of "nontreatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

1. The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

2. The discharger agrees to waive any opportunity to request a variance under 401 KAR 5:055, Section 3; and

3. The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(g) Technology-based effluent limitations shall [~~will~~] be established under this administrative regulation for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(h)1. The cabinet [~~director~~] may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall [~~will~~] not be subject to modification where:

a. Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant; or

b.(i) The limitation reflects BAT-level control of discharges of one (1) or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutants [~~(s)~~] is not feasible for economic or technical reasons;

(ii) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(iii) The fact sheet required by 401 KAR 5:075, Section 4, sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level control of the toxic pollutant discharges identified in paragraph (h)1b(ii) of this subsection, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutants [~~(s)~~].

2. The cabinet [~~director~~] may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

a. Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance; or

b.(i) The limitation reflects BAT-level control of discharges, or an appropriate level of one (1) or more hazardous substances [~~(s)~~] which are present in the waste stream, and a specific BAT, or other appropriate limitation upon the hazardous substances which are present in the waste stream, and a specific BAT, or other appropriate limitation upon the hazardous substance is not feasible for economic or technical reasons;

(ii) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(iii) The fact sheet, required by 401 KAR 5:075, Section 4, sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level, or other appropriate level, control of the hazardous substances discharges identified in paragraph (h)1b(ii) of this subsection, and a finding that it would be economically or technically infeasible to directly limit the hazardous substances [~~(s)~~].

c. Hazardous substances which are also toxic pollutants are subject to paragraph (h)1 of this subsection.

3. The cabinet shall [~~director may~~] not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutants [~~(s)~~] or hazardous substances [~~(s)~~] controlled by the limit were limited directly.

4. Toxic pollutants identified under paragraph (h)1 of this subsection remain subject to 401 KAR 5:065, Section 1(15), which requires notification of increased discharges of toxic pollutants above levels reported in the application form.

Section 2. Criteria for Issuance of Permits to Aquaculture Projects. (1) Purpose and scope.

(a) This section establishes guidelines for approval of any discharge of pollutants associated with an aquaculture project.

(b) This section authorizes, on a selective basis, controlled discharges which would otherwise be unlawful under KRS Chapter 224 in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially.

(c) Permits issued for discharges into aquaculture projects under this section are KPDES permits and are subject to all applicable requirements. Any permit shall [~~will~~] include such conditions, including monitoring and reporting requirements, as are necessary to comply with the KPDES administrative regulations. Technology-based effluent limitations need not be applied to discharges into the approved project except with respect to toxic pollutants.

(2) Criteria.

(a) [~~No~~] KPDES permits shall not [~~permit will~~] be issued to an aquaculture project unless:

1. The cabinet [~~director~~] determines that the aquaculture project:

a. Is intended by the project operator to produce a crop which has significant direct or indirect commercial value, or is intended to be operated for research into possible production of such a crop; and

b. Does not occupy a designated project area which is larger than

can be economically operated for the crop under cultivation or than is necessary for research purposes.

2. The applicant has demonstrated, to the satisfaction of the cabinet [~~director~~], that the use of the pollutant to be discharged to the aquaculture project shall result in an increased harvest of organisms under culture over what would naturally occur in the area;

3. The applicant has demonstrated, to the satisfaction of the cabinet [~~director~~], that if the species to be cultivated in the aquaculture project is not indigenous to the immediate geographical area, there shall be minimal adverse effects on the flora and fauna indigenous to the area, and the total commercial value of the introduced species is at least equal to that of the displaced or affected indigenous flora and fauna;

4. The cabinet [~~director~~] determines that the crop shall not have a significant potential for human health hazards resulting from its consumption; and

5. The cabinet [~~director~~] determines that migration of pollutants from the designated project area to waters of the Commonwealth outside of the aquaculture project will not cause or contribute to a violation of the applicable standards and limitations applicable to the supplier of the pollutant that would govern if the aquaculture project were itself a point source. The approval of an aquaculture project shall [~~will~~] not result in the enlargement of a preexisting mixing zone area beyond what had been designated for the original discharge.

(b) Permits shall not [~~No permit will~~] be issued for any aquaculture project in conflict with a water quality management plan or an amendment to a plan approved by EPA.

(c) Designated project areas shall [~~will~~] not include a portion of a body of water large enough to expose a substantial portion of the indigenous biota to the conditions within the designated project area.

(d) Any pollutants not required by or beneficial to the aquaculture crop shall not exceed applicable standards and limitations when entering the designated project area.

Section 3. Criteria and Standards for Determining Fundamentally Different Factors. (1) Purpose and scope.

(a) This section establishes the criteria and standards to be used in determining whether effluent limitations or pretreatment standards alternative to those required by promulgated EPA effluent limitations guidelines and categorical pretreatment standards, hereinafter referred to as "national limits," shall be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits. This section applies to all national limits promulgated by EPA except for best practicable treatment standards for steam-electric plants.

(b) This case-by-case review shall not [~~will only~~] be done unless [~~if~~] data specific to that discharger indicate they present factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person asserting [~~believing~~] that factors relating to a discharger's facilities, equipment, processes, or other facilities related to the discharger are fundamentally different from the factors considered during the development of the national limits may request a fundamentally different factors variance under 401 KAR 5:055, Section 3. In addition, such a variance may be proposed by the cabinet [~~director~~] in the draft permit.

(2) Criteria.

(a) A request for the establishment of effluent limitations under this section, fundamentally different factors variance, shall not [~~will~~] be approved unless [~~only if~~]:

1. There is an applicable national limit which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested;

2. Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA in establishing the national limits; and

3. The request for alternative effluent limitations or standards is made in accordance with the procedural requirements of 401 KAR 5:075.

(b) A request for the establishment of effluent limitations less stringent than those required by national limits guidelines shall not [~~will~~] be approved unless [~~only if~~]:

1. The alternative effluent limitation requested is not less stringent than justified by the fundamental difference;

2. The alternative effluent limitation or standard shall [~~will~~] ensure compliance with the KPDES administrative regulations and KRS Chapter 224; and

3. Compliance with the national limits, either by using the technologies upon which the national limits are based or by other control alternative, would result in:

a. A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

b. A nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the national limits.

(c) A request for alternative limits more stringent than required by national limits shall not [~~will~~] be approved unless [~~only if~~]:

1. The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

2. Compliance with the alternative effluent limitation or standard would not result in:

a. A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

b. A nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the national limits.

(d) Factors which may be considered fundamentally different are:

1. The nature or quality of pollutants contained in the raw waste load of the discharger's [~~applicant's~~] process wastewater;

2. The volume of the discharger's process wastewater and effluent discharged;

3. Nonwater quality environmental impact of control and treatment of the discharger's raw waste load;

4. Energy requirements of the application of control and treatment technology;

5. Age, size, land availability, and configuration as they relate to the discharger's equipment or facilities, processes employed, process changes, and engineering aspects of the application of control technology; and

6. Cost of compliance with required control technology.

(e) A variance request or portion of such a request under this section shall [~~will~~] not be granted on any of the following grounds:

1. The infeasibility of installing the required waste treatment equipment within the time allowed in Section 1 of this administrative regulation;

2. The assertion that the national limits cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factors [~~(s)~~] listed in paragraph (d) of this subsection;

3. The discharger's ability to pay for the required waste treatment; or

4. The impact of a discharge on local receiving water quality.

(3) Method of application.

(a) A written request for a variance under this administrative regulation shall be submitted in duplicate to the cabinet [~~director~~] in accordance with 401 KAR 5:075.

(b) The burden is on the person requesting the variance to demonstrate [~~explain~~] that:

1. Factors [~~(s)~~] listed in subsection (2) of this section regarding the discharger's facility are fundamentally different from the factors EPA considered in establishing the national limits. The requester shall refer to all relevant material and information, such as the published guideline regulations development document, all associated technical and economic data collected for use in developing each national limit,

all records of legal proceedings, and all written and printed documentation including records of communication, etc., relevant to the regulations which are kept on public file by the EPA;

2. The alternative limitations requested are justified by the fundamental difference alleged in subparagraph 1 of this paragraph; and

3. The appropriate requirements of subsection (2) of this section have been met.

Section 4. Criteria for Determining Alternative Effluent Limitations. (1) Purpose and scope. The factors, criteria and standards for the establishment of alternative thermal effluent limitations described in CWA Section 316(a) (33 USC Section 1326(a)) shall [will] also be used in KPDES permits and shall [will] be referred to as 401 KAR 5:055, Section 7(4), variances.

[~~(2) Definitions. For the purpose of this section:~~

~~(a) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under 401 KAR 5:055, Section 7(4).~~

~~(b) "Representative important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish and wildlife in the body of water into which a discharge of heat is made.~~

~~(c) The term "balanced, indigenous community" means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species and by a lack of domination by pollution tolerant species. Such a community may include historically nonnative species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modification. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with 401 KAR 5:065, Section 1(1)(b), and may not include species whose presence of abundance is attributable to alternative effluent limitations imposed pursuant to 401 KAR 5:055, Section 7(4).~~]

(2) [~~(3)~~] Early screening of applications for 401 KAR 5:055, Section 7(4), variances.

(a) Any initial application for the variance shall include the following early screening information:

1. A description of the alternative effluent limitation requested;

2. A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

3. A general description of the type of data, studies, experiments, and other information which the discharger intends to submit for the demonstration; and

4. [~~Such~~] Data and information as may be available to assist the cabinet [~~director~~] in selecting the appropriate representative important species.

(b) After submitting the early screening information under paragraph (a) of this subsection, the discharger shall consult with the cabinet [~~director~~] at the earliest practicable time, but not later than thirty (30) days after the application is filed, to discuss the discharger's early screening information. Within sixty (60) days after the application is filed, the discharger shall submit for the cabinet's [~~director's~~] approval a detailed plan of study which the discharger will undertake to support its 401 KAR 5:055, Section 7(4), demonstration. The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical, and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the cabinet shall [~~director will~~] either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies which the cabinet [~~director~~] subsequently determines necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger shall provide any additional information or studies which the discharger contends [~~feels~~] are appropriate to support the demonstration.

(c) Any application for the renewal of 401 KAR 5:055, Section 7(4), variance shall include only the [~~such~~] information described in paragraphs (a) and (b) of this subsection and 401 KAR 5:075 as the cabinet [~~director~~] requests within sixty (60) days after receipt of the permit application.

(d) The cabinet shall [~~director will~~] promptly notify the Secretary of the U.S. Department of Commerce, the Secretary of the U.S. Department of the Interior, and any affected state of the filing of the request and shall [~~will~~] consider any timely recommendations they submit.

(e) In making the demonstration the discharger shall consider any information or guidance published by EPA to assist in making the [~~such~~] demonstrations.

(f) If an applicant desires a ruling on a 401 KAR 5:055, Section 7(4), application before the ruling on any other necessary permit terms and conditions, it shall so request upon filing its application under paragraph (a) of this subsection. This request will be granted or denied at the discretion of the cabinet [~~director~~].

(3) [~~(4)~~] Criteria and standards for the determination of alternative effluent limitations.

(a) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the cabinet [~~director~~] that the [~~such~~] effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made. This demonstration shall show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, shall assure the protection and propagation of a balanced indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.

(b) In determining if [~~whether or not~~] the protection and propagation of the affected species will be assured, the cabinet [~~director~~] may consider any information contained or referenced in any applicable thermal water quality criteria and information published by the administrator under CWA Section 304(a) (33 USC Section 1314(a)) or any other information it [~~he~~] deems relevant.

(c) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any [~~such~~] demonstrations shall show:

1. That no appreciable harm has resulted from the normal component of the discharge, taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge has been made; or

2. That despite the occurrence of [~~such~~] previous harm, the desired alternative effluent limitations, or appropriate modifications thereof, shall nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.

(d) In determining if [~~whether or not~~] prior appreciable harm has occurred, the cabinet shall [~~director will~~] consider the length of time in which the applicant has been discharging and the nature of the discharge.

Section 5. New Sources and New Dischargers. [~~(1) Definitions.~~

~~(a) "New source" and "new discharger" are defined in 401 KAR 5:050, Section 1.~~

~~(b) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.~~

~~(c) "Existing source" means any source which is not a new source or a new discharger.~~

~~(d) "Site" is defined in 401 KAR 5:050, Section 1.~~

~~(e) "Facilities or equipment" means buildings, structures process or production equipment, or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.~~]

(1) [~~(2)~~] Criteria for new source determination.

(a) Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets the definition of "new source" in 401 KAR 5:001 [~~5:050, Section 1~~]; and:

1. It is constructed at a site at which no other source is located;

2. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

3. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the cabinet [~~director~~] shall consider such factors as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source.

(b) A source meeting the requirements of paragraph (a) of this subsection is a new source only if a new source performance standard is independently applicable to it. If there is no [~~such~~] independently applicable standard, the source is a new discharger. See 401 KAR 5:001 [~~5:050, Section 1~~].

(c) Construction on a site at which an existing source is located results in a modification subject to 401 KAR 5:070, Section 6 rather than a new source [~~(~~]or a new discharger[~~)~~] if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (a) of this subsection but otherwise alters, replaces, or adds to existing process or production equipment.

(d) Construction of a new source as defined under 401 KAR 5:001 [~~5:050, Section 1~~] has commenced if the owner or operator has:

1. Begun or caused to begin as part of a continuous on-site construction program:

a. Any placement, assembly, or installation of facilities or equipment; or

b. Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

2. Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be revoked [~~terminated~~] or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this subsection.

(e) When a KPDES permit issued to a source with a "protection period" under subsection (2) [~~(3)~~](a) of this section will expire on or after the expiration of the protection period, that permit shall require the owner or operator of the source to comply with the requirements of Section 1 of this administrative regulation and CWA Section 301 (33 USC Section 1311) and any other then applicable CWA requirements immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall [~~may~~] be allowed except when necessary to achieve compliance with requirements promulgated less than three (3) years before the expiration of the protection period.

(f) The owner or operator of a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet the conditions of its permits before beginning to discharge. Within the shortest feasible time (not to exceed ninety (90) days), the owner or operator shall meet all permit conditions. The requirements of this subsection do not apply if the owner or operator is issued a permit containing a compliance schedule under 401 KAR 5:070, Section 2(1).

(g) After the effective date of new source performance standards, no owner or operator shall operate the source in violation of those standards applicable to the source.

(2) [~~(3)~~] Effect of compliance with new source performance standards. The provisions of this subsection do not apply to existing sources which modify their pollution control facilities or construct new pollution control facilities and achieve performance standards, but which are neither new sources or new dischargers or otherwise do not meet the requirements of this subsection.

(a) Except as provided in paragraph (b) of this subsection, any new discharger, the construction of which commenced after October 18, 1972, or new source which meets the applicable promulgated new source performance standards before the commencement of discharge, shall [~~may~~] not be subject to any more stringent new source performance standards or to any more stringent technology-based standards under CWA Section 301(b)(2) (33 USC Section 1311(b)(2)) for the soonest ending of the following periods:

1. Ten (10) years from the date that construction is completed;

2. Ten (10) years from the date the source begins to discharge process or other nonconstruction related wastewater; or

3. The period of depreciation or amortization of the facility for the purposes of Internal Revenue Code Section 167 or 169 (26 USC Section 167 or 169).

(b) The protection from more stringent standards of performance afforded by paragraph (a) of this subsection does not apply to:

1. Additional or more stringent permit conditions which are not technology based; for example, conditions based on water quality standards, or toxic effluent standards or prohibitions under CWA Section 307(a) (33 USC Section 1317 (a)); or

2. Additional permit conditions in accordance with 401 KAR 5:065 [~~5:055~~], Section 2(5) [~~1(2)~~] controlling toxic pollutants or hazardous substances which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances.

Section 6. Toxic Pollutants. References throughout the KPDES administrative regulations establish specific requirements for discharges of toxic pollutants. The following listing identifies those toxic pollutants required to be considered for each of these KPDES requirements:

(1) Acenaphthene.
(2) Acrolein.
(3) Acrylonitrile.
(4) Aldrin or [~~/~~] dieldrin.
(5) Antimony and compounds.
(6) Arsenic and compounds.
(7) Asbestos.
(8) Benzene.
(9) Benzidine.
(10) Beryllium and compounds.
(11) Cadmium and compounds.
(12) Carbon tetrachloride.
(13) Chlordane (technical mixture and metabolites).
(14) Chlorinated benzenes (other than dichloro-benzenes).
(15) Chlorinated ethanes (including 1,2-dichloroethane, 1,1,1-trichloroethane, and hexachloroethane).

(16) Chloroalkyl ethers (chloromethyl, chloroethyl, and mixed ethers).
(17) Chlorinated naphthalene.
(18) Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols).
(19) Chloroform.
(20) 2-chlorophenol.
(21) Chromium and compounds.
(22) Copper and compounds.
(23) Cyanides.
(24) DDT and metabolites.
(25) Dichlorobenzenes (1,2-, 1,3-, and 1,4- dichlorobenzenes).
(26) Dichlorobenzidine.
(27) Dichloroethylenes (1,1- and 1,2-dichloroethylene).
(28) 2,4-dichlorophenol.
(29) Dichloropropane and dichloropropene.
(30) 2,4-dimethylphenol.
(31) Dinitrotoluene.
(32) Diphenylhydrazine.
(33) Endosulfan and metabolites.
(34) Endrin and metabolites.
(35) Ethylbenzene.
(36) Fluoranthene.
(37) Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ether, bromophenylphenyl ether, bis(dischloroisopropyl) ether, bis(chloroethyoxy) methane and polychlorinated diphenyl ethers).
(38) Halomethanes (other than those listed elsewhere; includes methylene chloride methylchloride, methyl-bromide, bromoform, dichlorobromomethane, trichlorofluoromethane, di-chlorodifluoromethane).
(39) Heptachlor and metabolites.
(40) Hexachlorobutadiene.
(41) Hexachlorocyclohexane (all isomers).
(42) Hexachlorocyclopentadiene.
(43) Isophorone.
(44) Lead and compounds.
(45) Mercury and compounds.
(46) Naphthalene.
(47) Nickel and compounds.
(48) Nitrobenzene.
(49) Nitrophenols (including 2,4-dinitrophenol, dinitrocresol).
(50) Nitrosamines.
(51) Pentachlorophenol.
(52) Phenol.
(53) Phthalate esters.
(54) Polychlorinated biphenyls (PCBs).
(55) Polynuclear aromatic hydrocarbons (including benzanthracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenzanthracenes, and indenopyrenes).
(56) Selenium and compounds.
(57) Silver and compounds.
(58) 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD).
(59) Tetrachloroethylene.
(60) Thallium and compounds.
(61) Toluene.
(62) Toxaphene.
(63) Trichloroethylene.
(64) Vinyl chloride.
(65) Zinc and compounds.
(66) The term "compounds" shall include organic and inorganic compounds.

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

EDUCATION AND HUMANITIES CABINET
Department of Education
Office of District Support Services
(Amended After Hearing)

702 KAR 3:270. SEEK funding formula.

RELATES TO: KRS 156.035, 156.070, 157.360, 157.410, 157.440, 157.620, 160.476, 160.477
STATUTORY AUTHORITY: KRS 156.070, 156.160
NECESSITY AND FUNCTION: KRS 156.035 and 156.070 set forth the State Board for Elementary and Secondary Education's plenary powers over the management and control of local school districts and disbursement of state appropriations. KRS 156.160 gives the State Board for Elementary and Secondary Education the authority to promulgate administrative regulations deemed necessary for the preparation of budgets and salary schedules for the school districts under its management and control. This administrative regulation is necessary to provide guidelines for the calculations to distribute the funds to school districts through **the program to** Support Education Excellence in Kentucky (SEEK).

Section 1. Definitions. (1) "At-risk **student** amount" means fifteen (15) percent of the per pupil guaranteed base funding provided pursuant to KRS 157.360(1) times the average of the highest number of approved applications for free meals in each of the eight (8) months (September through May excluding December) of the prior fiscal year and times the number of state agency children served pursuant to KRS 158.135.
(2) "Calculated base SEEK funding" means the guaranteed base funding provided in the biennial budget pursuant to KRS 157.360(1) plus the add-on components of the SEEK calculation including at-risk, home and hospital, exceptional children and transportation per KRS 157.360(2).
(3) "Collection rate" means the tax receipts collected for the prior year divided by the maximum revenue collectible. The maximum revenue collectible shall be the prior year's permissive tax revenue plus the levied rates per $100 of assessed value for real and tangible property and motor vehicles times the prior year assessment of real and tangible property and motor vehicles.
(4) "Debt service outstanding" means the amount of debt service in excess of eighty (80) percent of the allotment for the capital outlay component of SEEK plus the local revenue generated by the five (5) cent equivalent tax levy required for the Facility Support Program of Kentucky participation per KRS 157.620(1)(a).
(5) "Exceptional child amount" means the December 1 exceptional child count of the preceding fiscal year by exceptionality weighted as follows:
(a) 2.35 times the per pupil base funding per KRS 157.360(1) for students with severe disabilities;
(b) 1.17 times the per pupil base funding per KRS 157.360(1) for students with moderate disabilities; and
(c) .24 times the per pupil base funding per KRS 157.360(1) for students with communications disabilities.
(6) "Growth" means the percent change in the second month average daily attendance times the prior year adjusted average daily attendance.
(7) "Home and hospital **instruction** amount" means the current year**'s** first semester home and hospital average daily attendance plus the prior year**'s** second semester home and hospital average daily attendance, times the per pupil base funding per KRS 157.360(1), less the allotment for capital outlay **as set forth in the Biennial Budget**.
(8) "Levied equivalent tax rate" means estimated permissive tax revenue plus the current year's levied real estate tax rate, tangible tax rate and motor vehicle tax rate per $100 of assessed value times the current year's assessment of real estate, tangible property and motor

vehicles times the prior year's collection rate divided by the total current year's property and motor vehicle assessment.

(9) "Release time" means regularly scheduled time missed by students **with school district approval**.

(10) "Shared time average daily attendance" means the average attendance for nondistrict students who attend public schools on a part-time basis **in another district**.

(11) "State equalization amount" means 150 percent of the statewide average per pupil property assessment as provided in the biennial budget.

(12) "Tier I revenue" means revenue produced by a school district tax levy which, when equalized by state funds with the state equalization amount per KRS 157.440(1)(a), generates up to the maximum revenue allowable per KRS 157.440(1)(a), fifteen (15) percent above the calculated base SEEK funding.

(13) "Tier II revenue" means revenue produced by a school district tax levy above the Tier I tax levy which generates no more than the maximum revenue allowable per KRS 157.440(2), thirty (30) percent above the combined calculated base SEEK funding and Tier I revenue.

(14) "Transportation funding" means prior fiscal year calculated transportation costs for students in grades primary through twelve (12) transported by school districts as calculated by the Division of Pupil Transportation, Department of Education, pursuant to KRS 157.370 and adjusted by current year second month growth in transported students.

(15) "Vocational educational deduct" means a deduct factor to be applied against the per pupil guaranteed base funding in those instances where a student spends a portion of the school day at a state-operated vocational center.

Section 2. SEEK Calculation Formula. (1) Required data for the SEEK calculation shall include:

(a) Property assessments from the Department of Property Taxation, Revenue Cabinet provided per KRS 160.470(5);

(b) Tax rates levied by school districts;

(c) Equivalent tax rates based on tax levies;

(d) Home and hospital average daily attendance reported by the Pupil Attendance Branch, Division of Finance, Department of Education;

(e) Prior year adjusted average daily attendance reported by the Pupil Attendance Branch, Division of Finance, Department of Education (in accordance with subsection (3) calculation below);

(f) The growth factor report from the Pupil Attendance Branch, Division of Finance, Department of Education;

(g) Transportation funding reported by the Division of Pupil Transportation, Department of Education;

(h) The number of at-risk students reported by the Division of School and Community Nutrition, Department of Education;

(i) The number of exceptional students in each disability category as reported by the Division of Exceptional Children Services, Department of Education;

(j) Vocational education average daily attendance reported by the Pupil Attendance Branch, Division of Finance, Department of Education; and

(k) The state equalization amount.

(2) Assumptions used in the SEEK calculation shall include:

(a) Equivalent tax rates (ETR) shall be the lower of the ETR levied in the prior odd numbered year per KRS 157.440(1)(a) and the current year;

(b) Adjusted average daily attendance (AADA) plus growth shall be the prior year AADA plus the second month's percent attendance growth times prior year AADA; and

(c) **Percentage reduction in the allotments** **[~~Pro rata adjustment~~]** may be made to at-risk **student**, exceptional child, and home and hospital **instruction** amounts and to the state portion of Tier I funding and to transportation funding due to appropriations in the biennial budget.

(3) AADA shall be calculated for students in grades primary through twelve (12) as follows:

(a) Aggregate days attendance as reported by local school districts:

1. Divided by the number of school days taught as reported by local school districts;

2. Equals average daily attendance (ADA);

(b) ADA:

1. Plus shared time ADA as reported by local school districts;

2. Minus ADA for noncontract, nonresident students as reported by local school districts;

3. Minus release time as reported by local school districts;

4. Minus one-half (1/2) of the total aggregate kindergarten days attendance as reported by local school districts divided by the number of days taught;

5. Minus ADA for overage students as reported by local school districts;

6. Equals adjusted average daily attendance.

(4) The SEEK calculation shall be determined as follows:

(a) Per pupil guaranteed base funding per KRS 157.360(1):

1. Times prior year AADA plus growth;

2. Plus at-risk **student** amount;

3. Plus exceptional child amount;

4. Plus home and hospital **instruction** amount;

5. Plus transportation funding;

6. Equals calculated base SEEK funding;

(b) Calculated base SEEK funding:

1. Minus local effort required per KRS 160.470(12)(a);

2. Equals total state SEEK base;

3. Plus total state Tier I funding (in accordance with subsection (6) of this section calculation below);

4. Minus vocational education deduct amount (in accordance with subsection (7) of this section calculation below);

5. Plus hold harmless provision if provided in the biennial budget;

6. Plus prior year adjustments (if any);

7. Minus pro rata adjustments per KRS 157.430 (if any);

8. Equals state SEEK funding.

(5) The formula for the maximum Tier I equivalent tax rate allowable per KRS 157.440(1)(a) shall be as follows:

(a) Guaranteed base funding per KRS 157.360(1):

1. Plus calculated at-risk, exceptional child, home and hospital and transportation amounts:

2. Times fifteen (15) percent;

3. Divided by the greater of the state equalization amount and the local district per pupil assessment.

(6) State Tier I and Tier II funding formulas.

(a) For local districts which have levied an equivalent tax rate at or above the maximum Tier I equivalent tax rate, the state Tier I funding formula shall be as follows:

1. Total calculated base SEEK funding per KRS 157.360;

a. Times maximum Tier I participation fifteen (15) percent per KRS 157.440(1)(a);

b. Equals total Tier I revenue;

c. Divided by prior year AADA plus growth;

d. Equals total per pupil Tier I revenue;

2. Total per pupil Tier I revenue:

a. Minus per pupil local portion Tier I (school district's per pupil assessment divided by the state equalization amount times total per pupil Tier I revenue);

b. Equals state portion per pupil Tier I funding;

c. Times prior year AADA plus growth;

d. Minus pro rata adjustments due to appropriation in the biennial budget;

e. Equals total state Tier I funding.

(b) For local districts which have not levied at or above the maximum Tier I equivalent tax rate per KRS 157.440(1)(a), the state

Tier I funding formula shall be as follows:

1. Levied equivalent tax rate:

a. Minus required minimum thirty (30) cents equivalent tax rate per KRS 160.470(12)(a) and five (5) cents levy per KRS 157.620(1)(a);

b. Equals levied Tier I equivalent tax rate;

c. Times state equalization amount;

d. Equals per pupil total Tier I revenue;

2. Per pupil total Tier I revenue:

a. Minus per pupil local portion Tier I (school district's per pupil assessment divided by the state equalization amount times total per pupil Tier I revenue);

b. Equals state portion per pupil Tier I funding;

c. Times prior year AADA plus growth;

d. Minus pro rata adjustments due to appropriation in the biennial budget;

e. Equals total state Tier I funding.

(c) The Tier II calculation formula shall be as follows: Levied equivalent tax rate:

1. Minus required minimum thirty (30) cents equivalent tax rate per KRS 160.470(12)(a), the five (5) cents levy per KRS 157.620(1)(a), and the maximum Tier I equivalent tax rate;

2. Times total district assessment of property and motor vehicles;

3. Equals Tier II local revenue (not subject to state equalization).

(7) The vocational education **(voc ed)** deduct formula shall be as follows: Total state SEEK base:

(a) Divided by calculated base SEEK funding;

(b) Times per pupil guaranteed base funding per KRS 157.360(1);

(c) Times voc-ed deduct percentage as provided for in the biennial budget;

(d) Equals per pupil deduct amount;

(e) Times voc-ed ADA;

(f) Equals total voc-ed deduct amount.

Section 3. Facilities Support Program of Kentucky (FSPK) Calculation. (1) Data required for the FSPK calculation formula shall include:

(a) Property assessments from the Department of Property Taxation, Revenue Cabinet, per KRS 160.470(5);

(b) Equivalent tax rates based on tax levies from school districts;

(c) Prior year AADA as reported by the Pupil Attendance Branch, Division of Finance, Department of Education;

(d) Total annual debt service for school building revenue bonds; and

(e) State equalization amount.

(2) Assumptions used in the FSPK calculation shall include:

(a) No school district shall receive state equalization funds until the full five (5) cent equivalent tax required for participation has been levied;

(b) School districts which have levied a five (5) cent equivalent tax for building purposes per KRS 157.620(1)(a) shall qualify to receive state equalization funding when the district's outstanding debt service as of October 1 of each odd-numbered year is within $10,000 of the required amount; and

(c) A school district's eligibility for participation in the FSPK program shall be based on prior year AADA. State equalization funds shall be calculated based on prior year AADA plus growth.

(3) The FSPK eligibility calculation shall be as follows: Amount generated by a five (5) cent equivalent tax levy per KRS 157.620(1)(a):

(a) Equals total revenue available for debt service;

(b) Minus total current year debt service (from school district's outstanding school revenue bond issues);

(c) Equals debt service needed for equalization (positive amounts indicate ineligibility for equalization).

(4) Once a school district has been determined eligible for state FSPK funds, the state equalization calculation shall be as follows:

Maximum eligibility (state equalization amount times .0005):

(a) Minus local effort (per pupil assessment times .0005);

(b) Equals per pupil state equalization;

(c) Times prior year AADA plus growth;

(d) Times pro rata adjustments due to appropriation in the biennial budget;

(e) Equals prorated state FSPK amount.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at 3 p.m.

EDUCATION, ARTS, AND HUMANITIES CABINET
Department of Education
Bureau of Learning Results Services
(Amended After Hearing)

703 KAR 4:060. Academic expectations.

RELATES TO: KRS 158.645, 158.6451, 158.6453, 158.6455
STATUTORY AUTHORITY: KRS 156.070, 158.6455
NECESSITY AND FUNCTION: KRS 158.6455 gives the State Board for Elementary and Secondary Education the authority to promulgate administrative regulations to establish a system of determining successful schools and a system of rewards and sanctions for certified staff in schools and school districts. Successful schools must be defined in terms of student achievement of the goals set forth in KRS 158.6451, and with reference to the statewide assessment program set forth in KRS 158.6453. This administrative regulation clarifies the academic expectations which may be addressed by the statewide assessment program administered pursuant to KRS 158.6453.

Section 1. The "Academic Expectations", dated **July** ~~[May]~~, 1994, for the statewide assessment program are hereby adopted and incorporated by reference, and may be inspected and copied at the Department of Education, Office of Curriculum, Assessment, and Accountability, 19th Floor, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky, Monday through Friday, 8 a.m. through 4:30 p.m.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at 3 p.m.

PROPOSED AMENDMENTS RECEIVED THROUGH NOON, JULY 15, 1994

HIGHER EDUCATION ASSISTANCE AUTHORITY
(Proposed Amendment)

11 KAR 4:030. Student appeals process.

RELATES TO: KRS 164.748(14)
STATUTORY AUTHORITY: KRS 164.748(4)
NECESSITY AND FUNCTION: The Kentucky Higher Education Assistance Authority administers programs to provide financial assistance to students to attend postsecondary institutions. This administrative regulation sets forth the procedures by which students may request a review of decisions made by the authority which affect their rights, obligations and benefits or their eligibility to participate in authority administered programs. This amendment is necessary to specify certain hearing procedures.

Section 1. (1) Scope of administrative regulation. The procedures prescribed in this administrative regulation shall not apply to a determination of default or payment of an insurance claim by the authority with respect to an insured student loan, the setoff of an individual's tax refund for payment of a debt owed to the authority, or the issuance of an administrative order of wage garnishment by the authority for recovery of an insured student loan, except to the extent specified by administrative regulations applicable to those actions.

(2) Written Inquiry. A recipient of financial assistance benefits from the authority (including an individual indebted on a loan made or insured by the authority) or an applicant for financial assistance benefits from the authority [~~student~~] may, upon any adverse action by the authority, submit a written request to the authority at Frankfort, Kentucky, within sixty (60) days following notification of the adverse action [~~(or any delegated officer of the authority) at Frankfort, Kentucky~~], for a concise statement of the reason(s) for such action. The authority or any of its delegated officers, within ten (10) working days of receipt of the inquiry [~~said notice,~~] shall respond in writing to the [~~student~~] inquiry and notify the recipient of financial assistance or applicant [~~student~~] therein of his [~~the~~] right to appeal the adverse action.

Section 2. Request for Redetermination by Executive Director. (1) Grounds. In the event the recipient of financial assistance or applicant [~~student~~] disputes the factual accuracy of information contained in the authority's response, he [~~the student~~] may submit certified documentation and such other information as the authority may require, and request a redetermination. In the event that the recipient of financial assistance or applicant [~~student~~] disputes the application of rules and[~~/or~~] regulations [~~and/~~]or discretionary determinations by the authority to particular facts, the recipient of financial assistance or applicant [~~student~~] may request a review of the decision by the executive director. If the findings warrant, the executive director may uphold the findings of the officer or may find in favor of the recipient of financial assistance or applicant [~~student~~].

(2) Time frame. The [~~Said~~] review by the executive director shall be requested within sixty (60) days of notification of the reason(s) for any adverse action.

(3) Documentation. Prior to a determination by the executive director, the recipient of financial assistance or applicant [~~student~~] shall submit any and all documentation and information as he [~~the student~~] reasonably believes supports his[~~/her~~] position, and shall submit all [~~such~~] information and documentation that [~~as~~] the authority may reasonably require. The [~~Said~~] documentation and information shall be deemed conclusive evidence as to all matters in dispute, and shall be binding against all parties.

(4) [~~Section 2.~~] Notice[s]. The recipient of financial assistance or applicant [~~student~~] shall be provided with notice of the decision of the executive director, which shall [~~be issued in the name of the executive director and shall~~] inform the recipient of financial assistance or applicant [~~student~~] of the right to request a hearing within ten (10) days [~~appeal to the authority for a hearing~~] on all issues contained therein. [~~All requests for hearings may be effected in the same manner as prescribed by law for the service of civil process or by the student forwarding same to the authority by U.S. registered mail or certified mail, postage prepaid, to the authority at Frankfort, Kentucky. At such a hearing the student will be entitled to be represented by counsel chosen by the student at student expense. The hearing may be conducted by a hearing officer or a hearing committee appointed by the authority. All members of the authority and all persons appointed by the authority as hearing officer or members of a hearing committee are authorized to administer oaths, issue subpoenas for attendance of witness and for the production of related records and documentation, and to cite for contempt before the court having jurisdiction in the county in which the hearing is held for disobedience of its process or for improper conduct. The student, or student counsel or both will be entitled to introduce testimony by witnesses or, if the authority so permits, by deposition(s). Hearing officers and hearing committees will prepare recommendations and submit same to a committee of the board.~~]

Section 3. Request for Hearing. (1) In the event of an adverse decision by the executive director, the recipient of financial assistance or applicant may request a hearing. The request for a hearing shall be served on the authority within ten (10) days after receipt of notice of the executive director's adverse decision. Service of the notice of the executive director's decision shall be conclusively presumed to be effected five (5) days after mailing of the notice by the authority, if sent by U.S. first class mail, unless the notice is returned to the authority undelivered by the postal service. The date of service of the notice may otherwise be evidenced by affidavit of an individual executing personal service or a postal delivery receipt.

(2) Upon receipt of a timely request for a hearing, the authority shall arrange for a hearing on the record before a hearing officer appointed by the authority. The hearing officer shall establish a schedule for any discovery, prehearing conferences, and the time and place of the hearing. The place of the hearing shall be in Franklin County, unless another location is agreed on by the parties. The hearing may be conducted by telephone or upon written submissions if the recipient of financial assistance or applicant requests. An in-person or telephonic hearing shall be mechanically, electronically, or stenographically recorded.

(3) Not less than thirty (30) days prior to the scheduled in-person or telephonic hearing, the parties shall exchange and submit to the hearing officer a list of the names, addresses, and phone numbers of any witnesses expected to testify at the hearing and a brief summary of the testimony of each witness that the party expects to introduce into evidence. Upon the request of either party, at any time, the hearing officer may issue a subpoena for the production of documents or the attendance of witnesses. Either party may depose witnesses, upon reasonable notice to the witness and the opposing party, without leave of the hearing officer, except that attendance of witnesses that are not parties to the hearing may be compelled by subpoena issued by the hearing officer, either party may, without leave of the hearing officer, submit interrogatories and request for admissions to the opposing party. The party receiving the interrogatories or request for admissions shall respond within twenty (20) days, or upon such shorter or longer time as the hearing officer may allow. Each matter of which an admission is requested shall be deemed admitted unless, within fifteen (15) days after service of the request, or upon such

shorter or longer time as the hearing officer may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter.

(4) At the hearing, the parties shall have the right to be heard by the hearing officer, be represented by counsel, present evidence, cross-examine witnesses, and make both opening and closing statements.

(5) The hearing officer shall convene the in-person or telephonic hearing, identify the parties to the action and the persons participating, solicit from the parties and dispose of any objections or motions, accept into evidence any documentary evidence not objected to, solicit opening statement, and proceed with the taking of proof. The taking of proof shall commence first with the presentation of evidence by the recipient of financial assistance or applicant and then by the authority, with opportunities for cross-examination, rebuttal, and closing statements.

(6) The hearing officer shall not admit evidence that is excludable as a violation of an individual's constitutional or statutory rights or privilege recognized in the courts of the Commonwealth. However, statutes or judicial rules otherwise pertaining to the admission of evidence in a judicial proceeding shall not apply to a hearing under this administrative regulation, and the hearing officer may receive any evidence deemed reliable and relevant, including evidence that would be considered hearsay if presented in court, except that hearsay evidence shall not be sufficient in itself to support the hearing officer's decision. The hearing officer may exclude any evidence deemed unreliable, irrelevant, incompetent, immaterial, or unduly repetitious. The hearing officer may allow up to fifteen (15) working days following the hearing to submit additional briefs or written arguments and proposed findings of fact and conclusions of law.

(7) The hearing officer shall render the decision in writing, and shall set forth findings of fact and conclusions of law. The hearing officer shall issue the decision within thirty (30) working days of the date of the hearing.

(8) An adverse decision by the hearing officer shall be appealed to the board of directors of the authority not later than twenty (20) days after the date of the hearing officer's decision. If there is no appeal to the board within twenty (20) days, the findings of the hearing officer shall be conclusive and binding upon the parties.

Section 4. Appeal to Board. If a party timely appeals the hearing officer's decision to the board, the board shall review the hearing officer's decision and the record of the hearing. The board shall adopt the hearing officer's decision unless it is clearly unsupported by the evidence presented at the hearing and the applicable law. The board shall only consider the record adduced at the hearing, including all documents, briefs, and transcripts of the hearing, as well as the evidence presented at the hearing. The board may affirm, modify, or reverse the hearing officer's decision by a written statement of the reasons for the affirmance, modification, or reversal.

Section 5. Appeal to Court. If the party adversely affected by the decision of the board of directors is entitled as a matter of law to judicial review of the decision, then absent an appeal of the board's decision to a court of competent jurisdiction within twenty (20) days after the issuance of the decision by the board of directors, the board's determination shall be final and binding upon the parties. [~~Decisions and Appeals. In the absence of an appeal to the board, decisions made as a result of the authority hearing shall be binding upon the authority and the student, twenty (20) days after written notice thereof is given as provided.~~]

WAYNE STRATTON, Chairman

APPROVED BY AGENCY: June 28, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Tuesday, August 23, 1994 at 9 a.m. at 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky. Individuals interested in attending this hearing shall notify this agency in writing by Thursday, August 18, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Mr. Paul P. Borden, Executive Director, Kentucky Higher Education Assistance Authority, 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky 40601, (502) 564-7990.

REGULATORY IMPACT ANALYSIS

Agency Contact: Paul P. Borden

(1) Type and number of entities affected: In FY 93 more than 129,950 applications for loans, grants and/or scholarships were received by the Kentucky Higher Education Assistance Authority and more than 65,560 students and/or teachers received some sort of financial aid. Every one of these filers was potentially eligible to request an administrative hearing, if adversely affected by a KHEAA decision. In fact, however, in the last two years, only two hearings were requested, both by recipients of teacher scholarships, and one of these was settled prior to hearing date.

(a) Direct and indirect costs or savings to those affected:

1. First year: There will be minimal cost to the agency. The cost of the hearing (approximately $200 per case) will be absorbed by KHEAA.

2. Continuing costs or savings: See #1 above.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: This amendment reflects a recent change in legislation authorizing hearing officers appointed by KHEAA to issue subpoenas for attendance of witnesses and production of documents. The amendment would also allow either party to serve on the opposing party requests for admissions and interrogatories. While it is anticipated that these procedures would be used only on rare occasions to clarify issues and expedite the hearing process, these changes provide the potential for additional paperwork requirements for both the agency and the public.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There will be minimal savings to the public. The cost of the hearing (approximately $200 per case) will be absorbed by KHEAA.

2. Continuing costs or savings: Same as (2)(a)(1) above.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: This amendment reflects a recent change in legislation authorizing hearing officers appointed by KHEAA to issue subpoenas for attendance of witnesses and production of documents. The amendment would also allow either party to serve on the opposing party requests for admissions and interrogatories. While it is anticipated that these procedures would be used only on rare occasions to clarify issues and expedite the hearing process, these changes provide the potential for additional paperwork requirements for both the agency and the public.

(3) Assessment of anticipated effect on state and local revenues: The amendment will not have any significant impact of increasing or decreasing state or local revenue. The amendment is intended to set out procedures and time frames for conducting an administrative hearing in the event that a recipient of financial aid or an applicant for financial aid is adversely affected by a KHEAA decision.

(4) Assessment of alternative methods; reasons why alternatives

permit requirements.

(c) Transfers. The permit is not transferable to any person except after notice to the cabinet [~~director~~]. The cabinet [~~director~~] may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under KRS Chapter 224.

(d) Monitoring reports. Monitoring results shall be reported at the intervals specified in the permit. Monitoring results shall be reported as follows:

1. Monitoring results shall [~~must~~] be reported on a Discharge Monitoring Report (DMR).

2. If the permittee monitors any pollutant more frequently than required by the permit, using test procedures approved under 40 CFR Part 136 or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data [~~date~~] submitted in the DMR.

3. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the cabinet [~~director~~] in the permit.

(e) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than fourteen (14) days following each schedule date.

(f) Twenty-four (24) hour reporting. The permittee shall follow the provisions of 401 KAR 5:015 and shall orally report any noncompliance which may endanger health or the environment, within twenty-four (24) hours from the time the permittee becomes aware of the circumstances. This report shall be in addition to and not in lieu of any other reporting requirement applicable to the noncompliance. A written submission shall also be provided within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance. The cabinet [~~director~~] may waive the written report on a case-by-case basis if the oral report has been received within twenty-four (24) hours. The following shall be included as events which shall [~~must~~] be reported within twenty-four (24) hours:

1. Any unanticipated bypass which exceeds any effluent limitation in the permit, as indicated in subsection (13) of this section.

2. Any upset which exceeds any effluent limitation in the permit.

3. Violation of a maximum daily discharge limitation for any of the pollutants listed by the cabinet [~~director~~] in the permit to be reported within twenty-four (24) hours, as indicated in Section 2(7) of this administrative regulation.

(g) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (d), (e), and (f) of this subsection, when [~~at the time~~] monitoring reports are submitted. The reports shall contain the information listed in paragraph (f) of this subsection.

(h) Other information. Where the permittee becomes aware that it failed to submit any relevant fact in a permit application, or submitted incorrect information in a permit application or in any report to the cabinet [~~director~~], it shall promptly submit these [~~such~~] facts or information.

(13) Occurrence of a bypass.

[~~(a) Definitions.~~

~~1. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.~~

~~2. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.~~]

(a) [~~(b)~~] Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. This type of bypass is not subject to the provisions of paragraphs (b) and (c) [~~and (d)~~] of this subsection.

(b) [~~(c)~~] Notice.

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of the bypass. Compliance with this requirement constitutes compliance with 401 KAR 5:015, Section 1.

2. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in [~~paragraph (f) of~~] subsection (12)(f) of this section, twenty-four (24) hour notice. Compliance with this requirement constitutes compliance with 401 KAR 5:015, Section 4.

(c) [~~(d)~~] Prohibition of a bypass.

1. Bypassing is prohibited, and the cabinet [~~director~~] may take enforcement action against a permittee for bypass, unless:

a. The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and [~~.~~]

c. The permittee submitted notices as required under paragraph (b) [~~(c)~~] of this subsection.

2. The cabinet [~~director~~] may approve an anticipated bypass, after considering its adverse effects, if the cabinet [~~director~~] determines that it will meet the three (3) conditions listed in subparagraph 1a, b, and c of this paragraph.

(14) Occurrence of an upset.

[~~(a) Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.~~]

(a) [~~(b)~~] Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with [~~such~~] technology-based permit effluent limitations if the requirements of paragraph (b) [~~(c)~~] of this subsection are met.

(b) [~~(c)~~] Conditions necessary for a demonstration of an upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate through properly signed, contemporaneous operating logs, or [~~of~~] other relevant evidence that:

1. An upset occurred and that the permittee can identify the causes [~~(s)~~] of the upset;

2. The permitted facility was at the time being properly operated;

3. The permittee submitted notice of the upset as required in [~~paragraph (f) of~~] subsection (12)(f) of this section; and

4. The permittee complied with any remedial measures required under subsection (4) of this section.

(c) [~~(d)~~] Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

(15) Additional conditions applicable to specified categories of KPDES permits. The following conditions, in addition to others set forth in this administrative regulation, apply to all KPDES permits within the categories specified below:

(a) Existing manufacturing, commercial, mining, and silvicultural dischargers. In addition to the reporting requirements under subsections (12), (13), and (14) of this section, any existing manufacturing,

commercial, mining, and silvicultural discharger shall notify the cabinet [director] as soon as it knows or has reason to know [believe]:

1. That any activity has occurred or will occur which would result in the discharge on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

a. 100 micrograms per liter (100 ug/l [mg/l]);

b. 200 micrograms per liter (200 ug/l [mg/l]) for acrolein and acrylonitrile; 500 micrograms per liter (500 ug/l [mg/l]) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one (1) milligram per liter (1 mg/1) for antimony;

c. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 401 KAR 5:060, Section 2 [4](7);

d. The level established by the cabinet [director] in accordance with Section 2(6)[2] of this administrative regulation.

2. That any activity has occurred or will occur which would result in any discharge, on a nonroutine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

a. 500 micrograms per liter (500 ug/l);

b. One (1) milligram per liter (1 mg/l) for antimony;

c. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 401 KAR 5:060, Section 2 [4](7); or

d. The level established by the cabinet [director] in accordance with Section 2(6) of this administrative regulation.

(b) POTWs.

1. POTWs shall provide adequate notice to the cabinet [director] of the following:

a. Any new introduction of pollutants into that POTW from an indirect discharger which would be subject to the KPDES administrative regulations if it were directly discharging those pollutants; or [and]

b. Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

2. For purposes of this paragraph, adequate notice shall include information on the quality and quantity of effluent introduced into the POTWs and any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

Section 2. Establishing Permit Conditions. For the purpose of this section, permit conditions include any statutory or regulatory requirement which takes effect prior to the final administrative disposition of a permit. An applicable requirement may be any requirement which takes effect prior to the modification or revocation or reissuance of a permit, to the extent allowed in 401 KAR 5:070, Section 6. New or reissued permits, and to the extent allowed under 401 KAR 5:070, Section 6 modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in this section. In addition to the conditions established under Section 1 of this administrative regulation each KPDES permit shall [will] include conditions meeting the following requirements as applicable.

(1) Technology-based effluent limitations and standards; new source performance standards; and pretreatment requirements and standards, as required by 40 CFR Chapter I, Subchapter N (Part 401 et seq.), adopted without change [are incorporated by reference as specified] in Section 4 of this administrative regulation, or case-by-case effluent limitations and standards and pretreatment requirements or based on a combination of those standards in accordance with 401 KAR 5:080, Section 1(2) shall [will] be included, as applicable.

(2) Other effluent limitations and standards of KRS Chapter 224 shall be included as applicable. If any applicable toxic effluent standard or prohibition, including any schedule of compliance specified in the [such] effluent standard or prohibition, is promulgated by EPA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the cabinet shall [director will] institute proceedings under these administrative regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition.

(3) Reopener clause. For any discharger within a primary industry category, as listed in [401 KAR 5:060,] Section 4(2) of this administrative regulation [10,] requirements under the KPDES administrative regulations shall [will] be incorporated as applicable, as follows:

(a) On or before June 30, 1981.

1. If applicable standards or limitations have not yet been promulgated, the permit shall [will] include a condition stating that if an applicable standard or limitation is promulgated by EPA and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit, the permit shall [will] be promptly modified or revoked and reissued to conform to that effluent standard or limitation.

2. If applicable standards or limitations have been promulgated or approved, the permit shall [will] include those standards or limitations.

(b) After June 30, 1981, any permit issued shall [will] include effluent limitations and a compliance schedule to meet the applicable requirements indicated in Section 1(1)(b) of this administrative regulation, whether or not applicable effluent limitations guidelines have been promulgated or approved by EPA. These permits need not incorporate the reopener clause required by paragraph (a) of this subsection.

(c) The cabinet shall [director will] promptly modify or revoke and reissue any permit containing the clause required under paragraph (a) of this subsection to incorporate an applicable EPA effluent standard or limitation which is promulgated or approved after the permit is issued if that effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit.

(4) Water quality standards and state requirements shall be included as applicable. Any requirements in addition to or more stringent than EPA's effluent limitations guidelines or standards shall [will] be included, when necessary to:

(a) Achieve water quality standards established under KRS Chapter 224 and administrative regulations promulgated pursuant thereto, including any narrative criteria contained in 401 KAR 5:031. [;]

1. Limitations shall control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the cabinet determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard, including narrative criteria for water quality.

2. When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a water quality standard, the cabinet shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing, when evaluating whole effluent toxicity, and where appropriate, the dilution of the effluent in the receiving water.

3. When the cabinet determines, using the procedures in subparagraph 2 of this paragraph, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a numeric criteria within a water quality standard for an individual pollutant, the permit shall contain effluent limits for that pollutant.

4. When the cabinet determines, using the procedures in subparagraph 2 of this paragraph, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit shall contain effluent limits for whole effluent toxicity.

5. Except as provided in this subparagraph, when the cabinet determines, using the procedures in subparagraph 2 of this para-

decision shall [~~will~~] be stated in the fact sheet for the draft permit for the treatment works.

(13) Grants. Any conditions imposed in grants made by the cabinet [~~director~~] to POTWs which are reasonably necessary for the achievement of federally issued effluent limitations shall [~~will~~] be required as applicable.

(14) Sewage sludge. Requirements shall [~~will~~] be imposed, as applicable, governing the disposal of sewage sludge from publicly owned treatment works, in accordance with 40 CFR Part 503 [~~401 KAR 47:050~~].

(15) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, the permit shall [~~will~~] be conditioned as applicable. A condition that the discharge shall comply with any applicable federal regulations promulgated by the secretary of the department in which the Coast Guard is operating which establish specifications for safe transportation, handling, carriage, and storage of pollutants shall be imposed if applicable.

(16) Navigation. Any conditions that the Secretary of the United States Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with 401 KAR 5:075, Section 9, shall [~~will~~] be included as applicable.

(17) Duration of permits shall be imposed, as set forth in 401 KAR 5:070, Section 1.

Section 3. Calculating KPDES Permit Conditions. The following provisions shall [~~will~~] be used to calculate terms and conditions of the KPDES permit.

(1) Outfalls and discharge points. All permit effluent limitations, standards, and prohibitions shall [~~will~~] be established for each outfall or discharge point of the permitted facility, except as otherwise provided: under Section 2(10) of this administrative regulation; with BMPs where limitations are infeasible; and under subsection (8) of this section, limitations on internal waste streams.

(2) Production-based limitations.

(a) In the case of POTWs, permit limitations, standards, or prohibitions shall [~~will~~] be calculated based on design flow.

(b)1. Except in the case of POTWs or as provided in subparagraph 2a(ii) of this paragraph, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

2.a.(i) The cabinet [~~director~~] may include a condition establishing alternate permit limitations, standards, or prohibitions based upon anticipated increased (not to exceed maximum production capability) or decreased production levels.

(ii) For the automotive manufacturing industry only, the cabinet [~~director~~] may establish a condition under subparagraph 2a(i) of this paragraph if the applicant satisfactorily demonstrates to the cabinet [~~director~~] at the time the application is submitted that its actual production, as indicated in subparagraph 2a(i) of this paragraph, is substantially below maximum production capability and that there is a reasonable potential for an increase above actual production during the duration of the permit.

b. If the cabinet [~~director~~] establishes permit conditions under subparagraph 2a(i) of this paragraph:

(i) The permit shall require the permittee to notify the cabinet [~~director~~] at least two (2) business days prior to a month in which the permittee expects to operate at a level higher than the lowest production level identified in the permit. The notice shall specify the anticipated level and the period during which the permittee expects to operate at the alternate level. If the notice covers more than one (1) month, the notice shall specify the reasons for the anticipated production level increase. New notice of discharge at alternate levels is required to cover a period or production level not covered by prior notice or, if during two (2) consecutive months otherwise covered by a notice, the production level at the permitted facility does not in fact meet the higher level designated in the notice.

(ii) The permittee shall comply with the limitations, standards, or prohibitions that correspond to the lowest level of production specified in the permit, unless the permittee has notified the cabinet [~~director~~] under subparagraph 2b of this paragraph, then [~~in which case~~] the permittee shall comply with the lower of the actual level of production during each month or the level specified in the notice.

(iii) The permittee shall submit with the DMR the level of production that actually occurred during each month and the limitations, standards, or prohibitions applicable to that level of production.

(3) Metals. All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as described [~~defined~~] in 40 CFR Part 136 unless:

(a) An applicable effluent standard or limitation has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form; [~~or~~]

(b) In establishing permit limitations on a case-by-case basis under 401 KAR 5:080, Section 1(2), it is necessary to express the limitation on the metal in the dissolved or valent total form to carry out the provisions of KRS 224.16-050; or

(c) All approved analytical methods for the metal inherently measure only its dissolved form (e.g., hexavalent chromium).

(4) Continuous discharges. For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, unless impracticable shall [~~will~~] be stated as:

(a) Maximum daily and average monthly discharge limitations for all dischargers other than publicly owned treatment works; and

(b) Average weekly and average monthly discharge limitations for POTWs.

(5) Noncontinuous discharges. Discharges which are not continuous, as defined in 401 KAR 5:001 [~~5:050, Section 1(7)~~], shall be particularly described and limited, considering the following factors, as appropriate:

(a) Frequency: for example, a batch discharge shall not occur more than once every three (3) weeks;

(b) Total mass: for example, not to exceed 100 kilograms of zinc and 200 kilograms of chromium per batch discharge;

(c) Maximum rate of discharge of pollutants during the discharge: for example, not to exceed two (2) kilograms of zinc per minute; and

(d) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure: for example, shall not contain at any time more than 0.1 mg/l zinc or more than 250 grams (0.25 kilogram) of zinc in any discharge.

(6) Mass limitations.

(a) All pollutant limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

1. For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;

2. When applicable standards and limitations are expressed in terms of other units of measurement; or

3. If in establishing permit limitations on a case-by-case basis under 401 KAR 5:080, Section 1, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation, for example, discharges of TSS from certain mining operations, and permit conditions ensure that dilution will not be used as a substitute for treatment.

(b) Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall [~~will~~] require the permittee to comply with both limitations.

(7) Pollutants in intake water.

(a) Upon request of the discharger, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the discharger's intake water if:

1. The applicable effluent limitations and standards contained in 40 CFR Chapter I, Subchapter N, Part 401 et seq., specifically provide that they may be applied on a net basis; or

2. The discharger demonstrates that the control system it proposes or uses to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.

(b) Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) shall not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere.

(c) Credit shall be granted only to the extent necessary to meet the applicable limitations or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.

(d) Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The cabinet [~~director~~] may waive this requirement if the cabinet [~~director~~] finds that no environmental degradation will result.

(e) This subsection shall [~~of this regulation does~~] not apply to the discharge of raw water clarifier sludge generated from the treatment of intake water.

(8) Internal waste streams.

(a) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by Section 2(8) of this administrative regulation shall also be applied to the internal waste streams.

(b) Limits on internal waste streams shall [~~will~~] be imposed only when the fact sheet under 401 KAR 5:075, Section 4, sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible, for example, under ten (10) meters of water, the wastes at the point of discharge are so diluted as to make monitoring impracticable, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

(9) Disposal of pollutants into wells, into POTWs, or by land application. Permit limitations and standards shall be calculated as provided in 401 KAR 5:055, Section 6.

(10) Secondary treatment information. Permit conditions that involve secondary treatment shall [will] be written as provided in 401 KAR 5:045.

Section 4. Federal Regulations Adopted Without Change. The following federal regulations govern the subject matter of this administrative regulation and are hereby adopted without change. The federal regulations are published by the Office of the Federal Register, National Archives and Government Services, General Services Administration, and are available for inspection and copying, subject to copyright laws, during normal business hours of 8 a.m. to 4:30 p.m., excluding state holidays, at the Division of Water, 14 Reilly Road, Frankfort, Kentucky. Copies are also available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(1) Toxic Pollutant Effluent Standards, 40 CFR Part 129, revised as of July 1, 1991;

(2) Test Procedures for the Analysis of Pollutants, 40 CFR Part 136, revised as of September 11, 1992;

(3) Federal Effluent Limitations and Standards and New Source Performance Standards. [~~Incorporations. (1)~~] 40 CFR Chapter I, Subchapter N, Parts 401 et seq., revised as of July 1, 1993; and

(4) Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503, revised as of July 1993. [~~1986, as published by the Office of the Federal Register, National Archives and Register Services, General Services Administration and available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, is hereby incorporated by reference.~~

~~(2) Federal Registers incorporated. In addition to subsection (1) of this section, also incorporated by reference are additions, amendments and corrections to this codification, as published in the following Federal Registers:~~

~~Industry~~	~~40 CFR Part~~	~~Federal Register~~	~~Date~~
~~Aluminum Forming~~	~~467~~	~~48 FR 49126~~	~~10-24-83~~
		~~corrected by~~	
		~~49 FR 11629~~	~~03-27-84~~
~~Battery Manufacturing~~	~~461~~	~~49 FR 9108~~	~~03-09-84~~
		~~corrected by~~	
		~~49 FR 13879~~	~~04-09-84~~
		~~corrected by~~	
		~~49 FR 27946~~	~~07-09-84~~
~~Coal mining~~	~~434~~	~~47 FR 45382~~	~~10-13-82~~
		~~corrected by~~	
		~~48 FR 50321~~	~~11-01-83~~
		~~amended by~~	
		~~50 FR 41296~~	~~10-09-85~~
~~Coil coating (Phase I)~~	~~465~~	~~47 FR 54232~~	~~12-01-82~~
		~~amended by~~	
		~~48 FR 31403~~	~~07-08-83~~
		~~amended by~~	
		~~48 FR 41409~~	~~09-15-83~~
		~~corrected by~~	
		~~49 FR 33648~~	~~08-24-84~~
~~(Phase II, Can making)~~	~~465~~	~~48 FR 52380~~	~~11-17-83~~
		~~amended by~~	
		~~48 FR 31403~~	~~07-08-83~~
		~~corrected by~~	
		~~49 FR 14104~~	~~04-10-84~~
~~Copper Forming~~	~~468~~	~~48 FR 36942~~	~~08-15-83~~
		~~amended by~~	
		~~48 FR 41409~~	~~09-15-83~~
		~~amended by~~	
		~~50 FR 34242~~	~~08-23-85~~
		~~amended by~~	
		~~51 FR 7568~~	~~03-05-86~~
~~Electrical/Electronic Components (Phase 1)~~	~~469~~	~~48 FR 15382~~	~~04-08-83~~
		~~amended by~~	
		~~49 FR 5921~~	~~02-16-84~~
~~(Phase II)~~	~~469~~	~~48 FR 55690~~	~~12-14-83~~
		~~corrected by~~	
		~~49 FR 1056~~	~~01-09-84~~
~~Electroplating (Pretreatment)~~	~~413~~	~~44 FR 52590~~	~~09-07-79~~
		~~amended by~~	
		~~48 FR 32462~~	~~07-15-83~~
		~~corrected by~~	
		~~48 FR 41409~~	~~09-15-83~~
		~~48 FR 43680~~	~~09-26-83~~
		~~amended by~~	
~~Inorganic Chemicals (Phase 1)~~	~~415~~	~~47 FR 28260~~	~~06-29-82~~
		~~amended by~~	
		~~47 FR 55226~~	~~12-08-82~~
~~(Phase II)~~	~~415~~	~~49 FR 33402~~	~~08-22-84~~

graph, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable water quality standard, the permit shall contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the cabinet demonstrates in the fact sheet or statement of basis of the KPDES permit, using the procedures in subparagraph 2 of this paragraph, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative water quality standards.

6. If 401 KAR 5:031 does not specify a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable water quality standard, the cabinet shall establish effluent limits using one (1) or more or the following options:

a. Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the cabinet demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using administrative regulation interpreting the narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, September 1993, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

b. Establish effluent limits on a case-by-case basis, using water quality criteria listed in 401 KAR 5:031, supplemented where necessary by other relevant information; or

c. Establish effluent limitations on an indicator parameter for the pollutant of concern, if:

(i) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(ii) The fact sheet required by 401 KAR 5:075 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(iii) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(iv) The permit contains a reopener clause allowing the cabinet to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

7. When developing water quality-based effluent limits under this paragraph the cabinet shall ensure that:

a. The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

b. Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the cabinet;

(b) Attain or maintain a specified water quality through water quality related effluent limits established under Section 302 of CWA (33 USC Section 1312);

(c) Conform to applicable water quality requirements when the discharge affects a state other than Kentucky;

(d) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under federal or state law or administrative regulations in accordance with Section 301(b)(1)(c) of CWA (33 USC Section 1311(b)(1)c).

(e) Ensure consistency with the requirements of any Kentucky Water Quality Management Plan approved by EPA.

(f) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 401 KAR 5:080, Section 3.

(5) Toxic pollutants. Limitations established under subsections (1), (2) or (4) of this section, to control pollutants meeting the criteria listed in paragraph (a) of this subsection shall [~~will~~] be included in the permit, if applicable. Limitations shall [~~will~~] be established in accordance with paragraph (b) of this subsection. An explanation of the development of these limitations shall [~~will~~] be included in the fact sheet under 401 KAR 5:075, Section 4.

(a) Limitations shall [~~will~~] control all toxic pollutants which:

1. The cabinet [~~director~~] determines, based on information reported in a permit application under 401 KAR 5:060, Section 2(7) [~~4(7) or (11)~~], or in a notification under Section 1(15)(a) of this administrative regulation or on other information, are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under 401 KAR 5:080, Section 1(2)(c); or

2. The discharger does or may use or manufacture as an intermediate or final product or by-product.

(b) The requirement that the limitations control the pollutants meeting the criteria of paragraph (a) of this subsection shall [~~will~~] be satisfied by:

1. Limitations on those pollutants; or

2. Limitations on other pollutants which, in the judgment of the cabinet [~~director~~], will provide treatment of the pollutants under paragraph (a) of this subsection to the levels required by 401 KAR 5:080, Section 1(2)(c).

(6) Notification level. A "notification level" which exceeds the notification level of Section 1(15)(a)1a,b, or c of this administrative regulation, upon a petition from the permittee or on the cabinet's [~~director's~~] initiative shall [~~will~~] be incorporated as a permit condition, if applicable. This new notification level shall [~~may~~] not exceed the level which can be achieved by the technology-based treatment requirements appropriated to the permittee under 401 KAR 5:080, Section 1(2)(c).

(7) Twenty-four (24) hour reporting. Pollutants for which the permittee shall [~~will~~] report violations of maximum daily discharge limitations under Section 1 [~~3~~](12)(f) of this administrative regulation (twenty-four (24) hour reporting) shall be listed as such in the permit. This list shall [~~will~~] include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(8) Monitoring requirements. The permit shall [~~will~~] incorporate, as applicable in addition to Section 1(12) of this administrative regulation, the following monitoring requirements:

(a) To assure compliance with permit limitations, requirements to monitor:

1. The mass, or other measurement specified in the permit, for each pollutant limited in the permit;

2. The volume of effluent discharged from each outfall; and

3. Other measurements as appropriate; including pollutants in internal waste streams under Section 3(8) of this administrative regulation; frequency, rate of discharge, etc., for noncontinuous discharges under Section 3(5) of this administrative regulation; and pollutants subject to notification requirements under Section 1(15)(a) of this administrative regulation.

(b) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants having approved methods under the federal regulation, and according to a test procedure specified in the permit for pollutants with no approved methods.

(c) Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but not [~~in no case~~] less than once a year with the following exceptions:

1. Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the

discharge, but not less than once a year.

2. Requirements to report monitoring results for storm water discharges associated with industrial activity, other than those addressed in subparagraph 1 of this paragraph shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge shall require:

a. The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

b. The discharger to maintain for a period of three (3) years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of noncompliance;

c. The report and certification be signed in accordance with 401 KAR 5:060, Section 9; and

d. Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three (3) years by a professional engineer that the facility is in compliance with the permit, or alternative requirements.

3. Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under Section 1(12)(g) of this administrative regulation at least annually.

(9) Pretreatment program for POTWs. If applicable to the facility the permit shall [~~will~~] incorporate as a permit condition requirements for POTWs to:

(a) Identify, in terms of character and volume of pollutants, any significant indirect dischargers into the POTW subject to pretreatment standards under the KPDES administrative regulations.

(b) Submit a local program when required by and in accordance with 401 KAR 5:057 [~~5:055, Section 9~~], to assure compliance with pretreatment standards to the extent applicable in the KPDES administrative regulations. The local program shall [~~will~~] be incorporated into the permit as described in 401 KAR 5:057 [~~5:055, Section 9~~]. The program shall require all indirect dischargers to the POTW to comply with the applicable reporting requirements.

(10) Best management practices shall be included as a permit condition, as applicable, to control or abate the discharge of pollutants when:

(a) Applicable under KRS Chapter 224 and the KPDES administrative regulations for the control of toxic pollutants and hazardous substances from ancillary activities;

(b) Numeric effluent limitations are infeasible; or

(c) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of KRS Chapter 224.

(11) Reissued permits.

(a) The permit shall [~~will~~] include a condition concerning reissued permits, as applicable. When a permit is renewed or reissued, interim limitations, standards or conditions which are at least as stringent as any final limitations, standards, or conditions in the previous permit shall [~~will~~] be incorporated unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under 401 KAR 5:070, Section 6. [~~This requirement applies to those permits which were issued pursuant to CWA Section 402(a)(1) (33 USC Section 1242(a)(1)), unless one (1) of the following exceptions apply:~~]

(b) For effluent limitations established on the basis of 401 KAR 5:080, Section 1(2)(c)2, a permit shall not be renewed, revoked and reissued, or modified on the basis of effluent guidelines promulgated under CWA Section 304(b) subsequent to the original issuance of the permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

1. Exceptions. A permit to which paragraph (a) of this subsection applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if:

a. Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

b. Information is available which was not available at the time of permit issuance, other than revised regulations, guidance, or test methods, and which would have justified the application of a less stringent effluent limitation at the time of permit issuance;

c. The cabinet determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under 401 KAR 5:080, Section 1(2)(c)2;

d. A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

e. The permittee has received a permit modification under 401 KAR 5:055, Section 3; or

f. The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved, but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification.

2. Limitations. A permit to which paragraph (a) of this subsection applies shall not be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect when the permit is renewed, reissued, or modified. Such a permit to discharge into waters shall not be renewed, issued, or modified to contain less stringent effluent limitation if the implementation of the limitation would result in a violation of a water quality standard under 401 KAR 5:031 applicable to those waters.

~~[(a) If the discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the renewed or reissued permit may reflect the level of pollutant control actually achieved, but will not be less stringent than required by the subsequently promulgated effluent limitations guidelines;~~

~~(b) If the subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (BCT);~~

~~(c) If the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under 401 KAR 5:070, Section 6;~~

~~(d) If there is increased production at the facility which results in significant reduction in treatment efficiency, then the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event will permit limitations be less stringent than those required by subsequently promulgated standards and limitations.]~~

(12) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited copermittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this administrative regulation shall [~~will~~] be imposed as applicable. Alternatively, the cabinet [~~director~~] may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The cabinet's [~~director's~~] decision to issue a permit with no conditions applicable to any user, to impose conditions on one (1) or more users, to issue separate permits or to require separate applications, and the basis for that

		~~corrected by~~
		~~49 FR 37594 09-25-84~~
~~Iron & Steel~~	~~420~~	~~47 FR 23258 05-27-82~~
~~Manufacturing~~		~~corrected by~~
		~~47 FR 24554 06-07-82~~
		~~corrected by~~
		~~47 FR 41738 09-22-82~~
		~~corrected by~~
		~~48 FR 51773 11-14-83~~
		~~amended by~~
		~~49 FR 21024 05-17-84~~
		~~corrected by~~
		~~49 FR 24726 06-15-84~~
		~~corrected by~~
		~~49 FR 25634 06-22-84~~
~~Leather tanning~~	~~425~~	~~47 FR 52848 11-23-82~~
~~and finishing~~		~~amended by~~
		~~48 FR 30115 06-30-83~~
		~~amended by~~
		~~48 FR 31403 07-08-83~~
		~~corrected by~~
		~~48 FR 32346 07-15-83~~
		~~corrected by~~
		~~48 FR 35649 08-05-83~~
		~~amended by~~
		~~48 FR 41409 09-15-83~~
~~Metal Finishing~~	~~433~~	
	~~413~~	~~48 FR 32462 07-15-83~~
		~~amended by~~
		~~48 FR 41409 09-15-83~~
		~~corrected by~~
		~~48 FR 43680 09-26-83~~
~~Metal Molding and~~	~~464~~	~~50 FR 45212 10-30-85~~
~~Casting~~		
~~Nonferrous Metals~~	~~421~~	~~49 FR 8742 03-08-84~~
~~(Phase I)~~		~~corrected by~~
		~~49 FR 26738 06-29-84~~
		~~corrected by~~
		~~49 FR 29792 07-24-84~~
		~~corrected by~~
		~~50 FR 12252 03-28-85~~
		~~amended by~~
		~~50 FR 38276 09-02-85~~
		~~corrected by~~
		~~50 FR 41144 10-09-85~~
		~~corrected by~~
		~~50 FR 52775 12-26-85~~
~~(Phase III)~~	~~471~~	~~50 FR 34242 08-23-85~~
		~~corrected by~~
		~~51 FR 2884 01-22-86~~
~~Oil and Gas~~		
~~Extraction~~	~~435~~	~~41 FR 44942 10-13-76~~
		~~amended by~~
		~~44 FR 22069 04-13-79~~
		~~amended by~~
		~~47 FR 31554 07-21-82~~
~~Ore mining~~	~~440~~	~~47 FR 54598 12/03/82~~
~~Pesticides~~	~~455~~	~~50 FR 40672 10-04-85~~
~~Petroleum~~		
~~refining~~	~~419~~	~~47 FR 46434 10-18-82~~
		~~amended by~~
		~~50 FR 28516 07-12-85~~
		~~corrected by~~
		~~50 FR 32414 08-12-85~~
~~Pharmaceuticals~~	~~439~~	~~48 FR 49808 10-27-83~~
		~~corrected by~~
		~~48 FR 50322 11-01-83~~
		~~amended by~~
		~~50 FR 18486 05-01-85~~
~~Plastics~~	~~463~~	~~49 FR 49026 12-17-84~~
		~~corrected by~~
		~~50 FR 18248 04-30-85~~
~~Porcelain~~	~~466~~	~~47 FR 53172 11-24-82~~
~~enameling~~		~~amended by~~
		~~48 FR 31403 07-08-83~~
		~~amended by~~
		~~48 FR 41409 09-15-83~~
~~Pulp and paper~~	~~430~~	
	~~431~~	~~47 FR 52006 11-18-82~~
		~~corrected by~~
		~~48 FR 13176 03-30-83~~
		~~amended by~~
		~~48 FR 31403 07-08-83~~
~~Steam electric~~	~~423~~	~~47 FR 52290 11-19-82~~
		~~amended by~~
		~~48 FR 31403 07-08-83~~
~~Textile mills~~	~~410~~	~~47 FR 33810 09-02-82~~
		~~corrected by~~
		~~48 FR 39624 09-01-83~~
~~Timber~~	~~429~~	~~46 FR 8260 01-26-81~~
		~~amended by~~
		~~46 FR 57287 11-23-81~~]

Section 5. Primary Industry Categories. Any KPDES permit issued to dischargers in the following categories shall include effluent limitations and a compliance schedule to meet the requirements of the KPDES administrative regulations whether or not applicable effluent limitations guidelines have been promulgated.

(1) Adhesives and sealants.
(2) Aluminum forming.
(3) Auto and other laundries.
(4) Battery manufacturing.
(5) Coal mining.
(6) Coil coating.
(7) Copper forming.
(8) Electrical and electronic components.
(9) Electroplating.
(10) Explosives manufacturing.
(11) Foundries.
(12) Gum and wood chemicals.
(13) Inorganic chemicals manufacturing.
(14) Iron and steel manufacturing.
(15) Leather tanning and finishing.
(16) Mechanical products manufacturing.
(17) Nonferrous metals manufacturing.
(18) Ore mining.
(19) Organic chemicals manufacturing.
(20) Paint and ink formulation.
(21) Pesticides.
(22) Petroleum refining.
(23) Pharmaceutical preparations.
(24) Photographic equipment and supplies.
(25) Plastics processing.
(26) Plastic and synthetic materials manufacturing.
(27) Porcelain enameling.
(28) Printing and publishing.
(29) Pulp and paper mills.
(30) Rubber processing.
(31) Soap and detergent manufacturing.
(32) Steam electric power plants.
(33) Textile mills.
(34) Timber products processing.

PHILLIP J. SHEPHERD, Secretary

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NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:070. Provisions of the KPDES permit.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110

STATUTORY AUTHORITY: KRS ~~[224.01-110,]~~ 224.10-100

NECESSITY AND FUNCTION: KRS 224.16-050(1) provides that the Natural Resources and Environmental Protection Cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Sections 1342(b) and (d). KRS 224.16-050(1) requires that any exemptions granted in the issuance of NPDES permits shall be pursuant to 33 USC Sections 1311, 1312, and 1326(a). Further, KRS 224.16-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this section any effluent limitation, monitoring requirement or other condition which is more stringent than the effluent limitation, monitoring requirement or other condition which would have been applicable under the federal regulation if the permit were issued by the federal government. This administrative regulation contains the basis for provisions, terms, and effect of a KPDES permit, including permit duration, schedule of compliance, and basis for permit modification or ~~[,]~~ revocation and reissuance.

Section 1. Duration of Permits. (1) KPDES permits shall ~~[will]~~ be effective for a fixed term not to exceed five (5) years. Except as provided in 401 KAR 5:060, Section 1(5)(c) ~~[(4)(b)]~~, the term of a permit shall ~~[will]~~ not be extended by modification beyond this maximum duration. The cabinet ~~[director]~~ may issue a permit for a duration that is less than the full five (5) year term.

(2) A permit may be issued for the full term if the permit includes effluent limitations and a compliance schedule to meet the requirements of 401 KAR 5:080, Section 1(2)~~[2c, d, and e,]~~ whether or not applicable federal effluent limitations guidelines have been promulgated or approved.

Section 2. Schedules of Compliance. (1) The permit may, when appropriate, specify a schedule of compliance leading to compliance with KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(a) Time for compliance. Any schedules of compliance under this section shall ~~[will]~~ require compliance as soon as possible. In addition, schedules of compliance shall ~~[will]~~ require compliance not later than the applicable deadline specified in 401 KAR 5:080.

(b) The first KPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.

(c) Interim dates. Except as provided in subsection (2)(a)2 of this section, if a permit establishes a schedule of compliance which exceeds one (1) year from the date of permit issuance, the schedule shall ~~[will]~~ set forth interim requirements and the dates for their achievement.

1. The time between interim dates shall ~~[will]~~ not exceed one (1) year.

2. If the time necessary for completion of any interim requirement, such as the construction of a control facility, is more than one (1) year and is not readily divisible into stages for completion, the permit shall ~~[will]~~ specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(d) Reporting. The permit shall ~~[will]~~ be written to require that no later than fourteen (14) days following each interim date and the final date of compliance, the permittee shall notify the cabinet ~~[director]~~ in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports.

(2) Alternative schedules of compliance. A KPDES permit applicant or permittee may cease conducting regulated activities, by **termination** ~~[revocation]~~ ~~[termination]~~ of direct discharge for KPDES sources, rather than continue to operate and meet permit requirements as follows:

(a) If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued:

1. The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

2. The permittee shall cease conducting permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

(b) If the decision to cease conducting regulated activities is made before issuance of a permit whose term will include the **termination** ~~[revocation]~~ ~~[termination]~~ date, the permit shall ~~[will]~~ contain a schedule leading to **termination** ~~[revocation]~~ ~~[termination]~~ which shall ~~[will]~~ ensure timely compliance no later than the statutory deadline.

(c) If the permittee is undecided whether to cease conducting regulated activities, the cabinet shall ~~[director may]~~ issue or modify a permit to contain two (2) schedules as follows:

1. Both schedules shall ~~[will]~~ contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirements in a timely manner if the decision is to continue conducting regulated activities;

2. One (1) schedule shall ~~[will]~~ lead to timely compliance no later than the deadline contained in 401 KAR 5:080;

3. The second schedule shall ~~[will]~~ lead to cessation of regulated activities by a date which shall ~~[will]~~ ensure timely compliance no later than the deadline specified in 401 KAR 5:080; and

4. Each permit containing two (2) schedules shall ~~[will]~~ include a requirement that after the permittee has made a final decision under subparagraph 1 of this paragraph it shall follow the schedule leading to compliance if the decision is to continue conducting regulated activities, and follow the schedule leading to **termination** ~~[revocation]~~ ~~[termination]~~ if the decision is to cease conducting regulated activities.

(d) The applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the cabinet ~~[director]~~, such as a resolution of the board of directors of a corporation.

Section 3. Requirements for Recording and Reporting of Monitoring Results. All permits shall ~~[will]~~ specify:

(1) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods, including biological monitoring methods when appropriate;

(2) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring; and

(3) Applicable reporting requirements based upon the impact of the regulated activity and as specified in 401 KAR 5:065, Sections 1 and 2. Reporting shall be no less frequent than specified in Section 2 of this administrative regulation.

Section 4. Effect of a Permit. (1) Except for any toxic effluent standards and prohibitions included in 401 KAR 5:065, Section 1(1)(b), compliance with a KPDES permit during its term constitutes compliance, for purposes of enforcement, with the KPDES program. However, a permit may be modified, revoked and reissued, or revoked [~~terminated~~] during its term for cause as set forth in Sections 6 and 7 of this administrative regulation.

(2) The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

(3) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or administrative regulations.

Section 5. Transfer of Permits. (1) Transfers by modification. Except as provided in subsection (2) of this section, a permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued, under Section 6 of this administrative regulation, or if a minor modification has been made to identify the new permittee and incorporate such other requirements as may be necessary under the KPDES administrative regulations.

(2) Automatic transfers. As an alternative to transfers under subsection (1) of this section, any KPDES permit may be automatically transferred to a new permittee if:

(a) The current permittee notifies the cabinet [~~director~~] at least thirty (30) days in advance of the proposed transfer date in paragraph (b) of this subsection;

(b) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and [~~.~~]

(c) The cabinet [~~director~~] does not notify the existing permittee and the proposed new permittee of an intent to modify or revoke and reissue the permit. A modification under this paragraph may also be a minor modification under Section 6(3) of this administrative regulation. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph (b) of this subsection.

[~~(3) If a new KPDES permit is prepared as a result of either subsection (1) or (2) of this section, then the new permittee shall be subject to the "duplicate permit fee" as specified in 401 KAR 5:085, Section 5.~~]

Section 6. Modification or Revocation and Reissuance of Permit. When the cabinet [~~director~~] receives any information, the cabinet [~~director~~] may determine whether or not one (1) or more of the causes, listed in subsections (1) and (2) of this section for modification or revocation and reissuance or both, exist. If cause exists, the cabinet [~~director~~] may modify or revoke and reissue the permit accordingly, and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. If cause does not exist under this section, the cabinet [~~director~~] shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in subsection (3) of this section for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit shall [~~must~~] be prepared and other procedures in 401 KAR 5:075 shall [~~must~~] be followed.

(1) Causes for modification. The following are causes for modification but not revocation and reissuance of permits unless the permittee agrees to revocation and reissuance as well as modification of a permit.

(a) Alterations. If there are material and substantial alterations or additions made to the permitted facility or activity which occurred after permit issuance, the [~~such~~] alterations may justify the application of permit conditions that are different or absent in the existing permit.

(b) Information. If the cabinet [~~director~~] has received information, cause may exist for modification. KPDES permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance, except for revised administrative regulations, guidance, or test methods which would have justified application of different conditions at the time of permit issuance. In addition, the applicant shall [~~must~~] show that the information would have justified the application of different permit conditions at the time of issuance. For KPDES general permits this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

(c) New administrative regulations. If the standards or administrative regulations on which the permit was based have been changed by promulgation of amended standards or administrative regulations or by judicial decision after the permit was issued, then cause may exist for modification. However, the permit shall [~~may~~] be modified only as follows:

1. For promulgation of amended standards or administrative regulations, when:

a. The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards of 401 KAR 5:031, or the secondary treatment administrative regulations of 401 KAR 5:045;

b. EPA has revised, withdrawn, or modified that portion of the federal regulation or effluent limitation guideline or has approved a cabinet action with regard to a water quality standard on which the permit condition was based; and

c. A permittee requests modification in accordance with 401 KAR 5:075, Section 2, within ninety (90) days after the amendment, revision, or withdrawal is promulgated.

2. For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated effluent limitation guidelines, if the remand and stay concern that portion of the guidelines on which the permit condition was based and a request is filed by the permittee in accordance with 401 KAR 5:075, Section 2, within ninety (90) days of judicial remand.

(d) Compliance schedules. A permit may be modified if the cabinet [~~director~~] determines good cause exists for modification of a compliance schedule, based on an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, [~~in no case will~~] a KPDES compliance schedule shall not be modified to extend beyond an applicable statutory deadline in 401 KAR 5:080.

(e) In addition the cabinet [~~director~~] may modify a permit:

1. When the permittee has filed a request for any variance under 401 KAR 5:055, Section 7, or [~~for "fundamentally different factors" within the time specified in~~] 401 KAR 5:080, Section 3, and the cabinet [~~director~~] processes the request under the applicable provisions.

2. When required to incorporate [~~as~~] applicable toxic effluent standard or prohibition under 401 KAR 5:065, Section 2(2).

3. When required by the "reopener" conditions in a permit, which are established in the permit under 401 KAR 5:065, Section 2(3), for toxic effluent limitations, or 401 KAR 5:065, Section 2 (40 CFR Section 403.10(e), pretreatment program).

4. Upon request of a permittee who qualifies for a change in effluent limitations based on pollutants in intake water under 401 KAR 5:065, Section 3(7).

5. When a discharger is no longer eligible for net limitations, as provided in 401 KAR 5:065, Section 3(7).

6. As necessary under EPA effluent limitations guidelines concerning compliance schedule for development of a pretreatment program.

7. When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee

under 401 KAR 5:080, Section 1(2)(c).

8. When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant which was not reported in the permit application under 401 KAR 5:060, Section 2 [4].

9. To establish a "notification level" as provided in 401 KAR 5:065, Section 2(6).

10. To modify a schedule of compliance to reflect the time lost during the construction of an innovative or alternative facility, in the case of the POTW which has received a grant under CWA Section 202(a)(3) (33 USC Section 1282(a)(3)) for 100 percent of the cost to modify or replace facilities constructed with a grant for innovative or alternative wastewater technology under CWA Section 202(a)(2) (33 USC Section 1282(a)(2)). In no case shall [will] the compliance schedule be modified to extend beyond an applicable statutory deadline for compliance indicated in 401 KAR 5:080.

11. Upon failure of the cabinet [director] to notify an affected state whose waters may be affected by a discharge from Kentucky.

12. When the permit becomes final and effective on or after August 19, 1981, if the permittee shows a good cause for the modification, to conform to changes respecting the following administrative regulation: 401 KAR 5:065, Section 1(3) and (4).

[13. When the permittee's effluent limitations were imposed under 401 KAR 5:080, Section 1 and CWA Section 402(a)(1)) (33 USC Section 1342(a)(1)) and the permittee demonstrates operation and maintenance costs that are totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline, but in no case may the limitations be made less stringent than the subsequent guideline.]

13. [14.] To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.

14. [15.] When the discharger has installed the treatment technology considered by the cabinet [permit writer] in setting [settling] effluent limitations imposed under 401 KAR 5:080, Section 1 and CWA Section 402(a)(1) (33 USC Section 1342(a)(1)) and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline).

15. [16.] When the permit becomes final and effective on or after March 9, 1982, and the permittee applies for the modification no later than January 24, 1985, if the permittee shows good cause in its request and that it qualifies for the modification, to conform to changes respecting the following administrative regulations: [401 KAR 5:065, Section 3(2), 401 KAR 5:065, Section 3(3), and] 401 KAR 5:055, Section 6(2) and 401 KAR 5:065, Section 3(2) and (3).

(2) Causes for modification or revocation and reissuance. The following are causes to modify or, alternatively revoke and [or] reissue a permit:

(a) Cause exists for revocation [termination] under Section 7 of this administrative regulation and the cabinet [director] determines that modification or revocation and reissuance is appropriate.

(b) The cabinet [director] has received notification of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer but shall [will] not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

(3) Minor modifications of permits. Upon the consent of the permittee, the cabinet shall [director may] modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of 401 KAR 5:075. Any permit modification not processed as a minor modification under this section shall [will] be made for cause and with a 401 KAR 5:075 draft permit and public notice as required under this section. Minor modifications may only:

(a) Correct typographical errors;

(b) Require more frequent monitoring or reporting by the permittee;

(c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirements;

(d) Allow for a change in ownership or operational control of a facility where the cabinet [director] determines that no other change in the permit is necessary, if [provided that] a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the cabinet [director];

(e) Change the construction schedule for a discharger which is a new source; [or]

(f) Delete a point source outfall when the discharge from that outfall is **terminated** [revoked] [terminated] and does not result in discharge of pollutants from other outfalls except in accordance with permit limits; or

(g) Incorporate conditions of a POTW pretreatment program that has been approved in accordance with the procedures in 401 KAR 5:057 or a modification thereto that has been approved in accordance with the procedures in 401 KAR 5:057 as enforceable conditions of the POTW's permits.

Section 7. Revocation [Termination] of Permit. (1) The following are causes for revoking [terminating] a permit during its term, or for denying a renewal application:

(a) Noncompliance by the permittee with any condition of the permit;

(b) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant fact at any time; or

(c) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation [termination].

(2) KPDES permits may be modified or revoked [terminated] when there is a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit for example, plant closure or termination of discharge by connection to a POTW.

(3) The cabinet shall [director will] follow the applicable procedures of 401 KAR 5:075 in revoking [terminating] a KPDES permit under this section.

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:075. Cabinet review procedures for KPDES permits.

RELATES TO: KRS 224.01-010, 224.10-100, 224.10-420, 224.10-440, 224.10-470, 224.16-050, 224.70-100, **224.70-110**

STATUTORY AUTHORITY: KRS [224.01-110,] 224.10-100

NECESSITY AND FUNCTION: KRS 224.10-100 authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050(1) establishes that the

cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Section 1342(b) and (d). This administrative regulation sets forth the procedures through which the cabinet will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits.

Section 1. Review of the Application. (1) Any person who requires a permit under the KPDES program shall complete, sign, and submit to the cabinet [~~director~~] an application for the permit as required under 401 KAR 5:060, Section 1. Applications are not required for KPDES general permits. However, operators who elect to be covered by a general permit shall submit written notification to the cabinet [~~director~~] at such time as the cabinet [~~director~~] indicates in Section 3 of this administrative regulation.

(2) The cabinet shall [~~director will~~] not begin the processing of a permit until the applicant has fully complied with the application requirements for the permit, as required by 401 KAR 5:060, Section 1.

(3) Permit applications shall comply with the signature and certification requirements of 401 KAR 5:060, Section 9 [~~3~~].

(4) The cabinet shall [~~director will~~] review for completeness every application for a KPDES permit. Each application submitted by a KPDES new source or KPDES new discharger shall [~~will~~] be reviewed for completeness by the cabinet [~~director~~] within thirty (30) days of its receipt. Each application for a KPDES permit submitted by an existing source shall [~~will~~] be reviewed for completeness within sixty (60) days of receipt. Upon completing the review, the cabinet shall [~~director will~~] notify the applicant in writing whether the application is complete. If the application is incomplete, the cabinet shall [~~director will~~] list the information necessary to make the application complete. If [~~When~~] the application is for an existing source, the cabinet shall [~~director will~~] specify in the notice of deficiency a date for submitting the necessary information. The cabinet shall [~~director will~~] notify the applicant that the application is complete upon receiving this information. After the application is completed, the cabinet [~~director~~] may request additional information from an applicant when necessary to clarify, modify, or supplement previously submitted material. Requests for the [~~such~~] additional information shall [~~will~~] not render an application incomplete.

(5) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(6) If the cabinet [~~director~~] decides that a site visit is necessary for any reason in conjunction with the processing of an application, the cabinet shall [~~director will~~] notify the applicant and a date will be scheduled.

(7) The effective date of an application is the date on which the cabinet [~~director~~] notifies the applicant that the application is complete as provided in subsection (4) of this section.

(8) For each application from a major facility new source, or major facility new discharger, the cabinet shall [~~director will~~] no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule will specify target dates by which the cabinet [~~director~~] intends to:

(a) Prepare a draft permit;

(b) Give public notice;

(c) Complete the public comment period, including any public hearing;

(d) Issue a final permit; and

(e) Complete any formal proceedings under this administrative regulation.

(9) Conflicts of interest.

(a) Any person [~~The director~~] who issues a permit will be subject to the conflict of interest provisions of KRS 11A.020 and 11A.030 [~~KPDES policy memorandum concerning conflicts of interest~~]. **The director of the Division of Water shall not receive or have received during the previous two (2) years, a significant portion of income directly or indirectly from permit holders or applicants for a permit.**

(b) Any person aggrieved by the issuance of a permit under the KPDES administrative regulations may challenge the permit pursuant to Section 13 of this administrative regulation if paragraph (a) of this subsection [~~the policy memorandum~~] has been violated.

(c) The hearing officer shall [~~will~~] remand any permit issued in violation of paragraph (a) of this subsection [~~the policy memorandum~~] to the cabinet for reconsideration.

(d) Following remand, any cabinet employee who reconsiders the permit shall [~~will~~] be subject to the conflict of interest provisions [~~policy memorandum~~] set forth in paragraph (a) of this subsection. The reconsideration shall [~~will~~] require a new public comment period and public hearing only if information offered during earlier permit proceedings was excluded by the cabinet [~~director~~] as a direct result of a conflict of interest.

Section 2. Review Procedures for Permit Modification, Revocation and Reissuance, or Revocation [~~Termination~~]. (1) Permits may be modified, revoked and reissued, or revoked [~~terminated~~] either at the request of any interested person, including the permittee, or upon the cabinet's [~~director's~~] initiative. However, permits may only be modified, revoked and reissued, or revoked [~~terminated~~] for the reasons specified in 401 KAR 5:070, Sections 6 or 7. All requests shall be in writing and shall contain facts or reasons supporting the request.

(2) If the cabinet [~~director~~] decides the request is not justified, the cabinet shall [~~director will~~] send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or revocation [~~termination~~] are not subject to public notice, comment, or hearings.

(3) If the cabinet [~~director~~] tentatively decides to modify or revoke and reissue a permit under 401 KAR 5:070, Section 6, the cabinet [~~director~~] shall prepare a draft permit under Section 3 of this administrative regulation incorporating the proposed changes. The cabinet [~~director~~] may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the cabinet shall [~~director will~~] require the submission of a new application.

(a) In a permit modification under this section, only those conditions to be modified shall [~~will~~] be reopened when a new draft permit is prepared. All other aspects of the existing permit shall [~~will~~] remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(b) "Minor modifications" as described [~~defined~~] in 401 KAR 5:070, Section 6(3) shall [~~are~~] not be subject to the requirements of this section.

(4) If the cabinet preliminarily [~~director tentatively~~] decides to revoke [~~terminate~~] a permit under 401 KAR 5:070, Section 7, the cabinet shall [~~director will~~] issue a notice of intent to revoke [~~terminate~~]. A notice of intent to revoke [~~terminate~~] is a type of draft permit which follows the same procedure as any draft permit prepared under Section 3 of this administrative regulation.

Section 3. Draft Permits. (1) Once an application is complete, the cabinet shall preliminarily [~~director will tentatively~~] decide whether to prepare a draft permit or to deny the application.

(2) If the cabinet [~~director~~] makes a preliminary decision to deny the permit application, the cabinet shall [~~director will~~] issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedure as any draft permit prepared under this section. If the cabinet's [~~director's~~]

determination under Section 11 of this administrative regulation is that the preliminary decision to deny the permit application was incorrect, the cabinet shall [~~director will~~] withdraw the notice of intent to deny and proceed to prepare a draft permit under subsection (4) of this section.

(3) If the cabinet [~~director~~] makes a preliminary decision to issue a KPDES general permit, the cabinet shall [~~director will~~] prepare a draft general permit in accordance with subsection (4) of this section.

(4) If the cabinet [~~director~~] decides to prepare a draft permit, the cabinet shall [~~director will~~] prepare a draft permit that contains the following information:

(a) All conditions under 401 KAR 5:065, Section 1;

(b) All compliance schedules under 401 KAR 5:070, Section 2;

(c) All monitoring requirements under 401 KAR 5:070, Section 3; and

(d) Effluent limitations, standards, prohibitions, and conditions under 401 KAR 5:057, 401 KAR 5:060, 401 KAR 5:065, 401 KAR 5:070, 401 KAR 5:075, and 401 KAR 5:080 and all variances that are to be included.

(5) All draft permits prepared by the cabinet under this section shall [~~will~~] be accompanied by a fact sheet and shall [~~will~~] be based on the administrative record, publicly noticed, and made [~~make~~] available for public comment. The cabinet shall [~~director will~~] give notice of opportunity for a public hearing, issue a final decision, and respond to comments. A demand for a hearing may be made pursuant to KRS 224.10-420 and Section 13 of this administrative regulation following the issuance of a final decision.

Section 4. Fact Sheets. (1) A fact sheet shall [~~will~~] be prepared for every draft permit for a major KPDES facility or activity, for every KPDES general permit, for every KPDES draft permit that incorporates a variance or requires an explanation under subsection (3) [~~(4)~~] of this section, and for every draft permit which the cabinet [~~director~~] finds is the subject of widespread public interest or raises major issues. The fact sheet will briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The cabinet shall [~~director will~~] send this fact sheet to the applicant and, on request, to any other persons.

(2) The fact sheet shall [~~will~~] include, when applicable:

(a) A brief description of the type of facility or activity which is the subject of the draft permit;

(b) A quantitative and qualitative description of the discharges described in the application;

(c) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(d) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(e) A description of the procedures for reaching a final decision on the draft permit including:

1. The beginning and ending dates of the comment period under Section 5 of this administrative regulation and the address where comments will be received;

2. Procedures for requesting a hearing and the nature of that hearing;

3. Any other procedures under KRS 224.10-420 and Section 13 of this administrative regulation by which the public may participate in the final decision; [~~and~~]

(f) Name and telephone number of a person to contact for additional information; and [~~.~~]

(g) [~~(3)~~] Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guidelines or performance standard provisions, and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed. [~~:~~]

(3) [~~(4)~~](a) When the draft permit contains any of the following conditions, an explanation of the reasons why the [~~such~~] conditions are applicable:

1. Limitations to control toxic pollutants under 401 KAR 5:065, Section 2(5);

2. Limitations on internal waste streams under 401 KAR 5:065, Section 3(8); or

3. Limitations on indicator pollutants under 401 KAR 5:080, Section 1(2)(a).

(b) For every permit to be issued to a treatment works owned by a person other than the Commonwealth or its subdivisions [~~a municipality~~], an explanation of the cabinet's [~~director's~~] decision on regulation of users under 401 KAR 5:065, Section 2(12).

(4) [~~(5)~~] When appropriate, a sketch or detailed description of the location of the discharge described in the application.

Section 5. Public Notice of Permit Actions and Public Comment Period. (1) Scope.

(a) The cabinet shall [~~director will~~] give public notice that the following actions have occurred:

1. A permit application has been preliminarily [~~tentatively~~] denied under Section 3(2) of this administrative regulation;

2. A draft permit has been prepared under Section 3(4) of this administrative regulation;

3. A hearing has been scheduled under Section 7 of this administrative regulation; or [~~and~~]

4. A KPDES new source determination has been made in accordance with the definition in 401 KAR 5:001 [~~401 KAR 5:050~~].

(b) No public notice is required when a request for permit modification, revocation and reissuance, or revocation [~~termination~~] is denied under Section 2 of this administrative regulation. Written notice of that denial shall [~~will~~] be given to the requester and to the permittee.

(c) Public notices may describe more than one (1) permit or permit action.

(2) Timing.

(a) Public notice of the preparation of a draft permit, including a notice of intent to deny a permit application, required under subsection (1) of this section shall [~~will~~] allow at least thirty (30) days for public comment.

(b) Public notice of a public hearing shall [~~will~~] be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two (2) notices may be combined.

(3) Methods. Public notice of activities described in subsection (1)(a) of this section shall [~~will~~] be given by the following methods:

(a) The cabinet shall [~~will~~] mail a notice to the persons listed in subparagraphs 1 through 5 of this paragraph. Any person otherwise entitled to receive notice under this paragraph may waive their rights to receive notice for any classes and categories of permits.

1. The applicant, except for KPDES general permittees, and Region IV, EPA.

2. Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, the Advisory Council on Historic Preservation, Kentucky Historical Society and other appropriate government authorities, including any affected states [~~sates~~];

3. The U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

4. Any user identified in the permit application of a privately owned treatment works; and

5. Persons on a mailing list developed by:

a. Including those who request in writing to be on the list;

b. Soliciting persons for area lists from participants in past permit proceedings in that area; and

c. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as newsletters, environmental bulletins, or state law journals. The cabinet may update the mailing list from time to time by

requesting written indication of continued interest from those listed. The cabinet may delete from the list the name of any person who fails to respond to such a request.

(b) For major permits and KPDES general permits, the cabinet shall [~~will~~] publish a notice in a daily or weekly newspaper within the area affected by the facility or activity;

(c) In a manner constituting legal notice to the public under Kentucky law; and

(d) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(4) Contents.

(a) All public notices. All public notices issued under this administrative regulation shall [~~will~~] contain the following minimum information:

1. Name and address of the office processing the permit action for which notice is being given;

2. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of KPDES draft general permits under 401 KAR 5:055, Section 5;

3. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for KPDES general permits when there is no application;

4. Name, address, and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit as the case may be, fact sheet, and the application;

5. A brief description of the comment procedures required by Sections 6 and 7 of this administrative regulation and the time and place of any hearing that will be held, including a statement of procedures to request a hearing, unless a hearing has already been scheduled, and other procedures by which the public may participate in the final permit decision;

6. A general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement shall [~~will~~] be satisfied by a map or description of the permit area; and

7. Any additional information considered necessary or proper.

(b) Public notices for hearings. In addition to the general public notice described in paragraph (a) of this subsection, the public notice for a permit hearing under Section 7 of this administrative regulation shall [~~will~~] contain the following information:

1. Reference to the date of previous public notices, relating to the permit;

2. Date, time, and place of the hearing; and

3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(c) Requests under 401 KAR 5:055, Section 7(4). In addition to the information required under subsection (4)(a) of this section, public notice of a KPDES draft permit for a discharge when a 401 KAR 5:055, Section 7(4) request has been filed under 401 KAR 5:055, Section 3, shall [~~will~~] include:

1. A statement that the thermal component of the discharge is subject to effluent limitations under 401 KAR 5:065, Section 2(1) and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under CWA Sections 301 or 306 (33 USC Sections 1311 or 1316); and

2. A statement that a 401 KAR 5:055, Section 7(4), request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge and a brief description, including a quantitative statement, of the alternative effluent limitations, if any, included in the request.

(5) In addition to the general public notice described in subsection (4)(a) of this section all persons identified in subsection (3)(a)1, 2, 3, and 4 of this section shall [~~will~~] be mailed a copy of the fact sheet, the permit application (if any) and the draft permit (if any).

Section 6. Public Comments and Requests for Public Hearings. During the public comment period provided under Section 5 of this administrative regulation, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall [~~will~~] be considered in making the final decision and shall be answered as provided in Section 12 of this administrative regulation.

Section 7. Public Hearings. (1) The cabinet shall [~~director will~~] hold a public hearing when a significant degree of public interest in a draft permit is found on the basis of requests. The cabinet [~~director~~] also may hold a public hearing [~~at his or her discretion,~~] whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

(2) Public notice of the hearing shall [~~will~~] be given as specified in Section 5 of this administrative regulation.

(3) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under Section 5 of this administrative regulation shall [~~will~~] automatically be extended to the close of any public hearing under this section. The cabinet [~~hearing officer~~] may also extend the comment period by so stating at the hearing.

(4) A tape recording or written transcript of the hearing shall be made available to the public.

Section 8. Obligation to Raise Issues and Provide Information During the Public Comment Period. All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the cabinet's [~~director's~~] preliminary decision to deny an application, revoke [~~terminate~~] a permit, or prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period including any public hearing under Section 5 of this administrative regulation. All supporting materials shall be included in full and may not be incorporated by reference, unless they consist of state or federal statutes and regulations, EPA or the cabinet's documents of general applicability, or other generally available reference materials. Commenters shall make supporting material not already included in the record available to the cabinet as directed by the cabinet [~~director~~]. A comment period longer than thirty (30) days may be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods, which may be established under Section 5 of this administrative regulation. Nothing in this section shall [~~will~~] be construed to prevent any person aggrieved by a final permit decision from filing a demand for a hearing under KRS 224.10-420 and Section 13 of this administrative regulation.

Section 9. Conditions Requested by the Corps of Engineers and Other Government Agencies. (1) If during the comment period for a KPDES draft permit, the district engineer of the Corps of Engineers advises the cabinet [~~director~~] in writing that anchorage and navigation of any of the waters of the Commonwealth would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the district engineer advises the cabinet [~~director~~] that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the cabinet shall [~~director will~~] include the specified conditions in the permit. Review or appeal of denial of a permit or of

conditions specified by the district engineer shall be made through the applicable procedures of the Corps of Engineers, and shall [~~may~~] not be made through the procedures provided in this administrative regulation. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall [~~will~~] be considered stayed in the KPDES permit for the duration of that stay.

(2) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other state or federal agency with jurisdiction over fish, wildlife, or public health advises the director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the cabinet [~~director~~] may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of KRS Chapter 224.

(3) In appropriate cases the cabinet [~~director~~] may consult with one (1) or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

Section 10. Reopening of the Public Comment Period. (1) If any data information or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the cabinet [~~director~~] may take one (1) or more of the following actions:

(a) Prepare a new draft permit, appropriately modified, under Section 3 of this administrative regulation;

(b) Prepare a revised fact sheet under Section 4 of this administrative regulation and reopen the comment period; or

(c) Reopen and extend the comment period under Section 5 of this administrative regulation to give interested persons the opportunity to comment on the information or arguments submitted.

(2) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under Section 5 of this administrative regulation shall [~~should~~] define the scope of the reopening.

(3) Public notice of any of the above actions will be issued under Section 5 of this administrative regulation.

Section 11. Issuance and Effective Date of Permit. (1) After the close of the public comment period under Section 5 of this administrative regulation, the cabinet shall [~~director will~~] issue, deny, modify, revoke and [,] reissue, or revoke [~~terminate~~] a permit. The cabinet shall [~~director will~~] notify the applicant and each person who has submitted written comments or requested notice of that determination. This notice shall [~~will~~] include reference to the procedures for appealing the decision. For the purpose of this section, a final permit decision shall mean a final decision to issue, deny, modify, revoke and reissue, or revoke [~~terminate~~] a permit.

(2) A final permit decision shall [~~will~~] become effective thirty (30) days after the service of notice of the decision under subsection (1) of this section, unless:

(a) A later effective date is specified in the decision; [~~or~~]

(b) A stay is granted pursuant to KRS 224.10-420(2) and Section 13 of this administrative regulation; or

(c) No comments requested a change in the draft permit, in which case the permit shall [~~will~~] become effective immediately upon issuance.

(3) The [~~order or~~] determination which is a condition precedent to demanding a hearing under KRS 224.10-420(2) and Section 13 of this administrative regulation shall be the final permit decision. The thirty (30) day appeal period shall begin on the date the determination [~~order~~] is entered by the cabinet [~~director~~] and shall not begin on the date the permit decision becomes effective.

Section 12. Response to Comments. (1) When [~~At the time that~~] any final permit decision is issued under Section 11 of this administrative regulation the cabinet [~~director~~] shall issue a response to comments. This response shall [~~will~~]:

(a) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(b) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing. This response shall [~~will~~] fully consider all comments resulting from any hearing conducted under this administrative regulation.

(2) The response to comments shall [~~will~~] be available to the public. Any demand for a hearing on this response shall be filed according to procedures specified in KRS 224.10-420, 224.10-440, 224.10-470 and any administrative regulations promulgated pursuant thereto.

Section 13. Hearings under KRS 224.10-420. (1) A determination under Section 11 of this administrative regulation when issued by the cabinet shall [~~director will~~] be subject to a demand for a hearing pursuant to KRS 224.10-420(2).

(2) Any person aggrieved by the issuance of a final permit may demand a hearing pursuant to KRS 224.10-420(2).

(3) Any hearing held pursuant to this section shall [~~will~~] be subject to the provisions of KRS 224.10-440 and 224.10-470.

(4) Failure to raise issued pursuant to Section 8 of this administrative regulation shall [~~will~~] not preclude an aggrieved person from making a demand for a hearing pursuant to KRS 224.10-420(2).

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Water
(Amended After Hearing)

401 KAR 5:080. Criteria and standards for the Kentucky Pollutant Discharge Elimination System.

RELATES TO: KRS 224.10-100, 224.16-050, 224.70-100, 224.70-110

STATUTORY AUTHORITY: KRS [~~224.01-110,~~] 224.10-100

NECESSITY AND FUNCTION: KRS 224.10-100 authorizes the Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke, modify, suspend or deny under such conditions as the cabinet may prescribe, permits to discharge into any waters of the Commonwealth. KRS 224.16-050 provides that the cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act (33 USC Section 1251 et seq.) subject to the conditions imposed in 33 USC Section 1342(b) and (d). This section further provides that any exemptions granted in the issuance of KPDES permits shall be pursuant to 33 USC Sections 1311, 1312, and 1326(a). This administrative regulation sets forth the criteria and standards for the KPDES permitting system.

Section 1. Criteria and Standards for Technology-based Treatment Requirements. (1) Purpose and scope. This section establishes criteria and standards for the imposition of technology-based treatment requirements in KPDES permits including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations.

(2) Compliance with technology-based treatment requirements in KPDES permits.

(a) General. Technology-based treatment requirements represent the minimum level of control that shall ~~will~~ be imposed in a KPDES permit. Permits shall ~~will~~ contain the following technology-based treatment requirements in accordance with the deadlines indicated herein:

1. For POTWs effluent limitations based upon:

a. Secondary treatment as required by CWA Section 301(b)(1)(B) (33 USC Section 1311(b)(1)(B)) - from date of permit issuance; and

b. The best practicable waste treatment technology as required by CWA Section 301(b)(1)(A) (33 USC Section (b)(1)(A)) - not later than July 1, 1983; and

2. For dischargers other than POTWs, except as otherwise provided in the KPDES administrative regulations, effluent limitations requiring:

a. The best practicable control technology currently available (BPT):

(i) For effluent limitations promulgated under CWA Section 304(b) after January 1, 1982 and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before this date, compliance as expeditiously as practicable but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b) and not later than March 31, 1989;

(ii) For effluent limitations established on a case-by-case basis based on best professional judgment (BPJ) under paragraph (c)2 of this subsection in a permit issued after February 4, 1987, compliance as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989; or

(iii) For all other BPT effluent limitations compliance is required from the date of permit issuance.

b. For conventional pollutants, the best conventional pollutant control technology (BCT):

(i) For effluent limitations promulgated under CWA Section 304(b), as expeditiously as practicable but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b), and not later than March 31, 1989; or

(ii) For effluent limitations established on a case-by-case basis based on BPJ under paragraph (c)2 of this subsection, in a permit issued after February 4, 1987, compliance as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989;

c. For all toxic pollutants referred to in Section 6 of this administrative regulation the best available technology economically achievable (BAT):

(i) For effluent limitations established under CWA Section 304(b), as expeditiously as practicable but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b), and not later than March 31, 1989; or

(ii) For permits issued on a case-by-case basis based on BPJ under paragraph (c)2 of this subsection after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but not later than three (3) years after the date the limitations are established, and not later than March 31, 1989.

d. For all toxic pollutants other than those listed in Section 6 of this administrative regulation, effluent limitations based on BAT:

(i) For effluent limitations promulgated under CWA Section 304(b) compliance is required as expeditiously as practicable, but not later than three (3) years after the date the limitations are promulgated under CWA Section 304(b) and not later than March 31, 1989; or

(ii) For permits issued on a case-by-case BPJ basis under paragraph (c)2 of this subsection after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989.

e. For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT.

(i) For effluent limitations promulgated under CWA Section 304(b) compliance is required as expeditiously as practicable, but not later than three (3) years after the date the limitations are established and not later than March 31, 1989; or

(ii) For permits issued on a case-by-case BPJ basis under paragraph (c)2 of this subsection after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but not later than three (3) years after the date the limitations are established and not later than March 31, 1989.

~~[a. The best practicable control technology currently available (BPT) as required by CWA Section 301(b)(1)(A) (33 USC Section 1311(b)(1)(A)) from date of permit issuance;~~

~~b. For conventional pollutants, the best conventional pollutant control technology (BCT) not later than July 1, 1984;~~

~~c. For all toxic pollutants referred to in Section 5 of this regulation as required by CWA Section 301(b)(2)(A) (33 USC Section 1311(b)(2)(A)) the best available technology economically achievable (BAT) not later than July 1, 1984;~~

~~d. For all toxic pollutants other than those listed in Section 5 of this regulation effluent limitations based on the BAT not later than three (3) years after the date such effluent limitations are incorporated into a KPDES permit; and~~

~~e. For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three (3) years after the date such effluent limitations are incorporated into a KPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.]~~

(b) Variances and extensions.

1. The following variance from technology-based treatment requirements is authorized by KRS Chapter 224 and may be applied for under 401 KAR 5:055. For dischargers other than POTWs:

a. Economic variance from BAT, as indicated in 401 KAR 5:055, Section 7(1);

b. Thermal variance from BPT, BCT, and BAT, under Section 4 of this administrative regulation, may be authorized.

2. An extension of the BAT deadline may be applied for under 401 KAR 5:055, Section 7(3) for dischargers other than POTWs, for use of innovative technology.

(c) Methods of imposing technology-based treatment requirements in permits. Technology-based treatment requirements may be imposed through one (1) of the following three (3) methods:

1. Application of EPA-promulgated effluent limitations to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been withdrawn by EPA or remanded. In the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under 401 KAR 5:055, and Section 3 of this administrative regulation.

2. On a case-by-case basis under CWA Section 402(a)(1) (33 USC Section 1342(a)(1)), to the extent that EPA-promulgated effluent limitations are inapplicable. The cabinet [~~permit writer~~] shall apply the appropriate factors listed in paragraph (d) of this subsection and shall consider:

a. The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

b. Any unique factors relating to the applicant.

3. Through a combination of the methods in paragraph (c)1 and 2 of this subsection. Where EPA-promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to administrative regulation on a case-by-case basis in order to carry out the provisions of KRS Chapter 224.

4. Limitations developed under paragraph (c)2 of this subsection may be expressed, where appropriate, in terms of toxicity if it is shown that the limits reflect the appropriate requirements of KRS Chapter 224.

(d) In setting case-by-case limitations pursuant to paragraph (c) of this subsection, the cabinet shall [~~permit writer must~~] consider the following factors:

1. For BPT requirements:

a. The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

b. The age of equipment and facilities involved;

c. The process employed;

d. The engineering aspects of the application of various types of control techniques;

e. Process changes; and

f. Nonwater quality environmental impact (including energy requirements).

2. For BCT requirements:

a. The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

b. The comparison of the cost and level of reduction of the [~~such~~] pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of the [~~such~~] pollutants from a class or category of industrial sources;

c. The age of equipment and facilities involved;

d. The process employed;

e. The engineering aspects of the application of various types of control techniques;

f. Process changes; and

g. Nonwater quality environmental impact (including energy requirements).

3. For BAT requirements:

a. The age of equipment and facilities involved;

b. The process employed;

c. The engineering aspects of the application of various types of control techniques;

d. Process changes;

e. The cost of achieving such effluent reduction; and

f. Nonwater quality environmental impact (including energy requirements).

(e) Technology-based treatment requirements are applied prior to or at the point of discharge.

(f) Technology-based treatment requirements shall not [~~cannot~~] be satisfied through the use of "nontreatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

1. The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

2. The discharger agrees to waive any opportunity to request a variance under 401 KAR 5:055, Section 3; and

3. The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(g) Technology-based effluent limitations shall [~~will~~] be established under this administrative regulation for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(h)1. The cabinet [~~director~~] may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall [~~will~~] not be subject to modification where:

a. Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant; or

b.(i) The limitation reflects BAT-level control of discharges of one (1) or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutants [~~(s)~~] is not feasible for economic or technical reasons;

(ii) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(iii) The fact sheet required by 401 KAR 5:075, Section 4, sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level control of the toxic pollutant discharges identified in paragraph (h)1b(ii) of this subsection, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutants [~~(s)~~].

2. The cabinet [~~director~~] may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

a. Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance; or

b.(i) The limitation reflects BAT-level control of discharges, or an appropriate level of one (1) or more hazardous substances [~~(s)~~] which are present in the waste stream, and a specific BAT, or other appropriate limitation upon the hazardous substances which are present in the waste stream, and a specific BAT, or other appropriate limitation upon the hazardous substance is not feasible for economic or technical reasons;

(ii) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(iii) The fact sheet, required by 401 KAR 5:075, Section 4, sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level, or other appropriate level, control of the hazardous substances discharges identified in paragraph (h)1b(ii) of this subsection, and a finding that it would be economically or technically infeasible to directly limit the hazardous substances [~~(s)~~].

c. Hazardous substances which are also toxic pollutants are subject to paragraph (h)1 of this subsection.

3. The cabinet shall [~~director may~~] not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutants [~~(s)~~] or hazardous substances [~~(s)~~] controlled by the limit were limited directly.

4. Toxic pollutants identified under paragraph (h)1 of this subsection remain subject to 401 KAR 5:065, Section 1(15), which requires notification of increased discharges of toxic pollutants above levels reported in the application form.

Section 2. Criteria for Issuance of Permits to Aquaculture Projects. (1) Purpose and scope.

(a) This section establishes guidelines for approval of any discharge of pollutants associated with an aquaculture project.

(b) This section authorizes, on a selective basis, controlled discharges which would otherwise be unlawful under KRS Chapter 224 in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially.

(c) Permits issued for discharges into aquaculture projects under this section are KPDES permits and are subject to all applicable requirements. Any permit shall [~~will~~] include such conditions, including monitoring and reporting requirements, as are necessary to comply with the KPDES administrative regulations. Technology-based effluent limitations need not be applied to discharges into the approved project except with respect to toxic pollutants.

(2) Criteria.

(a) [~~No~~] KPDES permits shall not [~~permit will~~] be issued to an aquaculture project unless:

1. The cabinet [~~director~~] determines that the aquaculture project:

a. Is intended by the project operator to produce a crop which has significant direct or indirect commercial value, or is intended to be operated for research into possible production of such a crop; and

b. Does not occupy a designated project area which is larger than

can be economically operated for the crop under cultivation or than is necessary for research purposes.

2. The applicant has demonstrated, to the satisfaction of the cabinet [~~director~~], that the use of the pollutant to be discharged to the aquaculture project shall result in an increased harvest of organisms under culture over what would naturally occur in the area;

3. The applicant has demonstrated, to the satisfaction of the cabinet [~~director~~], that if the species to be cultivated in the aquaculture project is not indigenous to the immediate geographical area, there shall be minimal adverse effects on the flora and fauna indigenous to the area, and the total commercial value of the introduced species is at least equal to that of the displaced or affected indigenous flora and fauna;

4. The cabinet [~~director~~] determines that the crop shall not have a significant potential for human health hazards resulting from its consumption; and

5. The cabinet [~~director~~] determines that migration of pollutants from the designated project area to waters of the Commonwealth outside of the aquaculture project will not cause or contribute to a violation of the applicable standards and limitations applicable to the supplier of the pollutant that would govern if the aquaculture project were itself a point source. The approval of an aquaculture project shall [~~will~~] not result in the enlargement of a preexisting mixing zone area beyond what had been designated for the original discharge.

(b) Permits shall not [~~No permit will~~] be issued for any aquaculture project in conflict with a water quality management plan or an amendment to a plan approved by EPA.

(c) Designated project areas shall [~~will~~] not include a portion of a body of water large enough to expose a substantial portion of the indigenous biota to the conditions within the designated project area.

(d) Any pollutants not required by or beneficial to the aquaculture crop shall not exceed applicable standards and limitations when entering the designated project area.

Section 3. Criteria and Standards for Determining Fundamentally Different Factors. (1) Purpose and scope.

(a) This section establishes the criteria and standards to be used in determining whether effluent limitations or pretreatment standards alternative to those required by promulgated EPA effluent limitations guidelines and categorical pretreatment standards, hereinafter referred to as "national limits," shall be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits. This section applies to all national limits promulgated by EPA except for best practicable treatment standards for steam-electric plants.

(b) This case-by-case review shall not [~~will only~~] be done unless [~~if~~] data specific to that discharger indicate they present factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person asserting [~~believing~~] that factors relating to a discharger's facilities, equipment, processes, or other facilities related to the discharger are fundamentally different from the factors considered during the development of the national limits may request a fundamentally different factors variance under 401 KAR 5:055, Section 3. In addition, such a variance may be proposed by the cabinet [~~director~~] in the draft permit.

(2) Criteria.

(a) A request for the establishment of effluent limitations under this section, fundamentally different factors variance, shall not [~~will~~] be approved unless [~~only if~~]:

1. There is an applicable national limit which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested;

2. Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA in establishing the national limits; and

3. The request for alternative effluent limitations or standards is made in accordance with the procedural requirements of 401 KAR 5:075.

(b) A request for the establishment of effluent limitations less stringent than those required by national limits guidelines shall not [~~will~~] be approved unless [~~only if~~]:

1. The alternative effluent limitation requested is not less stringent than justified by the fundamental difference;

2. The alternative effluent limitation or standard shall [~~will~~] ensure compliance with the KPDES administrative regulations and KRS Chapter 224; and

3. Compliance with the national limits, either by using the technologies upon which the national limits are based or by other control alternative, would result in:

a. A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

b. A nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the national limits.

(c) A request for alternative limits more stringent than required by national limits shall not [~~will~~] be approved unless [~~only if~~]:

1. The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

2. Compliance with the alternative effluent limitation or standard would not result in:

a. A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

b. A nonwater quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the national limits.

(d) Factors which may be considered fundamentally different are:

1. The nature or quality of pollutants contained in the raw waste load of the discharger's [~~applicant's~~] process wastewater;

2. The volume of the discharger's process wastewater and effluent discharged;

3. Nonwater quality environmental impact of control and treatment of the discharger's raw waste load;

4. Energy requirements of the application of control and treatment technology;

5. Age, size, land availability, and configuration as they relate to the discharger's equipment or facilities, processes employed, process changes, and engineering aspects of the application of control technology; and

6. Cost of compliance with required control technology.

(e) A variance request or portion of such a request under this section shall [~~will~~] not be granted on any of the following grounds:

1. The infeasibility of installing the required waste treatment equipment within the time allowed in Section 1 of this administrative regulation;

2. The assertion that the national limits cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factors [~~(s)~~] listed in paragraph (d) of this subsection;

3. The discharger's ability to pay for the required waste treatment; or

4. The impact of a discharge on local receiving water quality.

(3) Method of application.

(a) A written request for a variance under this administrative regulation shall be submitted in duplicate to the cabinet [~~director~~] in accordance with 401 KAR 5:075.

(b) The burden is on the person requesting the variance to demonstrate [~~explain~~] that:

1. Factors [~~(s)~~] listed in subsection (2) of this section regarding the discharger's facility are fundamentally different from the factors EPA considered in establishing the national limits. The requester shall refer to all relevant material and information, such as the published guideline regulations development document, all associated technical and economic data collected for use in developing each national limit,

all records of legal proceedings, and all written and printed documentation including records of communication, etc., relevant to the regulations which are kept on public file by the EPA;

2. The alternative limitations requested are justified by the fundamental difference alleged in subparagraph 1 of this paragraph; and

3. The appropriate requirements of subsection (2) of this section have been met.

Section 4. Criteria for Determining Alternative Effluent Limitations. (1) Purpose and scope. The factors, criteria and standards for the establishment of alternative thermal effluent limitations described in CWA Section 316(a) (33 USC Section 1326(a)) shall [~~will~~] also be used in KPDES permits and shall [~~will~~] be referred to as 401 KAR 5:055, Section 7(4), variances.

[~~(2) Definitions. For the purpose of this section:~~

~~(a) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under 401 KAR 5:055, Section 7(4).~~

~~(b) "Representative important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish and wildlife in the body of water into which a discharge of heat is made.~~

~~(c) The term "balanced, indigenous community" means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species and by a lack of domination by pollution tolerant species. Such a community may include historically nonnative species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modification. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with 401 KAR 5:065, Section 1(1)(b), and may not include species whose presence of abundance is attributable to alternative effluent limitations imposed pursuant to 401 KAR 5:055, Section 7(4).~~]

(2) [~~(3)~~] Early screening of applications for 401 KAR 5:055, Section 7(4), variances.

(a) Any initial application for the variance shall include the following early screening information:

1. A description of the alternative effluent limitation requested;

2. A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

3. A general description of the type of data, studies, experiments, and other information which the discharger intends to submit for the demonstration; and

4. [~~Such~~] Data and information as may be available to assist the cabinet [~~director~~] in selecting the appropriate representative important species.

(b) After submitting the early screening information under paragraph (a) of this subsection, the discharger shall consult with the cabinet [~~director~~] at the earliest practicable time, but not later than thirty (30) days after the application is filed, to discuss the discharger's early screening information. Within sixty (60) days after the application is filed, the discharger shall submit for the cabinet's [~~director's~~] approval a detailed plan of study which the discharger will undertake to support its 401 KAR 5:055, Section 7(4), demonstration. The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical, and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the cabinet shall [~~director will~~] either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies which the cabinet [~~director~~] subsequently determines necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger shall provide any additional information or studies which the discharger contends [~~feels~~] are appropriate to support the demonstration.

(c) Any application for the renewal of 401 KAR 5:055, Section 7(4), variance shall include only the [~~such~~] information described in paragraphs (a) and (b) of this subsection and 401 KAR 5:075 as the cabinet [~~director~~] requests within sixty (60) days after receipt of the permit application.

(d) The cabinet shall [~~director will~~] promptly notify the Secretary of the U.S. Department of Commerce, the Secretary of the U.S. Department of the Interior, and any affected state of the filing of the request and shall [~~will~~] consider any timely recommendations they submit.

(e) In making the demonstration the discharger shall consider any information or guidance published by EPA to assist in making the [~~such~~] demonstrations.

(f) If an applicant desires a ruling on a 401 KAR 5:055, Section 7(4), application before the ruling on any other necessary permit terms and conditions, it shall so request upon filing its application under paragraph (a) of this subsection. This request will be granted or denied at the discretion of the cabinet [~~director~~].

(3) [~~(4)~~] Criteria and standards for the determination of alternative effluent limitations.

(a) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the cabinet [~~director~~] that the [~~such~~] effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made. This demonstration shall show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, shall assure the protection and propagation of a balanced indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.

(b) In determining if [~~whether or not~~] the protection and propagation of the affected species will be assured, the cabinet [~~director~~] may consider any information contained or referenced in any applicable thermal water quality criteria and information published by the administrator under CWA Section 304(a) (33 USC Section 1314(a)) or any other information it [~~he~~] deems relevant.

(c) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any [~~such~~] demonstrations shall show:

1. That no appreciable harm has resulted from the normal component of the discharge, taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge has been made; or

2. That despite the occurrence of [~~such~~] previous harm, the desired alternative effluent limitations, or appropriate modifications thereof, shall nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.

(d) In determining if [~~whether or not~~] prior appreciable harm has occurred, the cabinet shall [~~director will~~] consider the length of time in which the applicant has been discharging and the nature of the discharge.

Section 5. New Sources and New Dischargers. [~~(1) Definitions.~~

~~(a) "New source" and "new discharger" are defined in 401 KAR 5:050, Section 1.~~

~~(b) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.~~

~~(c) "Existing source" means any source which is not a new source or a new discharger.~~

~~(d) "Site" is defined in 401 KAR 5:050, Section 1.~~

~~(e) "Facilities or equipment" means buildings, structures process or production equipment, or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.~~]

(1) [~~(2)~~] Criteria for new source determination.

(a) Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets the definition of "new source" in 401 KAR 5:001 [~~5:050, Section 1~~]; and:

1. It is constructed at a site at which no other source is located;

2. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

3. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the cabinet [~~director~~] shall consider such factors as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source.

(b) A source meeting the requirements of paragraph (a) of this subsection is a new source only if a new source performance standard is independently applicable to it. If there is no [~~such~~] independently applicable standard, the source is a new discharger. See 401 KAR 5:001 [~~5:050, Section 1~~].

(c) Construction on a site at which an existing source is located results in a modification subject to 401 KAR 5:070, Section 6 rather than a new source [~~(~~]or a new discharger[~~)~~] if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (a) of this subsection but otherwise alters, replaces, or adds to existing process or production equipment.

(d) Construction of a new source as defined under 401 KAR 5:001 [~~5:050, Section 1~~] has commenced if the owner or operator has:

1. Begun or caused to begin as part of a continuous on-site construction program:

a. Any placement, assembly, or installation of facilities or equipment; or

b. Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

2. Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be revoked [~~terminated~~] or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this subsection.

(e) When a KPDES permit issued to a source with a "protection period" under subsection (2) [~~(3)~~](a) of this section will expire on or after the expiration of the protection period, that permit shall require the owner or operator of the source to comply with the requirements of Section 1 of this administrative regulation and CWA Section 301 (33 USC Section 1311) and any other then applicable CWA requirements immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall [~~may~~] be allowed except when necessary to achieve compliance with requirements promulgated less than three (3) years before the expiration of the protection period.

(f) The owner or operator of a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet the conditions of its permits before beginning to discharge. Within the shortest feasible time (not to exceed ninety (90) days), the owner or operator shall meet all permit conditions. The requirements of this subsection do not apply if the owner or operator is issued a permit containing a compliance schedule under 401 KAR 5:070, Section 2(1).

(g) After the effective date of new source performance standards, no owner or operator shall operate the source in violation of those standards applicable to the source.

(2) [~~(3)~~] Effect of compliance with new source performance standards. The provisions of this subsection do not apply to existing sources which modify their pollution control facilities or construct new pollution control facilities and achieve performance standards, but which are neither new sources or new dischargers or otherwise do not meet the requirements of this subsection.

(a) Except as provided in paragraph (b) of this subsection, any new discharger, the construction of which commenced after October 18, 1972, or new source which meets the applicable promulgated new source performance standards before the commencement of discharge, shall [~~may~~] not be subject to any more stringent new source performance standards or to any more stringent technology-based standards under CWA Section 301(b)(2) (33 USC Section 1311(b)(2)) for the soonest ending of the following periods:

1. Ten (10) years from the date that construction is completed;

2. Ten (10) years from the date the source begins to discharge process or other nonconstruction related wastewater; or

3. The period of depreciation or amortization of the facility for the purposes of Internal Revenue Code Section 167 or 169 (26 USC Section 167 or 169).

(b) The protection from more stringent standards of performance afforded by paragraph (a) of this subsection does not apply to:

1. Additional or more stringent permit conditions which are not technology based; for example, conditions based on water quality standards, or toxic effluent standards or prohibitions under CWA Section 307(a) (33 USC Section 1317 (a)); or

2. Additional permit conditions in accordance with 401 KAR 5:065 [~~5:055~~], Section 2(5) [~~1(2)~~] controlling toxic pollutants or hazardous substances which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances.

Section 6. Toxic Pollutants. References throughout the KPDES administrative regulations establish specific requirements for discharges of toxic pollutants. The following listing identifies those toxic pollutants required to be considered for each of these KPDES requirements:

(1) Acenaphthene.
(2) Acrolein.
(3) Acrylonitrile.
(4) Aldrin or [~~/~~] dieldrin.
(5) Antimony and compounds.
(6) Arsenic and compounds.
(7) Asbestos.
(8) Benzene.
(9) Benzidine.
(10) Beryllium and compounds.
(11) Cadmium and compounds.
(12) Carbon tetrachloride.
(13) Chlordane (technical mixture and metabolites).
(14) Chlorinated benzenes (other than dichloro-benzenes).
(15) Chlorinated ethanes (including 1,2-dichloroethane, 1,1,1-trichloroethane, and hexachloroethane).

(16) Chloroalkyl ethers (chloromethyl, chloroethyl, and mixed ethers).
(17) Chlorinated naphthalene.
(18) Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols).
(19) Chloroform.
(20) 2-chlorophenol.
(21) Chromium and compounds.
(22) Copper and compounds.
(23) Cyanides.
(24) DDT and metabolites.
(25) Dichlorobenzenes (1,2-, 1,3-, and 1,4- dichlorobenzenes).
(26) Dichlorobenzidine.
(27) Dichloroethylenes (1,1- and 1,2-dichloroethylene).
(28) 2,4-dichlorophenol.
(29) Dichloropropane and dichloropropene.
(30) 2,4-dimethylphenol.
(31) Dinitrotoluene.
(32) Diphenylhydrazine.
(33) Endosulfan and metabolites.
(34) Endrin and metabolites.
(35) Ethylbenzene.
(36) Fluoranthene.
(37) Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ether, bromophenylphenyl ether, bis(dischloroisopropyl) ether, bis(chloroethyoxy) methane and polychlorinated diphenyl ethers).
(38) Halomethanes (other than those listed elsewhere; includes methylene chloride methylchloride, methyl-bromide, bromoform, dichlorobromomethane, trichlorofluoromethane, di-chlorodifluoromethane).
(39) Heptachlor and metabolites.
(40) Hexachlorobutadiene.
(41) Hexachlorocyclohexane (all isomers).
(42) Hexachlorocyclopentadiene.
(43) Isophorone.
(44) Lead and compounds.
(45) Mercury and compounds.
(46) Naphthalene.
(47) Nickel and compounds.
(48) Nitrobenzene.
(49) Nitrophenols (including 2,4-dinitrophenol, dinitrocresol).
(50) Nitrosamines.
(51) Pentachlorophenol.
(52) Phenol.
(53) Phthalate esters.
(54) Polychlorinated biphenyls (PCBs).
(55) Polynuclear aromatic hydrocarbons (including benzanthracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenzanthracenes, and indenopyrenes).
(56) Selenium and compounds.
(57) Silver and compounds.
(58) 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD).
(59) Tetrachloroethylene.
(60) Thallium and compounds.
(61) Toluene.
(62) Toxaphene.
(63) Trichloroethylene.
(64) Vinyl chloride.
(65) Zinc and compounds.
(66) The term "compounds" shall include organic and inorganic compounds.

PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at noon

EDUCATION AND HUMANITIES CABINET
Department of Education
Office of District Support Services
(Amended After Hearing)

702 KAR 3:270. SEEK funding formula.

RELATES TO: KRS 156.035, 156.070, 157.360, 157.410, 157.440, 157.620, 160.476, 160.477
STATUTORY AUTHORITY: KRS 156.070, 156.160
NECESSITY AND FUNCTION: KRS 156.035 and 156.070 set forth the State Board for Elementary and Secondary Education's plenary powers over the management and control of local school districts and disbursement of state appropriations. KRS 156.160 gives the State Board for Elementary and Secondary Education the authority to promulgate administrative regulations deemed necessary for the preparation of budgets and salary schedules for the school districts under its management and control. This administrative regulation is necessary to provide guidelines for the calculations to distribute the funds to school districts through **the program to** Support Education Excellence in Kentucky (SEEK).

Section 1. Definitions. (1) "At-risk **student** amount" means fifteen (15) percent of the per pupil guaranteed base funding provided pursuant to KRS 157.360(1) times the average of the highest number of approved applications for free meals in each of the eight (8) months (September through May excluding December) of the prior fiscal year and times the number of state agency children served pursuant to KRS 158.135.
(2) "Calculated base SEEK funding" means the guaranteed base funding provided in the biennial budget pursuant to KRS 157.360(1) plus the add-on components of the SEEK calculation including at-risk, home and hospital, exceptional children and transportation per KRS 157.360(2).
(3) "Collection rate" means the tax receipts collected for the prior year divided by the maximum revenue collectible. The maximum revenue collectible shall be the prior year's permissive tax revenue plus the levied rates per $100 of assessed value for real and tangible property and motor vehicles times the prior year assessment of real and tangible property and motor vehicles.
(4) "Debt service outstanding" means the amount of debt service in excess of eighty (80) percent of the allotment for the capital outlay component of SEEK plus the local revenue generated by the five (5) cent equivalent tax levy required for the Facility Support Program of Kentucky participation per KRS 157.620(1)(a).
(5) "Exceptional child amount" means the December 1 exceptional child count of the preceding fiscal year by exceptionality weighted as follows:
(a) 2.35 times the per pupil base funding per KRS 157.360(1) for students with severe disabilities;
(b) 1.17 times the per pupil base funding per KRS 157.360(1) for students with moderate disabilities; and
(c) .24 times the per pupil base funding per KRS 157.360(1) for students with communications disabilities.
(6) "Growth" means the percent change in the second month average daily attendance times the prior year adjusted average daily attendance.
(7) "Home and hospital **instruction** amount" means the current year**'s** first semester home and hospital average daily attendance plus the prior year**'s** second semester home and hospital average daily attendance, times the per pupil base funding per KRS 157.360(1), less the allotment for capital outlay **as set forth in the Biennial Budget**.
(8) "Levied equivalent tax rate" means estimated permissive tax revenue plus the current year's levied real estate tax rate, tangible tax rate and motor vehicle tax rate per $100 of assessed value times the current year's assessment of real estate, tangible property and motor

vehicles times the prior year's collection rate divided by the total current year's property and motor vehicle assessment.

(9) "Release time" means regularly scheduled time missed by students **with school district approval**.

(10) "Shared time average daily attendance" means the average attendance for nondistrict students who attend public schools on a part-time basis **in another district**.

(11) "State equalization amount" means 150 percent of the statewide average per pupil property assessment as provided in the biennial budget.

(12) "Tier I revenue" means revenue produced by a school district tax levy which, when equalized by state funds with the state equalization amount per KRS 157.440(1)(a), generates up to the maximum revenue allowable per KRS 157.440(1)(a), fifteen (15) percent above the calculated base SEEK funding.

(13) "Tier II revenue" means revenue produced by a school district tax levy above the Tier I tax levy which generates no more than the maximum revenue allowable per KRS 157.440(2), thirty (30) percent above the combined calculated base SEEK funding and Tier I revenue.

(14) "Transportation funding" means prior fiscal year calculated transportation costs for students in grades primary through twelve (12) transported by school districts as calculated by the Division of Pupil Transportation, Department of Education, pursuant to KRS 157.370 and adjusted by current year second month growth in transported students.

(15) "Vocational educational deduct" means a deduct factor to be applied against the per pupil guaranteed base funding in those instances where a student spends a portion of the school day at a state-operated vocational center.

Section 2. SEEK Calculation Formula. (1) Required data for the SEEK calculation shall include:

(a) Property assessments from the Department of Property Taxation, Revenue Cabinet provided per KRS 160.470(5);

(b) Tax rates levied by school districts;

(c) Equivalent tax rates based on tax levies;

(d) Home and hospital average daily attendance reported by the Pupil Attendance Branch, Division of Finance, Department of Education;

(e) Prior year adjusted average daily attendance reported by the Pupil Attendance Branch, Division of Finance, Department of Education (in accordance with subsection (3) calculation below);

(f) The growth factor report from the Pupil Attendance Branch, Division of Finance, Department of Education;

(g) Transportation funding reported by the Division of Pupil Transportation, Department of Education;

(h) The number of at-risk students reported by the Division of School and Community Nutrition, Department of Education;

(i) The number of exceptional students in each disability category as reported by the Division of Exceptional Children Services, Department of Education;

(j) Vocational education average daily attendance reported by the Pupil Attendance Branch, Division of Finance, Department of Education; and

(k) The state equalization amount.

(2) Assumptions used in the SEEK calculation shall include:

(a) Equivalent tax rates (ETR) shall be the lower of the ETR levied in the prior odd numbered year per KRS 157.440(1)(a) and the current year;

(b) Adjusted average daily attendance (AADA) plus growth shall be the prior year AADA plus the second month's percent attendance growth times prior year AADA; and

(c) **Percentage reduction in the allotments** **[**~~Pro rata adjustment~~**]** may be made to at-risk **student**, exceptional child, and home and hospital **instruction** amounts and to the state portion of Tier I funding and to transportation funding due to appropriations in the biennial budget.

(3) AADA shall be calculated for students in grades primary through twelve (12) as follows:

(a) Aggregate days attendance as reported by local school districts:

1. Divided by the number of school days taught as reported by local school districts;

2. Equals average daily attendance (ADA);

(b) ADA:

1. Plus shared time ADA as reported by local school districts;

2. Minus ADA for noncontract, nonresident students as reported by local school districts;

3. Minus release time as reported by local school districts;

4. Minus one-half (1/2) of the total aggregate kindergarten days attendance as reported by local school districts divided by the number of days taught;

5. Minus ADA for overage students as reported by local school districts;

6. Equals adjusted average daily attendance.

(4) The SEEK calculation shall be determined as follows:

(a) Per pupil guaranteed base funding per KRS 157.360(1):

1. Times prior year AADA plus growth;

2. Plus at-risk **student** amount;

3. Plus exceptional child amount;

4. Plus home and hospital **instruction** amount;

5. Plus transportation funding;

6. Equals calculated base SEEK funding;

(b) Calculated base SEEK funding:

1. Minus local effort required per KRS 160.470(12)(a);

2. Equals total state SEEK base;

3. Plus total state Tier I funding (in accordance with subsection (6) of this section calculation below);

4. Minus vocational education deduct amount (in accordance with subsection (7) of this section calculation below);

5. Plus hold harmless provision if provided in the biennial budget;

6. Plus prior year adjustments (if any);

7. Minus pro rata adjustments per KRS 157.430 (if any);

8. Equals state SEEK funding.

(5) The formula for the maximum Tier I equivalent tax rate allowable per KRS 157.440(1)(a) shall be as follows:

(a) Guaranteed base funding per KRS 157.360(1):

1. Plus calculated at-risk, exceptional child, home and hospital and transportation amounts:

2. Times fifteen (15) percent;

3. Divided by the greater of the state equalization amount and the local district per pupil assessment.

(6) State Tier I and Tier II funding formulas.

(a) For local districts which have levied an equivalent tax rate at or above the maximum Tier I equivalent tax rate, the state Tier I funding formula shall be as follows:

1. Total calculated base SEEK funding per KRS 157.360;

a. Times maximum Tier I participation fifteen (15) percent per KRS 157.440(1)(a);

b. Equals total Tier I revenue;

c. Divided by prior year AADA plus growth;

d. Equals total per pupil Tier I revenue;

2. Total per pupil Tier I revenue:

a. Minus per pupil local portion Tier I (school district's per pupil assessment divided by the state equalization amount times total per pupil Tier I revenue);

b. Equals state portion per pupil Tier I funding;

c. Times prior year AADA plus growth;

d. Minus pro rata adjustments due to appropriation in the biennial budget;

e. Equals total state Tier I funding.

(b) For local districts which have not levied at or above the maximum Tier I equivalent tax rate per KRS 157.440(1)(a), the state

Tier I funding formula shall be as follows:

1. Levied equivalent tax rate:

a. Minus required minimum thirty (30) cents equivalent tax rate per KRS 160.470(12)(a) and five (5) cents levy per KRS 157.620(1)(a);

b. Equals levied Tier I equivalent tax rate;

c. Times state equalization amount;

d. Equals per pupil total Tier I revenue;

2. Per pupil total Tier I revenue:

a. Minus per pupil local portion Tier I (school district's per pupil assessment divided by the state equalization amount times total per pupil Tier I revenue);

b. Equals state portion per pupil Tier I funding;

c. Times prior year AADA plus growth;

d. Minus pro rata adjustments due to appropriation in the biennial budget;

e. Equals total state Tier I funding.

(c) The Tier II calculation formula shall be as follows: Levied equivalent tax rate:

1. Minus required minimum thirty (30) cents equivalent tax rate per KRS 160.470(12)(a), the five (5) cents levy per KRS 157.620(1)(a), and the maximum Tier I equivalent tax rate;

2. Times total district assessment of property and motor vehicles;

3. Equals Tier II local revenue (not subject to state equalization).

(7) The vocational education **(voc ed)** deduct formula shall be as follows: Total state SEEK base:

(a) Divided by calculated base SEEK funding;

(b) Times per pupil guaranteed base funding per KRS 157.360(1);

(c) Times voc-ed deduct percentage as provided for in the biennial budget;

(d) Equals per pupil deduct amount;

(e) Times voc-ed ADA;

(f) Equals total voc-ed deduct amount.

Section 3. Facilities Support Program of Kentucky (FSPK) Calculation. (1) Data required for the FSPK calculation formula shall include:

(a) Property assessments from the Department of Property Taxation, Revenue Cabinet, per KRS 160.470(5);

(b) Equivalent tax rates based on tax levies from school districts;

(c) Prior year AADA as reported by the Pupil Attendance Branch, Division of Finance, Department of Education;

(d) Total annual debt service for school building revenue bonds; and

(e) State equalization amount.

(2) Assumptions used in the FSPK calculation shall include:

(a) No school district shall receive state equalization funds until the full five (5) cent equivalent tax required for participation has been levied;

(b) School districts which have levied a five (5) cent equivalent tax for building purposes per KRS 157.620(1)(a) shall qualify to receive state equalization funding when the district's outstanding debt service as of October 1 of each odd-numbered year is within $10,000 of the required amount; and

(c) A school district's eligibility for participation in the FSPK program shall be based on prior year AADA. State equalization funds shall be calculated based on prior year AADA plus growth.

(3) The FSPK eligibility calculation shall be as follows: Amount generated by a five (5) cent equivalent tax levy per KRS 157.620(1)(a):

(a) Equals total revenue available for debt service;

(b) Minus total current year debt service (from school district's outstanding school revenue bond issues);

(c) Equals debt service needed for equalization (positive amounts indicate ineligibility for equalization).

(4) Once a school district has been determined eligible for state FSPK funds, the state equalization calculation shall be as follows:

Maximum eligibility (state equalization amount times .0005):

(a) Minus local effort (per pupil assessment times .0005);

(b) Equals per pupil state equalization;

(c) Times prior year AADA plus growth;

(d) Times pro rata adjustments due to appropriation in the biennial budget;

(e) Equals prorated state FSPK amount.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at 3 p.m.

EDUCATION, ARTS, AND HUMANITIES CABINET
Department of Education
Bureau of Learning Results Services
(Amended After Hearing)

703 KAR 4:060. Academic expectations.

RELATES TO: KRS 158.645, 158.6451, 158.6453, 158.6455
STATUTORY AUTHORITY: KRS 156.070, 158.6455
NECESSITY AND FUNCTION: KRS 158.6455 gives the State Board for Elementary and Secondary Education the authority to promulgate administrative regulations to establish a system of determining successful schools and a system of rewards and sanctions for certified staff in schools and school districts. Successful schools must be defined in terms of student achievement of the goals set forth in KRS 158.6451, and with reference to the statewide assessment program set forth in KRS 158.6453. This administrative regulation clarifies the academic expectations which may be addressed by the statewide assessment program administered pursuant to KRS 158.6453.

Section 1. The "Academic Expectations", dated **July** **[~~May~~]**, 1994, for the statewide assessment program are hereby adopted and incorporated by reference, and may be inspected and copied at the Department of Education, Office of Curriculum, Assessment, and Accountability, 19th Floor, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky, Monday through Friday, 8 a.m. through 4:30 p.m.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the State Board for Elementary and Secondary Education, as required by KRS 156.070(4).

Thomas C. Boysen
Commissioner of Education

JOSEPH W. KELLY, Chairman
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at 3 p.m.

PROPOSED AMENDMENTS RECEIVED THROUGH NOON, JULY 15, 1994

HIGHER EDUCATION ASSISTANCE AUTHORITY
(Proposed Amendment)

11 KAR 4:030. Student appeals process.

RELATES TO: KRS 164.748(14)
STATUTORY AUTHORITY: KRS 164.748(4)
NECESSITY AND FUNCTION: The Kentucky Higher Education Assistance Authority administers programs to provide financial assistance to students to attend postsecondary institutions. This administrative regulation sets forth the procedures by which students may request a review of decisions made by the authority which affect their rights, obligations and benefits or their eligibility to participate in authority administered programs. This amendment is necessary to specify certain hearing procedures.

Section 1. (1) Scope of administrative regulation. The procedures prescribed in this administrative regulation shall not apply to a determination of default or payment of an insurance claim by the authority with respect to an insured student loan, the setoff of an individual's tax refund for payment of a debt owed to the authority, or the issuance of an administrative order of wage garnishment by the authority for recovery of an insured student loan, except to the extent specified by administrative regulations applicable to those actions.

(2) Written Inquiry. A recipient of financial assistance benefits from the authority (including an individual indebted on a loan made or insured by the authority) or an applicant for financial assistance benefits from the authority [~~student~~] may, upon any adverse action by the authority, submit a written request to the authority at Frankfort, Kentucky, within sixty (60) days following notification of the adverse action [~~(or any delegated officer of the authority) at Frankfort, Kentucky~~], for a concise statement of the reason(s) for such action. The authority or any of its delegated officers, within ten (10) working days of receipt of the inquiry [~~said notice,~~] shall respond in writing to the [~~student~~] inquiry and notify the recipient of financial assistance or applicant [~~student~~] therein of his [~~the~~] right to appeal the adverse action.

Section 2. Request for Redetermination by Executive Director. (1) Grounds. In the event the recipient of financial assistance or applicant [~~student~~] disputes the factual accuracy of information contained in the authority's response, he [~~the student~~] may submit certified documentation and such other information as the authority may require, and request a redetermination. In the event that the recipient of financial assistance or applicant [~~student~~] disputes the application of rules and[~~/or~~] regulations [~~and/~~]or discretionary determinations by the authority to particular facts, the recipient of financial assistance or applicant [~~student~~] may request a review of the decision by the executive director. If the findings warrant, the executive director may uphold the findings of the officer or may find in favor of the recipient of financial assistance or applicant [~~student~~].

(2) Time frame. The [~~Said~~] review by the executive director shall be requested within sixty (60) days of notification of the reason(s) for any adverse action.

(3) Documentation. Prior to a determination by the executive director, the recipient of financial assistance or applicant [~~student~~] shall submit any and all documentation and information as he [~~the student~~] reasonably believes supports his[~~/her~~] position, and shall submit all [~~such~~] information and documentation that [~~as~~] the authority may reasonably require. The [~~Said~~] documentation and information shall be deemed conclusive evidence as to all matters in dispute, and shall be binding against all parties.

(4) [~~Section 2.~~] Notice[~~s~~]. The recipient of financial assistance or applicant [~~student~~] shall be provided with notice of the decision of the executive director, which shall [~~be issued in the name of the executive director and shall~~] inform the recipient of financial assistance or applicant [~~student~~] of the right to request a hearing within ten (10) days [~~appeal to the authority for a hearing~~] on all issues contained therein. [~~All requests for hearings may be effected in the same manner as prescribed by law for the service of civil process or by the student forwarding same to the authority by U.S. registered mail or certified mail, postage prepaid, to the authority at Frankfort, Kentucky. At such a hearing the student will be entitled to be represented by counsel chosen by the student at student expense. The hearing may be conducted by a hearing officer or a hearing committee appointed by the authority. All members of the authority and all persons appointed by the authority as hearing officer or members of a hearing committee are authorized to administer oaths, issue subpoenas for attendance of witness and for the production of related records and documentation, and to cite for contempt before the court having jurisdiction in the county in which the hearing is held for disobedience of its process or for improper conduct. The student, or student counsel or both will be entitled to introduce testimony by witnesses or, if the authority so permits, by deposition(s). Hearing officers and hearing committees will prepare recommendations and submit same to a committee of the board.~~]

Section 3. Request for Hearing. (1) In the event of an adverse decision by the executive director, the recipient of financial assistance or applicant may request a hearing. The request for a hearing shall be served on the authority within ten (10) days after receipt of notice of the executive director's adverse decision. Service of the notice of the executive director's decision shall be conclusively presumed to be effected five (5) days after mailing of the notice by the authority, if sent by U.S. first class mail, unless the notice is returned to the authority undelivered by the postal service. The date of service of the notice may otherwise be evidenced by affidavit of an individual executing personal service or a postal delivery receipt.

(2) Upon receipt of a timely request for a hearing, the authority shall arrange for a hearing on the record before a hearing officer appointed by the authority. The hearing officer shall establish a schedule for any discovery, prehearing conferences, and the time and place of the hearing. The place of the hearing shall be in Franklin County, unless another location is agreed on by the parties. The hearing may be conducted by telephone or upon written submissions if the recipient of financial assistance or applicant requests. An in-person or telephonic hearing shall be mechanically, electronically, or stenographically recorded.

(3) Not less than thirty (30) days prior to the scheduled in-person or telephonic hearing, the parties shall exchange and submit to the hearing officer a list of the names, addresses, and phone numbers of any witnesses expected to testify at the hearing and a brief summary of the testimony of each witness that the party expects to introduce into evidence. Upon the request of either party, at any time, the hearing officer may issue a subpoena for the production of documents or the attendance of witnesses. Either party may depose witnesses, upon reasonable notice to the witness and the opposing party, without leave of the hearing officer, except that attendance of witnesses that are not parties to the hearing may be compelled by subpoena issued by the hearing officer, either party may, without leave of the hearing officer, submit interrogatories and request for admissions to the opposing party. The party receiving the interrogatories or request for admissions shall respond within twenty (20) days, or upon such shorter or longer time as the hearing officer may allow. Each matter of which an admission is requested shall be deemed admitted unless, within fifteen (15) days after service of the request, or upon such

shorter or longer time as the hearing officer may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter.

(4) At the hearing, the parties shall have the right to be heard by the hearing officer, be represented by counsel, present evidence, cross-examine witnesses, and make both opening and closing statements.

(5) The hearing officer shall convene the in-person or telephonic hearing, identify the parties to the action and the persons participating, solicit from the parties and dispose of any objections or motions, accept into evidence any documentary evidence not objected to, solicit opening statement, and proceed with the taking of proof. The taking of proof shall commence first with the presentation of evidence by the recipient of financial assistance or applicant and then by the authority, with opportunities for cross-examination, rebuttal, and closing statements.

(6) The hearing officer shall not admit evidence that is excludable as a violation of an individual's constitutional or statutory rights or privilege recognized in the courts of the Commonwealth. However, statutes or judicial rules otherwise pertaining to the admission of evidence in a judicial proceeding shall not apply to a hearing under this administrative regulation, and the hearing officer may receive any evidence deemed reliable and relevant, including evidence that would be considered hearsay if presented in court, except that hearsay evidence shall not be sufficient in itself to support the hearing officer's decision. The hearing officer may exclude any evidence deemed unreliable, irrelevant, incompetent, immaterial, or unduly repetitious. The hearing officer may allow up to fifteen (15) working days following the hearing to submit additional briefs or written arguments and proposed findings of fact and conclusions of law.

(7) The hearing officer shall render the decision in writing, and shall set forth findings of fact and conclusions of law. The hearing officer shall issue the decision within thirty (30) working days of the date of the hearing.

(8) An adverse decision by the hearing officer shall be appealed to the board of directors of the authority not later than twenty (20) days after the date of the hearing officer's decision. If there is no appeal to the board within twenty (20) days, the findings of the hearing officer shall be conclusive and binding upon the parties.

Section 4. Appeal to Board. If a party timely appeals the hearing officer's decision to the board, the board shall review the hearing officer's decision and the record of the hearing. The board shall adopt the hearing officer's decision unless it is clearly unsupported by the evidence presented at the hearing and the applicable law. The board shall only consider the record adduced at the hearing, including all documents, briefs, and transcripts of the hearing, as well as the evidence presented at the hearing. The board may affirm, modify, or reverse the hearing officer's decision by a written statement of the reasons for the affirmance, modification, or reversal.

Section 5. Appeal to Court. If the party adversely affected by the decision of the board of directors is entitled as a matter of law to judicial review of the decision, then absent an appeal of the board's decision to a court of competent jurisdiction within twenty (20) days after the issuance of the decision by the board of directors, the board's determination shall be final and binding upon the parties. ~~[Decisions and Appeals. In the absence of an appeal to the board, decisions made as a result of the authority hearing shall be binding upon the authority and the student, twenty (20) days after written notice thereof is given as provided.]~~

WAYNE STRATTON, Chairman

APPROVED BY AGENCY: June 28, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Tuesday, August 23, 1994 at 9 a.m. at 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky. Individuals interested in attending this hearing shall notify this agency in writing by Thursday, August 18, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Mr. Paul P. Borden, Executive Director, Kentucky Higher Education Assistance Authority, 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky 40601, (502) 564-7990.

REGULATORY IMPACT ANALYSIS

Agency Contact: Paul P. Borden

(1) Type and number of entities affected: In FY 93 more than 129,950 applications for loans, grants and/or scholarships were received by the Kentucky Higher Education Assistance Authority and more than 65,560 students and/or teachers received some sort of financial aid. Every one of these filers was potentially eligible to request an administrative hearing, if adversely affected by a KHEAA decision. In fact, however, in the last two years, only two hearings were requested, both by recipients of teacher scholarships, and one of these was settled prior to hearing date.

(a) Direct and indirect costs or savings to those affected:

1. First year: There will be minimal cost to the agency. The cost of the hearing (approximately $200 per case) will be absorbed by KHEAA.

2. Continuing costs or savings: See #1 above.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: This amendment reflects a recent change in legislation authorizing hearing officers appointed by KHEAA to issue subpoenas for attendance of witnesses and production of documents. The amendment would also allow either party to serve on the opposing party requests for admissions and interrogatories. While it is anticipated that these procedures would be used only on rare occasions to clarify issues and expedite the hearing process, these changes provide the potential for additional paperwork requirements for both the agency and the public.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There will be minimal savings to the public. The cost of the hearing (approximately $200 per case) will be absorbed by KHEAA.

2. Continuing costs or savings: Same as (2)(a)(1) above.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: This amendment reflects a recent change in legislation authorizing hearing officers appointed by KHEAA to issue subpoenas for attendance of witnesses and production of documents. The amendment would also allow either party to serve on the opposing party requests for admissions and interrogatories. While it is anticipated that these procedures would be used only on rare occasions to clarify issues and expedite the hearing process, these changes provide the potential for additional paperwork requirements for both the agency and the public.

(3) Assessment of anticipated effect on state and local revenues: The amendment will not have any significant impact of increasing or decreasing state or local revenue. The amendment is intended to set out procedures and time frames for conducting an administrative hearing in the event that a recipient of financial aid or an applicant for financial aid is adversely affected by a KHEAA decision.

(4) Assessment of alternative methods; reasons why alternatives

were rejected: No alternative method was considered. The amendment is intended to set out procedures and time frames for conducting an administrative hearing in the event that a recipient of financial aid or an applicant for financial aid is adversely affected by a KHEAA decision.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: N/A

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A

(6) Any additional information or comments: None

Tiering: Was tiering applied? If no, explain why tiering was not applied. The concept of tiering is not applicable to this administrative regulation. Disparate treatment of any person or entity affected by this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the Fourteenth Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

HIGHER EDUCATION ASSISTANCE AUTHORITY
(Proposed Amendment)

11 KAR 5:150. Notification of award.

RELATES TO: KRS 164.740 to 164.764, 164.780, 164.785, 1994 Ky. Acts ch. 36

STATUTORY AUTHORITY: KRS 13A.100, 164.748(4)

NECESSITY AND FUNCTION: The Kentucky Higher Education Assistance Authority administers grant programs to provide financial assistance to students to attend Kentucky educational institutions. This administrative regulation sets forth the procedures for notification to applicants and to educational institutions. This amendment reflects the codification of the CAP grant program by enactment of 1994 Ky. Acts ch. 36. [~~deletes common definitions that are being placed in a separate regulation. The provisions of this regulation duplicate 11 KAR 11:040. Therefore, an amendment of this regulation repeals 11 KAR 11:040.~~]

Section 1. The authority shall notify each KHEAA grant recipient of the amount of award together with disbursement information. The recipient shall notify the authority of any incorrect information appearing on the notice, including name, address, social security number or institutional choice errors or changes.

Section 2. So long as funds are available the authority shall individually notify applicants of the reason for their denial. When funds are no longer available, public, rather than individual, notification shall be given.

Section 3. Periodically the authority shall forward to the KGPO at each educational institution a report listing student applicants indicating that institution as the one in which they plan to enroll.

WAYNE STRATTON, Chairman

APPROVED BY AGENCY: June 28, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Tuesday, August 23, 1994 at 9 a.m. at 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky. Individuals interested in attending this hearing shall notify this agency in writing by Thursday, August 18, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Mr. Paul P. Borden, Executive Director, Kentucky Higher Education Assistance Authority, 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky 40601, (502) 564-7990.

REGULATORY IMPACT ANALYSIS

Agency Contact: Paul P. Borden

(1) Type and number of entities affected: The only change to the administrative regulation is a reference to newly-enacted legislation. There is no substantive change impacting rights, benefits, obligations or procedures. The CAP grant program was previously authorized by directives in several biennial budgets. The program was enacted into statute by 1994 Ky. Acts ch.36 in substantially the same form as previously authorized, except that for the first time, institutions offering only nondegree programs are eligible to participate. An estimated 300-400 students enrolled in nondegree programs of study at one of 25 publicly supported vocational-technical schools will now receive CAP Grants. Students enrolled at a number of private institutions that do not offer degree programs are now potentially eligible for CAP Grants, except that the institutions have not sought voluntary participation in the program for the 1994-95 academic year.

(a) Direct and indirect costs or savings to those affected:

1. First year: There is no substantive change impacting rights, benefits, obligations or procedures. There will be no direct or indirect costs or savings resulting from this amendment.

2. Continuing costs or savings: There is no substantive change impacting rights, benefits, obligations or procedures. There will be no direct or indirect costs or savings resulting from this amendment.

3. Additional factors increasing or decreasing costs (note any effects upon competition): Same as #2 above.

(b) Reporting and paperwork requirements: There will be no additional reporting or paperwork requirements.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings: There is no substantive change impacting rights, benefits, obligations or procedures. There will be no direct or indirect costs or savings resulting from this amendment.

1. First year: There will be no direct or indirect costs or savings.

2. Continuing costs or savings: There will be no direct or indirect costs or savings.

3. Additional factors increasing or decreasing costs: Same as #2 above.

(b) Reporting and paperwork requirements: There will be no additional reporting or paperwork requirements.

(3) Assessment of anticipated effect on state and local revenues: There is no effect on state or local revenue.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternative method was considered. This regulation is being amended to cite 1994 Ky. Acts ch. 36 as the codification of the CAP grant program into statute.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: N/A

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A

(6) Any additional information or comments: None

Tiering: Was tiering applied? No. The only change to the administrative regulation is a reference to newly-enacted legislation. The concept of tiering is not applicable to this amendment of this administrative regulation. Disparate treatment of any person or entity affected by this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and

"due process" clauses of the Fourteenth Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

HIGHER EDUCATION ASSISTANCE AUTHORITY
(Proposed Amendment)

11 KAR 5:170. Refund and repayment policy.

RELATES TO: KRS 164.748(4), (8), (12), (14); 164.753(4)(a), 164.780, 164.785, 1994 Ky. Acts ch. 36

STATUTORY AUTHORITY: KRS 13A.100, 164.748(4)

NECESSITY AND FUNCTION: The Kentucky Higher Education Assistance Authority administers grant programs to provide financial assistance to students to attend Kentucky post secondary institutions. This regulation sets forth the apportionment of financial aid refunds from institutions and repayment from students due to the KHEAA grant programs. This amendment deletes certain provisions pertaining to the allocation of refunds among various student financial assistance programs to avoid conflict with new federal requirements governing federal student financial assistance programs [~~common definitions that are being placed in a separate regulation. Additionally, the provisions of this regulation substantially duplicate 11 KAR 11:060. Therefore, an amendment of this regulation repeals 11 KAR 11:060.~~]

Section 1. A student who fails to enroll, withdraws or changes enrollment status may be due a refund of monies paid to the institution or may owe a repayment of cash disbursements made to the student for educational expenses. If the student received financial aid, a portion of the refund and/or repayment shall be due to the financial aid programs.

Section 2. The amount of the refund and/or repayment shall be determined in accordance with the educational institution's refund and repayment policies relative to financial aid funds, except as provided in Section 3 of this regulation. These policies shall be published and consistently administered. The policies shall be filed with the authority. The authority shall be notified in writing of any changes in such policies.

Section 3. When a KHEAA grant recipient officially or unofficially withdraws from or is expelled by an institution before the first day of classes of the award period, the award shall be deemed an overaward and a full refund or repayment of the KHEAA grant shall be required, notwithstanding any institutional policy to the contrary. In cases of unofficial withdrawal, the institution shall use the last recorded date of class attendance by the student as the end of the student's enrollment. If the institution is unable to document the student's last date of attendance, any KHEAA grant disbursement for that award period shall be subject to full refund and repayment. If, at any time, a KHEAA grant recipient's enrollment is terminated with no assessment of tuition and fees by the institution, then the full KHEAA grant shall be subject to cancellation, if not yet disbursed, or refund and repayment if the grant has already been disbursed.

[~~Section 4. If a refund is due under the institution's financial aid refund policy, the KHEAA grant or a portion thereof shall be refunded by the institution by check made payable to KHEAA grants. The institution shall multiply the total financial aid refund amount by the following fraction to determine the portion of the refund to be returned to the authority:~~

~~KHEAA grant for the term~~
~~Total aid awarded for the term~~
~~(Minus work earnings)~~

~~Section 5. (1) If, under the institution's financial aid repayment policy, the student owes a repayment, the KHEAA grant or a portion thereof shall be repaid to the authority by the student. The institution shall calculate the amount of repayment due to the authority and notify the student and the authority in a timely fashion regarding the amount due to the authority. Students are required to make such repayments by certified check or money order payable to KHEAA Grants, Frankfort, Kentucky. The institution shall multiply the total financial aid repayment amount by the following fraction to determine the portion of the repayment to be paid to the authority by the student:~~

~~KHEAA grant for the term~~
~~Total aid awarded for the term~~
~~(Minus work earnings)~~

~~(2) The authority shall notify the student and the institution when repayment is received.~~]

Section 4. [~~6.~~] Refunds by institutions and notifications of student repayments due transmitted to the authority shall be accompanied by student's name and social security number, the reason for the refund or repayment, date of enrollment status change, the semester and year, and the calculation used for determining each refund or repayment.

WAYNE STRATTON, Chairman

APPROVED BY AGENCY: June 28, 1994

FILED WITH LRC: July 13, 1994 at 2 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Tuesday, August 23, 1994 at 9 a.m. at 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky. Individuals interested in attending this hearing shall notify this agency in writing by Thursday, August 18, 1994 five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Mr. Paul P. Borden, Executive Director, Kentucky Higher Education Assistance Authority, 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky 40601, (502) 564-7990.

REGULATORY IMPACT ANALYSIS

Agency Contact: Paul P. Borden

(1) Type and number of entities affected: A total of 81 institutions of higher education encompassing approximately 25,000 students will participate in the 1994-95 Kentucky Higher Education Assistance Authority grant programs. This administrative regulation merely aligns state refund procedures with new federal requirements.

(a) Direct and indirect costs or savings to those affected:

1. First year: There will be no direct or indirect costs or savings. A refund is determined to be due based upon the educational institution's own refund policy. This administrative regulation, as well as federal regulations governing federal programs, prescribe how a refund, once it is determined to be due, is allocated among the various student aid programs from which the student received assistance. Therefore, this administrative regulation does not change the amount of refund that might be determined to be due.

2. Continuing costs or savings: There will be no direct or indirect costs or savings.

3. Additional factors increasing or decreasing costs (note any

effects upon competition): This amended administrative regulation will not increase direct or indirect costs or otherwise effect competition. The refund policy of each educational institution is equally applied to all students at the institution, and the allocation of refunds among student aid programs is uniformly prescribed by federal regulations and statutes for all institutions.

(b) Reporting and paperwork requirements: There will be no additional reporting or paperwork requirements.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: The amount of refunds that may be payable for KHEAA grant recipients can not be projected precisely because the occurrence of a refund is dependent on unforeseen, individual circumstances for each grant recipient (i.e. whether the student remains enrolled or withdraws and how long the student remains enrolled). For the 1993-94 academic year that ended June 30, 1994, KHEAA grant programs (College Access Program grants and Kentucky Tuition Grants) received $168,228 in refunds and repayments. Under recent changes in federal statutes and regulations that govern the federal student financial aid programs, any refunds determined to be due by an institution must first be allocated to any federal student loans received by the student and then to federal grants, and thereafter, to the extent that there are remaining funds to be refunded, money would be returned to the state grant programs and institutional aid programs. This contrasts with the former method of allocation of refunds prescribed by federal regulations whereby refunds would be allocated proportionately across all of the student aid programs from which the student received assistance.

Accordingly, it is anticipated that refunds, which are typically small amounts, would be fully absorbed by the federal loan and grant programs, leaving almost nothing to be returned to the state grant programs. Amounts returned to the state grant programs as refunds are normally redisbursed in subsequent semesters as student grants to other students, so there would not be a direct cost or savings to the promulgating administrative body.

2. Continuing costs or savings: There will be no direct or indirect costs or savings.

3. Additional factors increasing or decreasing costs: There will be no direct or indirect costs.

(b) Reporting and paperwork requirements: There are no additional reporting or paperwork requirements.

(3) Assessment of anticipated effect on state and local revenues: The funds appropriated for the state grant programs, KTG and CAP, will not change.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternative method was considered. This regulation is being amended to eliminate sections that prescribed the allocation of refunds among various student financial aid programs. 34 CFR Section 668.22 (Allocation of Refunds and Overpayments) directs educational institutions to allocate refunds first to federal student financial assistance programs.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: This administrative regulation is being amended to eliminate sections that prescribed the proportional allocation of refunds among various student financial aid programs. 34 CFR Section 668.22 (Allocation of Refunds and Overpayments) now directs educational institutions to allocate refunds first to federal student financial assistance programs.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: See (5)(a) above.

(6) Any additional information or comments: None

Tiering: Was tiering applied? No. Disparate treatment of any person or entity affected by this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the Fourteenth Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

HIGHER EDUCATION ASSISTANCE AUTHORITY
(Proposed Amendment)

11 KAR 5:180. Records and reports.

RELATES TO: KRS 164.740 to 164.764, 164.780, 164.785, 1994 Ky. Acts ch. 36

STATUTORY AUTHORITY: KRS 13A.100, 164.748(4)

NECESSITY AND FUNCTION: The Kentucky Higher Education Assistance Authority administers grant programs to provide financial assistance to students to attend Kentucky educational institutions. This administrative regulation requires that educational institutions provide records and reports to the authority. This amendment is necessary to reflect the codification of the CAP grant program by enactment of 1994 Ky. Acts ch. 36. [~~delete common definitions that are being placed in a separate regulation, and delete provisions that impose requirements upon the form of an enrollment contract. Additionally, the provisions of this regulation substantially duplicate 11 KAR 11:070. Therefore, an amendment to this regulation repeals 11 KAR 11:070.~~]

Section 1. Records and Reports. An educational institution shall establish an organized system of records pertaining to KHEAA grant recipient eligibility, maintain these records for a period of not less than five (5) years after the award year in which the recipient ceased enrollment, and, upon request, make available to the authority:

(1) All records relied upon by that institution to certify that any recipient of funds from the authority is an eligible student; and

(2) Information necessary to verify that the institution has complied with 11 KAR Chapter 5, and the federal act, and representations and requirements contained in its agreement with the authority.

WAYNE STRATTON, Chairman

APPROVED BY AGENCY: June 28, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Tuesday, August 23, 1994 at 9 a.m. at 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky. Individuals interested in attending this hearing shall notify this agency in writing by Thursday, August 18, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Mr. Paul P. Borden, Executive Director, Kentucky Higher Education Assistance Authority, 1050 U.S. 127 South, Suite 102, Frankfort, Kentucky 40601, (502) 564-7990.

REGULATORY IMPACT ANALYSIS

Agency Contact: Paul P. Borden

(1) Type and number of entities affected: The only change to the administrative regulation is a reference to newly-enacted legislation. There is no substantive change impacting rights, benefits, obligations or procedures. The CAP grant program was previously authorized by directives in several biennial budgets. The program was enacted into statute by 1994 Ky. Acts ch.36 in substantially the same form as previously authorized, except that for the first time, institutions offering only nondegree programs are eligible to participate. An estimated

300-400 students enrolled in nondegree programs of study at one of 25 publicly supported vocational-technical schools will now receive CAP Grants. Students enrolled at a number of private institutions that do not offer degree programs are now potentially eligible for CAP Grants, except that the institutions have not sought voluntary participation in the program for the 1994-95 academic year.

(a) Direct and indirect costs or savings to those affected:

1. First year: There is no substantive change impacting rights, benefits, obligations or procedures. There will be no direct or indirect costs or savings resulting from this amendment.

2. Continuing costs or savings: There is no substantive change impacting rights, benefits, obligations or procedures. There will be no direct or indirect costs or savings resulting from this amendment.

3. Additional factors increasing or decreasing costs (note any effects upon competition): Same as #2 above.

(b) Reporting and paperwork requirements: There will be no additional reporting or paperwork requirements.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings: There is no substantive change impacting rights, benefits, obligations or procedures. There will be no direct or indirect costs or savings resulting from this amendment.

1. First year: There will be no direct or indirect costs or savings.

2. Continuing costs or savings: There will be no direct or indirect costs or savings.

3. Additional factors increasing or decreasing costs: Same as #2 above.

(b) Reporting and paperwork requirements: There will be no additional reporting or paperwork requirements.

(3) Assessment of anticipated effect on state and local revenues: There is no effect on state or local revenue.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternative method was considered. This regulation is being amended to cite 1994 Kentucky Acts Chapter 36 as the codification of the CAP grant program into statute.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: N/A

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A

(6) Any additional information or comments: None

Tiering: Was tiering applied? No. The only change to the administrative regulation is a reference to newly-enacted legislation. The concept of tiering is not applicable to this amendment of this administrative regulation. Disparate treatment of any person or entity affected by this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the Fourteenth Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:080. Plant nutrients.

RELATES TO: KRS 250.366(7)

STATUTORY AUTHORITY: KRS 250.421

NECESSITY AND FUNCTION: To prescribe in detail when and how plant nutrients in addition to nitrogen, phosphorus and potassium shall be registered and guaranteed.

Section 1. Plant nutrients in addition to nitrogen, phosphorus and potassium when mentioned in any form or manner shall be registered and shall be guaranteed. Guarantees shall be made on the elemental basis. Sources of the elements guaranteed and proof of availability shall be provided the director upon request. Except guarantees for those water soluble nutrients labeled for hydroponic or continuous liquid feed programs, and guarantees for potting soils, the minimum percentages which will be accepted for registration are as follows:

Element	Percent
Calcium (Ca)	1.0000
Magnesium (Mg)	0.5000
Sulfur (S)	1.0000
Boron (B)	0.0200
Chlorine (Cl)	0.1000
Cobalt (Co)	0.0005
Copper (Cu)	0.0500
Iron (Fe)	0.1000
Manganese (Mn)	0.0500
Molybdenum (Mo)	0.0005
Sodium (Na)	0.1000
Zinc (Zn)	0.0500

Section 2. Guarantees or claims for the plant nutrients listed in Section 1 of this regulation are the only ones which will be accepted. Proposed labels and directions for the use of the fertilizer shall be furnished with the application for registration upon request. Any of the elements listed in Section 1 of this regulation which are guaranteed shall appear in the order listed and shall immediately follow guarantees for the primary nutrients of nitrogen, phosphorus and potassium if present.

C. ORAN LITTLE, Dean and Director

APPROVED BY AGENCY: July 7, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:080, Plant Nutrients, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.

CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry

(1) Type and number of entities affected: 255 in-state and 261 out-of-state registrants.

(a) Direct and indirect costs or savings to those affected:

1. First year: Since this administrative regulation allows the registration of products that previously would have been disapproved, the affected entities will incur the direct cost of registration of $50 per product for those registered.

2. Continuing costs or savings: Continuing costs would be the same as above.

3. Additional factors increasing or decreasing costs (note any effects upon competition): Puts competition on a fairer basis.

(b) Reporting and paperwork requirements: An application for registration must be filed as usual to register the affected products.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There will be very few products affected and the additional administrative work will be insignificant.

2. Continuing costs or savings: No change.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: An application must be filed to register any product that now qualifies for registration.

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: The amendment allows certain types of fertilizers to be registered that otherwise would be rejected. It improves the information available to the consumer.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments: None

TIERING: Was tiering applied? Yes. This regulation allows those fertilizers specifically labeled for continuous liquid feed or hydroponics; or, for potting soils that contain fertilizer to be exempt from the minimums all other fertilizers are subject to.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:090. Guaranteed analysis.

RELATES TO: KRS 250.366(7), (17)

STATUTORY AUTHORITY: KRS 250.421

NECESSITY AND FUNCTION: To prescribe the format of the guaranteed analysis required to be on a fertilizer label.

Section 1. The following information in the format presented is the minimum required for all fertilizer labels. For packaged products, this information shall either:

(1) Appear on the front or back of a package;

(2) Occupy at least the upper-third of a side of a package; or

(3) Be printed on a tag and attached to the package.

Section 2. This information shall be in a readable and conspicuous form. For bulk products, this same information in written or printed form shall accompany delivery and be supplied to the purchaser at time of delivery.

(1) Net weight.

(2) Brand and grade: provided that the grade shall not be required when no primary nutrients are claimed.

(3) Guaranteed analysis:*

Total Nitrogen (N)** . . . . . ____%
____% Ammoniacal Nitrogen
____% Nitrate Nitrogen
____% Water Insoluble Nitrogen
____% Urea Nitrogen
____% (Other recognized and determinable forms of N)
Available Phosphate [~~Phosphoric Acid~~] (P_{os} . . . . . ____%
Soluble Potash (K_o) . . . . . ____%
(Other nutrients, elemental basis)*** . . . . . ____%

*If percentage is zero (0), the nutrient shall be omitted from the statement except in nutrient guarantee breakdowns.

**If the chemical forms of N are claimed, the form shall be guaranteed in the format shown and the percentages of the individual forms shall add up to the total nitrogen percentage. No implied order of the forms of nitrogen is intended.

***As prescribed by 12 KAR 4:080.

(4) Sources of nutrients, when shown on the label, shall be listed below the completed guaranteed analysis statement.

(5) Name and address of registrant or licensee.

C. ORAN LITTLE, Dean and Director

APPROVED BY AGENCY: July 7, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:090, Guaranteed analysis, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.

CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry

(1) Type and number of entities affected: 255 in-state and 261 out-of-state registrants.

(a) Direct and indirect costs or savings to those affected:

1. First year: The amendment requires a change in the way phosphorus is guaranteed on the fertilizer label. For farm fertilizers the change can be made with little or no cost. For speciality fertilizers where the label is more elaborate the cost is estimated at about $300 per label. If the change is made as part of other changes on the label there would be little or no additional cost. By allowing this change to be made when other changes are made on the label or when the label is reprinted will minimize cost of this change to the regulated industry.

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs (note any effects upon competition): By allowing the registrants to phase in the label change, the costs will be minimized.

(b) Reporting and paperwork requirements: Each company will have to submit the revised labels as part of the registration process; however, when incorporated as part of normal label updating, no significant additional work is anticipated.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: The Division of Regulatory Services will review the labels for the change as part of the routine label review process which will not change the usual paperwork requirements or add any additional costs to the division.

2. Continuing costs or savings: Same as in the first year.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: No change.

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: Any alternate way of stating the phosphorus guarantee would be nonstandard and cause problems in the industry.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments:

TIERING: Was tiering applied? No. All fertilizer labels must be uniform to preclude erroneous interpretations and misunderstandings by the consumers. It would also result in unfair competition to allow certain entities within the industry to use a different label; therefore, it is essential that all labels be uniform.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:100. Slowly released nutrients.

RELATES TO: KRS 250.366(7), (17), (18)

STATUTORY AUTHORITY: KRS 250.421

NECESSITY AND FUNCTION: To interpret the fertilizer law as it relates to the proper labeling of slowly released nutrients.

Section 1. No fertilizer labeling shall bear a statement that connotes or implies that certain plant nutrients contained in a fertilizer are released slowly over a period of time, unless the nutrient or nutrients are identified and guaranteed at a level of at least fifteen (15) percent of the total guarantee for that nutrient(s).

Section 2. Types of products with slow release properties recognized are:

(1) Water insoluble [~~(N products only)~~], such as natural organics, urea form materials, urea-formaldehyde products, isobutylidene diurea [~~IBDU~~], oxamide, etc.;

(2) Coated slow release, such as sulfur coated urea and other encapsulated soluble fertilizers; [~~and~~]

(3) Occluded slow release, where fertilizers or fertilizer materials are mixed with waxes, resins, or other inert materials and formed into particles; and

(4) Products containing water soluble slowly available nitrogen such as urea-formaldehyde products, methylenediurea (MDU), dimethylenetriurea (DMTU), dicyanodiamide (DCD), urea-triazone solutions, etc.

The terms, "water insoluble, coated slow release, slow release, controlled release, slowly available water soluble, and occluded slow release" are accepted as descriptive of these products, [~~respectively,~~] provided the manufacturer can show a testing program substantiating the claim (testing under guidance of Kentucky Agricultural Experiment Station personnel or a recognized reputable researcher acceptable to the director). A laboratory procedure, acceptable to the director for evaluating the release characteristics of the product(s) must also be provided by the manufacturer.

Section 3. If an amount of nitrogen is designated as organic, then the water insoluble nitrogen or the slow release nitrogen guarantee must not be less than sixty (60) percent of the nitrogen so designated. Coated urea shall not be included in meeting the sixty (60) percent requirement. [~~To supplement Section 2 of this regulation when the nitrogen is organic, it should be established that if the labeling states the amount of organic nitrogen present in a phrase, such as "nitrogen in organic form equivalent to X% N," then the water insoluble guarantee must not be less than sixty (60) percent of the nitrogen so designated. For example: If the total nitrogen guarantee for a fertilizer is ten (10) percent and the label states, "Nitrogen in organic form equivalent to two and five tenths (2.5) percent N" then the water insoluble guarantee must not be less than one and five tenths (1.5) percent (2.5% x 0.6 = 1.5%).~~]

Section 4. Until more appropriate methods are developed, AOAC International method 970.04 is to be used to confirm the coated slow release and occluded slow release nutrients and others whose slow release characteristics depend on particle size. AOAC International method 945.01 shall be used to determine the water insoluble nitrogen of organic materials. [~~When a slowly released nutrient is less than fifteen (15) percent of the guarantee for either total nitrogen (N), available phosphoric acid (P_2O_5), or soluble potash (K_2O), as appropriate, the labeling shall make no slowly available claims.~~]

C. ORAN LITTLE, Dean and Director

APPROVED BY AGENCY: July 7, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:100, Slowly released nutrients, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.

CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry

(1) Type and number of entities affected: 255 in-state and 261 out-of-state fertilizer registrants.

(a) Direct and indirect costs or savings to those affected:

1. First year: There are no direct or indirect costs or savings to affected entities because this administrative regulation clarifies the labeling requirements for slow released nutrients.

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs (note any effects upon competition): Clarifies the standard way of guaranteeing slowly released nutrients which makes competition fairer.

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There are no direct or indirect costs or savings to the Division of Regulatory Services because this administrative regulation clarifies the labeling requirements for slow released nutrients. There may be fewer questions about labeling which would reduce the administrative work load slightly.

2. Continuing costs or savings: No change.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: Any other way would be nonstandard and cause problems in the industry.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. All fertilizer labels must be uniform to preclude erroneous interpretations and misunderstandings by the consumers. It would also result in unfair competition to allow certain entities within the industry to use a different label; therefore, it is essential that all labels be uniform.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:110. Terms and definitions.

RELATES TO: KRS 250.406

STATUTORY AUTHORITY: KRS 250.421

NECESSITY AND FUNCTION: To utilize standard terms and definitions which reduces regulatory problems for companies selling fertilizer in Kentucky and other states.

Section 1. Definitions. (1) "Acid-forming fertilizer" means a fertilizer capable of increasing the residual acidity of soil.

(2) "Nonacid-forming fertilizer" means a fertilizer that is not capable of increasing the residual acidity of the soil.

(3) "Fertilizer formula" means the quantity and analysis of the crude stock materials used in making a mixed fertilizer.

(4) "Primary nutrients" means nitrogen (N), available phosphate (P_2O_5) or phosphorus (P), and soluble potash (K_2O) or potassium (K).

(5) "Secondary nutrients" means the essential plant nutrients of calcium, magnesium, and sulfur.

(6) "Micronutrients" means the essential plants nutrients of boron, chlorine, cobalt, copper, iron, manganese, molybdenum, sodium and zinc.

(7) "Unit" means twenty (20) pounds of plant food or one (1) percent of a ton.

(8) "Organic fertilizer" means a fertilizer containing carbon combined covalently with one (1) or more elements essential for plant growth other than hydrogen and oxygen.

(9) "Natural organic fertilizers" means organic fertilizers derived from either plant or animal products. These fertilizers:

(a) May be subjected to biological degradation processes under normal conditions of aging, rainfall, sun-curing, air-drying, composting, rotting, enzymatic, or anaerobic/aerobic bacterial action, or any combination of these; and

(b) Shall not be mixed with synthetic materials or changed in any physical or chemical manner from their initial state except by manipulations such as drying, cooking, chopping, grinding, shredding, hydrolysis, or pelleting.

(10) "Synthetic" means any substance generated from another material or materials by means of a chemical reaction.

(11) "Filler" means any substance added to fertilizer materials to provide bulk, prevent caking or serve some purpose other than providing essential plant nutrients.

(12) "Granular fertilizer" means a fertilizer in which ninety-five (95) percent or more of the product is retained on a series of sieves within the range of U.S. No. 4 (4.75 mm opening) to and including U.S. No. 20 (0.850 mm opening) and in which the largest particle passes through a sieve having an opening not larger than four (4) times that of the sieve which retains ninety-five (95) percent or more of the product.

(13) "Liquid fertilizer" means a fluid fertilizer in which the plant nutrients are in true solution.

(14) "Slurry fertilizer" means a fluid fertilizer containing dissolved and undissolved plant nutrient materials which requires continuous mechanical agitation to assure homogeneity.

(15) "Suspension fertilizer" means a fluid fertilizer containing dissolved and undissolved plant nutrients where the undissolved plant nutrients are suspended with the aid of a nonfertilizer suspending agent or by the inherent properties of the undissolved materials. Mechanical agitation may be necessary in some cases to facilitate uniform suspension of the undissolved plant nutrients.

(16) "Coated slow release fertilizer" means a fertilizer containing sources of water soluble nutrients, release of which in the soil is controlled by a coating applied to the fertilizer.

(17) "Nitrophosphate" means a fertilizer obtained by acidulation of phosphate rock with nitric acid resulting in a complex mixture of nitrates and phosphates that does not contain nitrate nitrogen and phosphorus in the same molecule. The process is subject to modifications designed to remove the hygroscopic calcium nitrate formed such as ammoniation, physical separation, coacidulation with sulfuric or phosphoric acids, or subsequent treatment with carbon dioxide.

(18) "Chelate" means the type of compound or chemical union in which a central metallic ion is joined to a chelating agent in the same molecule by two (2) or more bonds. Such linkages result in the formation of one (1) or more heterocyclic rings in which the metal is part of the ring.

(19) "Chelating agent" means a compound having two (2) or more sites of attachment to a metallic ion to form a chelate. Examples are EDTA (ethylenediaminetetraacetic acid), NTA (nitrilo-triacetic acid), polyphosphoric acid, proteins and polyflavanoids.

(20) "Chelated plant nutrients" means metallic secondary nutrients and micronutrients which have reacted with chelating agents and have the property of being available under pH conditions in which the nutrients normally form insoluble compounds.

(21) "Pelletized fertilizer" means a fertilizer whose physical form is uniform in size and usually of globular shape containing one (1) or more nutrients produced by one (1) of several methods including:

(a) Solidification of a melt while falling through a countercurrent stream of air;

(b) Dried layers of slurry applied to recycling particles;

(c) Compaction;

(d) Extrusion; and

(e) Granulation.

(22) "Manipulation" means processed or treated in any manner, including drying to a moisture content of less than thirty (30) percent, composting, bagging, leaching, pelleting, dissolution and recrystallization.

(23) "Unmanipulated" means materials not subjected to manipulation.

(24) "Slow or controlled release fertilizer" means a fertilizer containing a plant nutrient in a form which delays its availability for plant uptake and use after application, or which extends its availability to the plant significantly longer than a reference "rapidly available nutrient fertilizer" such as ammonium nitrate, urea, ammonium phosphate, or potassium chloride. Such delay of initial availability or extended time of continued availability may occur by a variety of mechanisms including:

(a) Controlled water solubility of the material by semipermeable coatings, occlusion, or by inherent water insolubility of polymers, natural nitrogenous organics, protein materials, or other chemical forms;

(b) By slow hydrolysis of water soluble low molecular weight compounds; or

(c) By other unknown means.

(25) "Hydroponics" means a system in which water soluble nutrients are placed in intimate contact with the plant's root system, being grown in an inert supportive medium which supplies physical support for the roots but which does not add or subtract plant nutrients.

(26) "Continuous liquid feed" means the external application of water soluble nutrients in the irrigation water every time the plant requires water.

(27) "Polymer coated fertilizer" means a coated slow release fertilizer consisting of fertilizer particles coated with a polymer (plastic) resin and is a source of slowly available plant nutrient(s).

(28) "Composting" means the biological decomposition of organic matter which may be accomplished by mixing and piling in such a way to promote aerobic and/or anaerobic decay. The process inhibits pathogens, viable weed seeds, and odors.

(29) "Compost" means a biologically stable material derived from the composting process.

(30) "Natural inorganic fertilizer" means a mineral nutrient source that exists in or is produced by nature and may be altered from its original state only by physical manipulation.

(31) "Natural fertilizer" means a fertilizer composed only of natural organic and/or natural inorganic fertilizer materials and natural fillers.

(32) "Potting soil" means a material suitable for holding and growing potted plants and usually made from natural materials. It may include fertilizers, pesticides and/or soil amendments.

(33) "Ammoniated superphosphate" means a fertilizer obtained when superphosphate is treated with ammonia or with solutions which contain ammonia and other compounds of nitrogen. The guaranteed percentages of nitrogen and of available phosphate shall be stated as part of the name.

(34) "Ammonium nitrate" means a fertilizer that is chiefly the ammonium salt of nitric acid. It shall contain not less than thirty-three (33) percent nitrogen, one-half (1/2) of which is in the ammonium form and one-half (1/2) in the nitrate form.

(35) "Calcium nitrate" means a fertilizer that is chiefly the calcium salt of nitric acid. It shall contain not less than fifteen (15) percent nitrate nitrogen.

(36) "Nitrate of potash or potassium nitrate" means a fertilizer that is chiefly the potassium salt of nitric acid. It shall contain not less than twelve (12) percent nitrogen and forty-four (44) percent soluble potash.

(37) "Nitrate of soda or sodium nitrate" means a fertilizer that is chiefly the sodium salt of nitric acid. It shall contain not less than sixteen (16) percent nitrate nitrogen and twenty-six (26) percent sodium.

(38) "Nitrate of soda potash or sodium and potassium nitrate" means a fertilizer that is chiefly the sodium and potassium salts of nitric acid. It shall contain not less than fifteen (15) percent nitrate nitrogen, ten (10) percent soluble potash and eighteen (18) percent sodium.

(39) "Sulfate of ammonia or ammonium sulfate" means a fertilizer that is chiefly the ammonium salt of sulfuric acid. It shall contain not less than twenty and five-tenths (20.5) percent nitrogen.

(40) "Ammonium sulfate nitrate" means a fertilizer that is a double salt of ammonium sulfate and ammonium nitrate which are present in equal molecular proportions. It shall contain not less than twenty-six (26) percent nitrogen, one-fourth (1/4) of which is in the nitrate form and three-fourths (3/4) in the ammonium form.

(41) "Acidulated fish tankage" means a fertilizer that is derived from rendered fish or fish scrap treated with sulfuric acid.

(42) "Activated sewage" means a fertilizer made from sewage freed from grit and coarse solids and aerated after being inoculated with microorganisms. The resulting flocculated organic matter is withdrawn from the tanks, filtered with or without the aid of coagulants, dried, ground and screened.

(43) "Bat guano" means partially decomposed bat manure.

(44) "Cyanamide" means a commercial product consisting principally of calcium cyanamide (CaNCN) and carbon and it shall contain not less than nineteen and five-tenths (19.5) percent nitrogen.

(45) "Dried blood" means a fertilizer that is the collected blood of slaughtered animals, dried and ground and containing not less than twelve (12) percent nitrogen.

(46) "Animal manure" means a fertilizer derived from the excreta of animals together with whatever bedding materials are needed to follow good dairy barn, feed lot, poultry house, etc., practice in order to maintain proper sanitary conditions.

(47) "Vegetable manure" means plant material that has been composted.

(48) "Garbage tankage" means the rendered, dried and ground product derived from waste household food materials.

(49) "Hoof and horn meal" means a fertilizer derived from processed dried and ground hoofs and horns.

(50) "Peat" means the partly decayed vegetable matter of natural occurrence. It is composed chiefly of organic matter that contains some nitrogen of low activity.

(51) "Fish tankage" means a fertilizer derived from dried, ground, rendered or unrendered whole fish or fish scrap.

(52) "Process tankage" means a fertilizer made under steam pressure from crude inert nitrogenous materials, with or without the use of acids or bases, for the purpose of increasing the activity of nitrogen. These products shall be called "process tankage" with or without further qualification and the water insoluble nitrogen shall test at least fifty (50) percent active by the alkaline permanganate method (AOAC International Method 920.07), or eighty (80) percent active by the neutral permanganate method (AOAC International Method 920.06).

(53) "Tankage (without qualification)" means a fertilizer made from the rendered, dried, and ground by-product, largely meat and bone, from slaughtered animals or those that have otherwise died.

(54) "Sheep manure wool waste" means a fertilizer that is the by-product from wool-carding establishments consisting chiefly of sheep manure, seeds, and wool fiber.

(55) "Crude, inert, or slow-acting nitrogenous materials" means low value fertilizers made from unprocessed organic substances relatively high in nitrogen but having nitrogen activity indexes of less than fifty (50) percent by the alkaline (AOAC International Method 920.07) and less than eighty (80) percent by the neutral (AOAC International Method 920.06) permanganate methods.

(56) "Urea" means a fertilizer that is the commercial synthetic acid amide of carbonic acid and it shall contain not less than forty-five (45) percent nitrogen.

(57) "Ureaform materials (sparingly soluble)" means fertilizers that are reaction products of urea and formaldehyde which:

(a) Contain at least thirty-five (35) percent nitrogen, largely in water insoluble but slowly available form;

(b) Have at least sixty (60) percent of the total nitrogen content in water insoluble form; and

(c) Have a water insoluble nitrogen activity index of not less than forty (40) percent when determined by AOAC International Method 955.05.

(58) "Urea-formaldehyde products (water soluble)" means fertilizers that are reaction products of urea and formaldehyde which:

(a) Contain at least thirty (30) percent nitrogen, largely in water soluble form;

(b) Have some slowly available nitrogen products present;

(c) Form stable aqueous solutions; and

(d) Contain a maximum of fifty-five (55) percent free urea, with the remainder of the urea being chemically combined as methylolureas, methylolurea ethers, and/or methylenediurea (MDU) and dimethylenetriurea (DMTU).

(59) "Urea-formaldehyde products (sparingly soluble)" means fertilizers that are reaction products of urea and formaldehyde which:

(a) Contain less than thirty-five (35) percent total nitrogen, largely in water insoluble but slowly available form;

(b) Have not less than sixty (60) percent of the total nitrogen in water insoluble form; and

(c) Shall have activity indexes of the water insoluble nitrogen that are either:

1. Not less than forty (40) percent by the AOAC International Method 955.05 (nitrogen activity index for urea-formaldehyde products); or

2. Not less than fifty (50) percent by AOAC International Method

920.07 (alkaline permanganate) or eighty (80) percent by AOAC International Method 920.06 (neutral permanganate). They shall have the percentage of total nitrogen as part of the product name; for example: Twenty (20) percent N Urea-Formaldehyde.

(60) "Isobutylidene diurea" means a fertilizer that is the condensation product of isobutyraldehyde and urea having a minimum total nitrogen content of thirty (30) percent. It is a source of slowly available nitrogen by virtue of particle size, solubility decreasing with increase in particle size. Material conforming to the description of a " granular fertilizer " will have ninety (90) percent of its nitrogen content in the water insoluble form prior to grinding as tested by AOAC International Method 945.01.

(61) "Sulfur coated urea" means a coated slow release fertilizer consisting of urea particles coated with sulfur. The product is usually further coated with a sealant (two (2) percent to three (3) percent of total weight) and a conditioner (two (2) percent to three (3) percent of total weight). It typically contains about thirty (30) percent to forty (40) percent nitrogen and about ten (10) percent to thirty (30) percent sulfur.

(62) "Methylenediurea (MDU)" means a fertilizer that is a water soluble condensation product resulting from the reaction of one (1) molecule of formaldehyde with two (2) molecules of urea, with the elimination of one (1) molecule of water. It has a minimum total nitrogen content of forty-two (42) percent and is a source of slowly available nitrogen.

(63) "Dimethylenetriurea (DMTU)" means a fertilizer that is a water soluble condensation product resulting from the reaction of two (2) molecules of formaldehyde with three (3) molecules of urea, with the elimination of two (2) molecules of water. It has a minimum total nitrogen content of forty-one (41) percent and is a source of slowly available nitrogen.

(64) "Dicyanodiamide (cyanoguanidine)" means a fertilizer that is a water soluble organic compound of formula $C_2N_4H_4$ which contains at least sixty-five (65) percent nitrogen. It is a source of slowly available nitrogen.

(65) "Polymer coated urea (PCU)" means a coated slow release fertilizer consisting of urea particles coated with a polymer (plastic) resin. It typically contains about forty (40) percent nitrogen and is a source of slowly available nitrogen.

(66) "Triazone" means a fertilizer that is a water soluble compound of formula $C_9H_{12}N_3O$ which contains at least forty-one (41) percent total nitrogen. (CAS No. 709814-6, 1,3,5 triazin-2-one, tetrahydro-s-triazone)

(67) "Melamine" means a fertilizer that is a sparingly soluble organic compound of formula $C_3H_6N_6$ which contains at least sixty-six (66) percent nitrogen. (CAS No. 10878-1 2,4,6 triamino-1,3,5-triazine, triamino-s-triazine).

(68) "Urea-triazone solution" means a fertilizer that is a stable solution resulting from controlled reaction in aqueous medium of urea, formaldehyde, and ammonia which:

(a) Contains at least twenty-five (25) percent total nitrogen; and

(b) Shall contain no more than forty (40) percent nor less than five (5) percent of the total nitrogen from unreacted urea and not less than forty (40) percent of the total nitrogen from triazone. All other nitrogen shall be derived from water soluble, dissolved reaction products of the above reactants. It is a source of slowly available nitrogen.

(69) "Oxamide (fertilizer grade)" means a fertilizer that is the diamide of oxalic acid of the formula $C_2H_4N_2O_2$ which contains twenty-eight (28) to thirty-two (32) percent nitrogen. It is a source of slowly available nitrogen.

(70) "Ammonium thiosulfate (fertilizer grade)" means a commercial fertilizer composed principally of $(NH_4)_2S_2O_3$. The guaranteed percentages of nitrogen and sulfur shall be stated as part of the name.

(71) "Phosphate" means the phosphorus in a fertilizer that is designated and guaranteed as equivalent to phosphorus pentoxide (P_2O_5).

(72) "Available phosphate" means the sum of the water soluble and the citratesoluble phosphate in a fertilizer.

(73) "Ammonium phosphate (fertilizer grade)" means a fertilizer obtained when phosphoric acid is treated with ammonia (anhydrous or aqueous), and consists principally of monoammonium phosphate and diammonium phosphate or a mixture of these two (2) salts. The guaranteed percentage of nitrogen and of available phosphate shall be stated as part of the name.

(74) "Ammonium phosphate-sulfate (fertilizer grade)" means a fertilizer obtained when a mixture of phosphoric acid and sulfuric acid is treated with ammonia. It consists principally of a mixture of ammonium phosphate and ammonium sulfate. The guaranteed percentages of nitrogen and of available phosphate shall be stated as a part of the name.

(75) "Basic lime phosphate (lime-based superphosphate)" means a superphosphate to which liming materials have been added at least six (6) percent in excess of the quantity required to convert all water soluble phosphate to the citratesoluble form.

(76) "Basic phosphate slag" means a fertilizer that is a by-product obtained in the manufacture of steel from phosphatic iron ores. The product shall:

(a) Contain no admixture of materials other than those resulting from the original process of manufacture;

(b) Contain not less than twelve (12) percent total phosphate of which at least eighty (80) percent shall be available phosphate; and

(c) Be ground so that not less than ninety (90) percent passes through a U.S. Standard No. 50 sieve (300 um opening) and seventy (70) percent of the material passes through a U.S. Standard No. 100 sieve (150 um opening). Any basic phosphate slag not conforming to this definition shall be designated low phosphate.

(77) "Citrate-soluble phosphate" means that part of the total phosphate in a fertilizer that is insoluble in water but soluble in a solution of citrate of ammonia according to AOAC International Method 960.01.

(78) "Dicalcium phosphate" means a manufactured fertilizer consisting chiefly of dicalcic salt of phosphoric acid.

(79) "Acidulated bone" means a fertilizer made from ground bone or bone meal that has been treated with sulfuric acid.

(80) "Ground raw bone" means a fertilizer made from ground animal bones that have not been previously steamed under pressure, heated, or otherwise manipulated.

(81) "Ground sterilized bone" means a fertilizer made from ground animal bones or bone meal that have been previously steamed under pressure, heated, or rendered sterile in some other acceptable manner.

(82) "Phosphate rock" means a natural rock containing one (1) or more calcium phosphate minerals of sufficient purity and quantity to permit its use, either directly or after concentration, in the manufacture of commercial fertilizers.

(83) "Precipitated phosphate" means a fertilizer that consists mainly of dicalcium phosphate obtained by neutralizing with calcium hydroxide the acid solution of either phosphate rock or processed bone.

(84) "Superphosphate" means a fertilizer that is obtained when phosphate rock is treated with either sulfuric acid, phosphoric acid, or a mixture of those acids. The guaranteed percentage of available phosphate shall be stated as a part of the name.

(85) "Soft phosphate with colloidal clay" means a very finely divided, low-analysis fertilizer that is a byproduct from mining Florida rock phosphate by a hydraulic process in which the colloidal materials settle at points in artificial basins farthest from the washer, and are later removed after the natural evaporation of the water.

(86) "Calcium metaphosphate" means a fertilizer that is a vitreous product substantially free from crystalline phosphates, resulting from the treatment of phosphate rock with gaseous phosphorus pentoxide at high temperatures. The guaranteed percentage of available

phosphate shall be stated as part of the name.

(87) "Polyphosphates" means a general class of phosphatic fertilizers made form the salts of any of a series of polyphosphoric acids, whose molecular structure contains two (2) or more phosphorus atoms linked by oxygen. Solutions may contain several ionic species such as orthophosphates, pyrophosphates, and polyphosphates containing three (3) or more phosphorus atoms, commonly known as tripolyphosphates or tetrapolyphosphates and water.

(88) "Superphosphoric acid" means the acid form of polyphosphates, consisting of a mixture of orthophosphoric and polyphosphoric acids. Ionic species distribution varies with concentration, typically sixty-eight (68) to eighty-three (83) percent P_2O_5.

(89) "Calcined phosphate" means a fertilizer made from phosphate rock which has been heated, with or without one (1) or more catalysts or reagents, sufficient to volatilize and remove most or all organic, carbonate, fluoride and other impurities, and/or thermally altered to more available calcium phosphate compounds, depending on the process. Included are compounds known as fused tricalcium phosphate, defluorinated phosphate, rhenania phosphate and various trade names. A significant portion of the phosphate is citrate soluble and such percentage shall be stated as part of the brand name.

(90) "DAP (fertilizer grade)" means a fertilizer composed of ammonium phosphates, principally diammonium phosphate, resulting from the ammoniation of phosphoric acid. It may contain up to two (2) percent nonammoniacal nitrogen. The guaranteed percentage of nitrogen and available phosphate shall be stated as part of the name.

(91) "MAP (fertilizer grade)" means a fertilizer composed of ammonium phosphates, principally monoammonium phosphate, resulting from the ammoniation of phosphoric acid. The guaranteed percentage of nitrogen and available phosphate shall be stated as part of the name.

(92) "Potash" means the potassium in a fertilizer that is designated and guaranteed as equivalent to potassium oxide (K_2O).

(93) "Soluble potash" means the potash contained in a fertilizer which is soluble in aqueous ammonium oxalate, aqueous ammonium citrate, or water, according to an applicable AOAC International Method.

(94) "Kainit" means a fertilizer that is a potash salt containing potassium and sodium chlorides and sometimes sulfate of magnesia with not less than twelve (12) percent soluble potash (K_2O).

(95) "Mine run potash salts" means fertilizers that are potash salts containing a high percentage of chloride and from twenty (20) percent to thirty (30) percent soluble potash (K_2O).

(96) "Muriate of potash (commercial potassium chloride)" means a fertilizer that contains forty-eight (48) percent to sixty-two (62) percent soluble potash (K_2O) chiefly as chloride.

(97) "Sulfate of potash magnesia" means a fertilizer containing not less than twenty-five (25) percent soluble potash (K_2O) nor less than twenty-five (25) percent sulfate of magnesia and not more than two and one-half (2.5) percent chlorine.

(98) "Double sulfate of potash and magnesia (langbeinite)" means a fertilizer containing not less than twenty-one (21) percent soluble potash (K_2O) nor less than fifty-three (53) percent sulfate of magnesia and not more than two and one-half (2.5) percent chlorine.

(99) "Sulfate of potash (commercial potassium sulfate)" means a fertilizer containing not less than forty-eight (48) percent soluble potash (K_2O), chiefly as sulfate, and not more than two and one-half (2.5) percent chlorine.

(100) "Kelp (seaweed)" means a fertilizer derived from the dried marine algae of the botanical divisions of Rhodophyta (red algae), Phaeophyta (brown algae), and Chlorophyta (green algae).

(101) "Manganese sulfate" means a fertilizer consisting of anhydrous manganese sulfate ($MnSO_4$).

(102) "Natural base fertilizer" means a mixed fertilizer where more than half of the fertilizer materials is natural and where more than half of the sum of the guaranteed primary nutrient percentages is derived from natural materials.

(103) "Organic base fertilizer" means a mixed fertilizer where more than half of the fertilizer materials is organic and where more than half of the sum of the guaranteed primary nutrient percentages is derived from organic materials.

(104) "Nitrogen stabilizer" means a substance added to a fertilizer which extends the time the nitrogen component of the fertilizer remains in the soil in the ammoniacal form.

(105) "Stabilized nitrogen fertilizer" means a fertilizer to which a nitrogen stabilizer has been added.

(106) "Magnesium sulfate" means a fertilizer consisting chiefly of the chemical compound, magnesium sulfate, with or without combined water, such as, epsom salts ($MgSO_4.7H_2O$), kieserite ($MgSO_4.H_2O$) and calcined kieserite ($MgSO_4$). ~~[Except as the director has designated otherwise in specific cases, the official terms and definitions for commercial fertilizers adopted by the Association of American Plant Food Control Officials are hereby adopted by reference.~~

~~Section 2. The official terms and definitions adopted by the Association of American Plant Food Control Officials are generally recognized by industry and other regulatory agencies in North America as the standards. The terms are those commonly used in the fertilizer trade, such as brand, fertilizer grade, and primary nutrients; and the definitions include those for nitrogen, phosphorus, potassium, magnesium, sulfur, and manganese products.~~

~~Section 3. The official terms and definitions adopted are those found in Official Publication No. 38 (1985) of the Association of American Plant Food Control Officials. Copies are available from: Treasurer, Association of American Plant Food Control Officials, P.O. Box 1163, 1100 Bank Street, Room 412, Richmond, Virginia 23209 or may be viewed during regular business hours in Room 102, Scovell Hall, University of Kentucky, Lexington, Kentucky.]~~

C. ORAN LITTLE, Dean and Director

APPROVED BY AGENCY: July 7, 1994

FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:110, Terms and definitions, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.

CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry

(1) Type and number of entities affected: 255 in-state and 261 out-of-state registrants.

(a) Direct and indirect costs or savings to those affected:

1. First year: There is no direct or indirect costs or savings to affected entities because this administrative regulation adopts the approved definitions of the Association of American Plant Food Control Officials which had been previously incorporated by reference.

2. Continuing costs or savings: No change.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There is no direct or indirect costs or savings to the Division of Regulatory Services because this administrative regulation adopts the approved definitions of the Association of American Plant Food Control Officials which had been previously incorporated by reference.

2. Continuing costs or savings: No change.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: By placing the terms and definitions in a regulation all registrants will have them easily available. The alternative of adoption by reference restricts the assessability and thereby increases noncompliance.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. All fertilizer registrants must use the same terms and definitions when labeling fertilizers. It would also result in confusion in the market place to use conflicting terms and definitions on fertilizer labeling.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:130. Investigational allowances.

RELATES TO: KRS 250.366(19), 250.391(3), 250.396(1), (2), 250.401

STATUTORY AUTHORITY: KRS 250.421

NECESSITY AND FUNCTION: To prescribe scientifically sound and fair investigational allowances as a basis for declaring a fertilizer sample deficient in its guaranteed analyses and to detail the calculation of the index value of a fertilizer.

Section 1. A fertilizer shall be deemed deficient if the analysis of an official sample for any primary nutrient is below the guarantee by an amount exceeding the values in the following schedule.

Guaranteed percent	Total Nitrogen (N) percent*	Available Phosphate [~~Phosphoric acid~~] (P_2O_5) percent*	Soluble Potash (K_2O) percent*
05 or less	0.37	0.65	0.39
06	0.47	0.71	0.47
07	0.59	0.77	0.56
08	0.72	0.82	0.63
09	0.81	0.86	0.70
10	0.89	0.89	0.76
12	1.03	0.95	0.87
14	1.18	1.02	0.96
16	1.29	1.12	1.05
18	1.43	1.19	1.12
20	1.57	1.32	1.18
22	1.62	1.39	1.22
24	1.65	1.46	1.26
26	1.66	1.53	1.29
28	1.58	1.59	1.33
30	1.28	1.67	1.36
32 or more	1.28	1.67	1.36

For guarantees not listed, calculate the appropriate value by interpolation.

*For these investigational allowances to be applicable, the [~~recommended Association of Official Analytical Chemists~~] procedures recommended by AOAC International for obtaining samples, preparation and analysis must be used. These are described in the current edition of the Official Methods of Analysis of the AOAC International [~~Association of Official Analytical Chemists, 13th Edition, 1980, and in succeeding issues of the Journal of the Association of Official Analytical Chemists~~]. In evaluating replicate data, Table 19, page 935, Journal of the Association of Official Analytical Chemists, Volume 49, No. 5, October, 1966, should be followed.

Section 2. A fertilizer shall be deemed deficient in the overall index value if the overall index value is less than ninety-seven (97) percent.

(1) The overall index value is calculated by comparing the value guaranteed with the value found. Unit values of the nutrients used shall be those referred to in KRS 250.401.

(2) Overall index value. Example of calculation for a 10-10-10 grade found to contain ten and one-tenth (10.1) percent Total Nitrogen (N), ten and two-tenths (10.2) percent Available Phosphate [~~Phosphoric Acid~~] (P_2O_5) and ten and one-tenth (10.1) percent Soluble Potash (K_2O). Nutrient unit values are assumed to be three (3) dollars per unit N, two (2) dollars per unit (P_2O_5), and one (1) dollar per unit K_2O.

10.0 units N	x3=	10.0
10.0 units P_2O_5	x2=	20.0
10.0 units K_2O	x1=	10.0
Commercial Value Guaranteed =		60.0
10.0 units of N	x3=	30.3
10.2 units of P_2O_5	x2=	20.4
10.1 units K_2O	x1=	10.1
Commercial Value Found =		60.8

Overall Index Value = 100(60.8/60.00) = 101.3%

Section 3. Secondary and minor elements shall be deemed deficient if the analysis of an official sample for any of these elements is below the guarantee by an amount exceeding the values in the following schedule:

Element	Investigational Allowance
Calcium)	0.2 unit + 5% of guarantee
Magnesium)	0.2 unit + 5% of guarantee
Sulfur)	0.2 unit + 5% of guarantee
Boron)	0.003 unit + 15% of guarantee
Molybdenum)	0.0001 unit + 30% of guarantee
Chlorine)	0.005 unit + 10% of guarantee
Copper)	0.005 unit + 10% of guarantee
Iron)	0.005 unit + 10% of guarantee
Manganese)	0.005 unit + 10% of guarantee
Sodium)	0.005 unit + 10% of guarantee
Zinc)	0.005 unit + 10% of guarantee

The maximum allowance when calculated in accordance to the above shall be one (1) unit (1%).

C. ORAN LITTLE, Dean and Director
APPROVED BY AGENCY: July 7, 1994
FILED WITH LRC: July 12, 1994 at 10 a.m.
PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:130, Investigational allowances, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.
CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry
(1) Type and number of entities affected: 255 in-state and 261 out-of-state registrants.
(a) Direct and indirect costs or savings to those affected:
1. First year: There are no direct or indirect costs or savings to affected entities because this amended administrative regulation contains only changes to the way phosphorus is stated and the name change for the Association of Official Analytical Chemists.
2. Continuing costs or savings: No change.
3. Additional factors increasing or decreasing costs (note any effects upon competition): None
(b) Reporting and paperwork requirements: None
(2) Effects on the promulgating administrative body:
(a) Direct and indirect costs or savings:
1. First year: There are no direct or indirect costs or savings to the Division of Regulatory Services because this amended administrative regulation contains only changes to the way phosphorus is stated and the name change for the Association of Official Analytical Chemists. None.
2. Continuing costs or savings: No change.
3. Additional factors increasing or decreasing costs: None
(b) Reporting and paperwork requirements: None
(3) Assessment of anticipated effect on state and local revenues: None
(4) Assessment of alternative methods; reasons why alternatives were rejected: Any alternate way of stating the phosphorus guarantee would be nonstandard and cause problems in the industry.
(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None
(a) Necessity of proposed regulation if in conflict:
(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:
(6) Any additional information or comments: The amendment to this regulation accomplishes the change to the way of stating the phosphorus guarantee.
TIERING: Was tiering applied? No. All fertilizer labels must be uniform to preclude erroneous interpretations and misunderstandings by the consumers. It would also result in unfair competition to allow certain entities within the industry to use a different label; therefore, it is essential that all labels be uniform.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:140. Monetary penalties.

RELATES TO: KRS 250.396(1), (2)
STATUTORY AUTHORITY: KRS 250.421
NECESSITY AND FUNCTION: To prescribe the specific method of calculating the monetary penalties required by the fertilizer law.

Section 1. Penalties for deficiencies in Total Nitrogen (N), Available Phosphate [~~Phosphoric Acid~~] (P_2O_5), soluble potash (K_20), and index value shall be calculated from the following schedule:

Number of Investigational Allowances Below Guarantee	Penalty Schedule
≤ 2	Equal to the monetary value of the deficiency
$>2 \leq 3$	Two (2) times the monetary value of the deficiency
>3	Three (3) times the monetary value of the deficiency

Section 2. Minimum standards and overages of primary nutrients are allowed to reduce penalties calculated in Section 1 of this administrative regulation for fertilizer with index values equal to or greater than ninety-seven (97) percent on the basis of the following schedule:

Number of Investigational Allowances Below Guarantee	Penalty Adjustments
No more than one (1) deficiency that is less than or equal to two (2) investigational allowances	Penalty adjusted to zero
No more than one (1) deficiency that is greater than two (2) but less than three (3) investigational allowances	Value of overages may adjust up to 100% of the value of the deficiencies
Two (2) deficiencies that are less than three (3) investigational allowances; or, no more than one (1) deficiency that is equal to or greater than three (3) but less than four (4) investigational allowances	Value of overages may adjust up to 75% of the value of the deficiencies

Section 3. When a fertilizer is subject to a penalty from both a primary nutrient deficiency and an index value deficiency, only the larger penalty shall apply; however, in no case shall the penalty exceed the total value of the fertilizer.

Section 4. Penalties for deficiencies in secondary and minor elements and for excess chlorine in tobacco fertilizer shall be calculated from the following schedule.
(1) Deficiencies.

Number of Investigational Allowances Below Guarantee	Penalty Schedule
≤2	Equal to the monetary value of the deficiency
>2	Two (2) times the monetary value of the deficiency

(2) Excess chlorine in tobacco fertilizers. The investigational allowance for maximum chlorine shall be five-tenths (0.5) percent.

Number of Investigational Allowances Above Maximum Chlorine Guarantee	Penalty Schedule
≤2	Equal to the difference in the soluble potash (for tobacco) unit value and the nontobacco soluble potash unit value
>2	Two (2) times the difference in the soluble potash (for tobacco) unit value and the nontobacco soluble potash unit value

Section 5. Any penalty assessed under Section 1 of this regulation shall be added to any penalty assessed under Section 4 of this regulation and the total shall be paid by the registrant to the consumer of the lot of fertilizer represented by the sample within three (3) months after the date of notice from the director, receipts taken therefore and promptly forwarded to the director. If said consumer cannot be found, the amount of the penalty payments shall be paid to the Kentucky Agricultural Experiment Station within three (3) months after the date of the notice from the director to the registrant and set aside for purchase of equipment for the sampling, handling, analyzing and reporting of results of analyses of official samples and for the education of the Kentucky fertilizer industry on the newest methods in manufacturing blended fertilizers. If the lot of fertilizer is on hand at a retail location the penalty payments assessed under this section shall be used to reduce the retail price of the fertilizer if it is to be relabeled and sold.

Section 6. In no case shall the total of the penalties assessed under this regulation exceed the retail value of the fertilizer.

C. ORAN LITTLE, Dean and Director
APPROVED BY AGENCY: July 7, 1994
FILED WITH LRC: July 12, 1994 at 10 a.m.
PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:140, Monetary penalties, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.
CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry
(1) Type and number of entities affected: 255 in-state and 261 out-of-state registrants.
(a) Direct and indirect costs or savings to those affected:
1. First year: There are no direct or indirect costs or savings to affected entities because this amended administrative regulation contains only the change to the way phosphorus is stated on a fertilizer label to be consistent with the law.
2. Continuing costs or savings: No change.
3. Additional factors increasing or decreasing costs (note any effects upon competition): None
(b) Reporting and paperwork requirements: None
(2) Effects on the promulgating administrative body:
(a) Direct and indirect costs or savings:
1. First year: There are no direct or indirect costs or savings to the Division of Regulatory Services because this amended administrative regulation contains only the change to the way phosphorus is stated on a fertilizer label to be consistent with the law.
2. Continuing costs or savings: No change.
3. Additional factors increasing or decreasing costs: None
(b) Reporting and paperwork requirements: None
(3) Assessment of anticipated effect on state and local revenues: None
(4) Assessment of alternative methods; reasons why alternatives were rejected: Any alternate way of stating the phosphorus guarantee would be nonstandard and cause problems in the industry.
(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None
(a) Necessity of proposed regulation if in conflict:
(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:
(6) Any additional information or comments: The amendment to this regulation accomplishes the change to the way of stating the phosphorus guarantee.
TIERING: Was tiering applied? No. All fertilizer labels must be uniform to preclude erroneous interpretations and misunderstandings by the consumers. It would also result in unfair competition to allow certain entities within the industry to use a different label; therefore, it is essential that all labels be uniform.

KENTUCKY AGRICULTURAL EXPERIMENT STATION
Division of Regulatory Services
(Proposed Amendment)

12 KAR 4:160. Guaranteed nutrients.

RELATES TO: KRS 250.366(7)
STATUTORY AUTHORITY: KRS 250.421
NECESSITY AND FUNCTION: To interpret the fertilizer law as it relates to the format for guaranteeing chemical forms of a guaranteed nutrient.

Section 1. When the chemical forms of a plant nutrient are guaranteed, the percentage for each component shall be shown before the name of the form. Example:
Total nitrogen (N) 34%
17% nitrate nitrogen
17% ammoniacal nitrogen

Magnesium (mg)	2.0%
1% water soluble magnesium (Mg)	
Sulfur (S)	10.0%
5% free sulfur (S)	
5% combined sulfur (S)	
Iron (Fe)	2.0%
2% chelated iron (Fe)	
Manganese (Mn)	1.0%
0.5% water soluble manganese (Mn)	

C. ORAN LITTLE, Dean and Director
APPROVED BY AGENCY: July 7, 1994
FILED WITH LRC: July 12, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on administrative regulation 12 KAR 4:080, Plant Nutrients, shall be held on Monday, August 22, 1994, at 10 a.m. in Room 109, Regulatory Services Building, University of Kentucky, Lexington Kentucky. Individuals interested in attending this hearing shall notify this agency in writing of their intent to attend by Wednesday, August 17, 1994 five days before the hearing. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed regulation. A transcript of the hearing will not be made unless requested in writing. Anyone who does not wish to be heard at the public hearing may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the hearing, or written comments on the proposed administrative regulation, to the contact person.

CONTACT PERSON: D. L. Terry, Coordinator Fertilizer Regulatory Program, 103 Regulatory Services Building, Division of Regulatory Services, College of Agriculture, University of Kentucky, Lexington, KY 40546-0275.

REGULATORY IMPACT ANALYSIS

Agency Contact: D. L. Terry

(1) Type and number of entities affected: 255 in-state and 261 out-of-state registrants.

(a) Direct and indirect costs or savings to those affected:

1. First year: There are no direct or indirect costs or savings to affected entities because this amended administrative regulation simply expands the list of examples of acceptable ways of guaranteeing forms of nutrients.

2. Continuing costs or savings: No change.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There are no direct or indirect costs or savings to the Division of Regulatory Services because this amended administrative regulation simply expands the list of examples of acceptable ways of guaranteeing forms of nutrients.

2. Continuing costs or savings: No change.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: Any alternate way of stating the guarantees would be nonstandard and cause problems in the industry.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments:

TIERING: Was tiering applied? No. All fertilizer labels must be uniform to preclude erroneous interpretations and misunderstandings by the consumers. It would also result in unfair competition to allow certain entities within the industry to use a different label; therefore, it is essential that all labels be uniform.

PERSONNEL BOARD
(Proposed Amendment)

101 KAR 1:365. Appeal and hearing procedures.

RELATES TO: KRS 18A.075, 18A.0751, 18A.095
STATUTORY AUTHORITY: KRS Chapter 13A, 18A.0751
NECESSITY AND FUNCTION: KRS 18A.075 requires the Personnel Board to promulgate comprehensive administrative regulations consistent with the provisions of KRS 18A.005 to 18A.200. KRS 18A.0751 specifies that the Personnel Board promulgate comprehensive administrative regulations providing for the procedures to be utilized by the board in the conduct of hearings.

Section 1. General Provisions. (1)(a) Appeals shall be filed with the Personnel Board through the office of the executive director.

(b) Appeals, motions, exceptions, responses, witness lists, or other documents may be filed by a party with the board by means of facsimile transmission. An attempt shall be made by the party to transmit such documents to all parties in like manner.

(c) To be timely filed, a document transmitted by facsimile must be received by the board within the statutory or regulatory times specified for filing and must be received by the board no later than midnight on the last day for filing.

(d) The original of all facsimile transmissions shall be received by the Personnel Board no later than three (3) business days after transmission or the document transmitted may be voided.

(e) Failure of the board's facsimile equipment to receive a document shall be at the risk of the sender, in which case receipt of the original by the board shall prevail.

(f) Nothing in this section shall be construed to permit the use of state time, equipment, materials, or personnel by state employees in pursuing an appeal.

(2)(a) All appeals shall be heard in Frankfort, Kentucky.

(b) An appeal shall be filed on "Kentucky Personnel Board Appeal Form".

(3) If the appeal form has been signed by an attorney indicating [~~indicates~~] that the appealing employee has retained counsel at the time of filing an appeal, notice of the scheduled hearing and all future notices, correspondence and orders regarding the appeal shall be transmitted to that attorney and all filings and motions on behalf of the appealing employee shall be submitted by that attorney.

(4) Unless otherwise directed by the board, the executive director shall assign a hearing officer or officers to each appeal. If more than one (1) hearing officer is assigned, one (1) shall be designated as chief. If the appeal is to be heard by the full board, the chairman shall serve as the chief hearing officer.

Section 2. Continuances. (1) A[~~ny~~] party may request a continuance of a scheduled hearing for good cause. The request shall be in writing, shall state the reason for the request and include proposed dates for rescheduling. The request shall be filed with the board, through the office of the executive director, and mailed to all parties at least ten (10) days prior to the scheduled hearing.

(2) A[~~ny~~] party objecting to a requested continuance may file a written objection stating the reason. An[~~y~~] objection shall be filed with the board, through the office of the executive director, within five (5) days prior to the scheduled hearing. Copies shall be mailed to all parties.

(3) A continuance may be granted [~~in extraordinary circum-~~

~~stances~~] by the hearing officer for good cause.

(4) A request [~~for a continuance based on a bona fide personal emergency shall be granted only upon appropriate justification and may be granted without strict compliance with the requirements of this section.~~

~~(5) All requests~~] for a continuance shall be ruled on by the hearing officer. At the direction of the hearing officer, the executive director shall execute and transmit to all parties an interim order either granting or denying the continuance. If the continuance is granted, the interim order shall state [~~indicate~~] the date on which the hearing has been rescheduled or that the hearing has been continued generally.

Section 3. Prehearing Procedures. (1) A[~~n~~] motion[~~s~~], request[~~s~~] or filing[~~s~~] shall be in writing, filed with the board through the office of the executive director, and served on all [~~other~~]parties.

(2) An[~~y~~] interim order by the hearing officer shall be executed and transmitted by the executive director to all parties. An interim order[~~s~~] shall [~~are~~] not be reviewable by the board except on final review, unless otherwise provided in the interim order.

(3) If an [~~appealing~~] employee retains counsel subsequent to filing his appeal, his [~~the~~] attorney shall file a written entry of appearance. Subsequent [~~All future~~] notices, correspondence, and orders [~~regarding the appeal~~] shall be transmitted to that attorney and subsequent [~~all future~~] filings and motions on behalf of the [~~appealing~~] employee shall be submitted by that attorney.

(4) An [~~appealing~~] employee shall notify all parties and the board in writing of a[~~ny~~] change of address.

(5) A list of witnesses who may be called to testify shall be filed by each party at least five (5) days prior to the scheduled hearing. Failure of a [~~either~~] party to file a witness list within the prescribed time shall restrict that party to rebuttal.

(6) Kentucky Personnel Board subpoena forms shall be available in the office of the executive director and shall be issued by the executive director. Preparation and service of the subpoena and compliance with the subpoena are the responsibility of the party requesting the subpoena.

(7) Depositions may be taken only in extraordinary circumstances and upon authorization by the hearing officer. A request to take a deposition shall be filed at least seven (7) days prior to the scheduled hearing. An objection to the request [~~Any objections~~] shall be filed prior to the scheduled hearing.

(8) Upon agreement of all parties and approval by the hearing officer, two (2) or more appeals which involve the same or similar facts may be consolidated. Upon motion of any party, or upon his own motion, the hearing officer may join other parties as necessary to appropriately consider the matter [~~on appeal~~].

(9)[~~(a)~~] The hearing officer may schedule a prehearing conference to define the issues, determine which facts, if any, can be stipulated, rule on pending motions or requests, and address any other matter which will facilitate the hearing.

[~~(b) At the prehearing conference, the hearing officer shall not rule on a motion to dismiss for lack of jurisdiction.~~]

(10) An[~~y~~] agreed settlement[~~s~~] shall be submitted in writing for [~~the full board's~~] review and final action by the board.

(11) The executive director, general counsel, and board staff may participate in ex parte communication concerning pending and impending proceedings before the board relating to:

(a) Procedural questions.

(b) Scheduling of hearings.

Section 4. Conduct of Hearing. (1) Unless the appeal is heard by the full board, the hearing officer assigned shall hear the appeal. The hearing officer shall [~~be empowered to~~] make all decisions and rule on all matters concerning the conduct of the hearing. He shall require an orderly and proper decorum at the hearing, and shall be authorized to require compliance with his rulings.

(2) Failure of a[~~ny~~] party to appear at the hearing may result in an adverse ruling against that party.

(3) The rules of civil procedure shall [~~do~~] not apply.

(4) The hearing officer shall direct one of the parties to present its case first, examine witnesses and submit documentation, subject to cross examination. The opposing party shall then present its case, examine witnesses and submit documentation, subject to cross examination.

(5) [~~All~~] Parties shall provide four (4) [~~three (3)~~] copies of an[~~y~~] exhibit that [~~which~~] is to be introduced as evidence. Copies shall be prepared prior to the hearing.

(6) The proceedings and evidence presented may [~~shall~~] be recorded by a court reporter or by video or audio equipment.

Section 5. Findings and Recommendations; Exceptions. (1) Following completion of the hearing, the hearing officer shall prepare a recommended order, including findings of fact and recommendations, based on the evidence, facts and information presented at the hearing and contained in the record.

(2) At the direction of the hearing officer, the recommended order shall be entered and transmitted by the executive director to all parties.

(3) Unless otherwise directed by the hearing officer at the time the recommended order is entered, a [~~Any~~] party may submit written exceptions to the findings of fact and recommendations. Exceptions shall be filed with the board through the office of the executive director within ten (10) days of entry of the recommended order, [~~unless otherwise directed by the hearing officer at the time the recommended order is entered,~~] and served on all parties.

(4) A[~~ny~~] party may submit a written response to exceptions filed with the board. Unless otherwise directed by the hearing officer at the time the recommended order is entered, the response shall be filed with the board through the office of the executive director within twenty (20) days of entry of the recommended order, [~~unless otherwise directed by the hearing officer at the time the recommended order is entered,~~] and served on all parties.

(5)(a) If [~~In appeals where~~] the recommended order entered by the hearing officer recommends [~~proposes~~] immediate reinstatement and [~~,~~] the appointing authority objects [~~objecting~~] to this [~~such a~~] recommendation, it shall file a written request that reinstatement be stayed until appeals are exhausted.

(b) The [~~Such~~] objection and request shall:

1. Completely state the grounds relied upon by the appointing authority; and

2. Be filed with the board and served upon the appellant or his counsel within fifteen (15) days of date the recommended order is entered.

Section 6. Board Review and Action. Following consideration by the full board, a final order shall be entered disposing of the appeal. The order shall be prepared, executed and entered at the direction of the board by the secretary to the board. Copies of the order shall be transmitted to all parties by the executive director.

Section 7. Incorporation by Reference. (1) "Kentucky Personnel Board Appeal Form (3-25-91)", and "Kentucky Personnel Board Subpoena Form (2-90)" are incorporated by reference.

(2) These forms may be inspected, copied or obtained at the Personnel Board, 28 Fountain Place, Frankfort, Kentucky 40601, 8 a.m. to 4:30 p.m., Monday through Friday.

TERRI KING SCHOBORG, Chairperson

APPROVED BY AGENCY: July 8, 1994

FILED WITH LRC: July 14, 1994 at 4 p.m.

PUBLIC HEARING: A public hearing on this proposed administrative regulation shall be held on August 23, 1994, at 9 a.m., at 5 Fountain Place, Frankfort, Kentucky. Individuals interested in being

heard at this hearing shall notify this agency in writing by August 18, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on this proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: R. Hanson Williams, Executive Director, Kentucky Personnel Board, 28 Fountain Place, Frankfort, Kentucky 40601, (502) 564-7830.

REGULATORY IMPACT ANALYSIS

Contact Person: R. Hanson Williams

(1) Type and number of entities affected: All state agencies with classified employees.

(a) Direct and indirect costs or savings to those affected: None

1. First year:

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs (note any effects upon competition):

(b) Reporting and paperwork requirements: Minimal

(2) Effects on the promulgating administrative body: None

(a) Direct and indirect costs or savings: None

1. First year:

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs:

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: None

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: None

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: None

(6) Any additional information or comments: None

TIERING: Is tiering applied? No. This regulation must apply to all classified employees and all state agencies with classified employees. Further tiering has not been utilized in the administrative regulations of the Personnel Board in that the board is a quasi-judicial body and as such has no latitude not granted by statute to utilize tiering methods outlined in KRS 13A.210.

PERSONNEL BOARD
(Proposed Amendment)

101 KAR 1:375. Employee grievances and complaints.

RELATES TO: KRS 18A.075, 18A.0751

STATUTORY AUTHORITY: KRS Chapter 13A, 18A.0751

NECESSITY AND FUNCTION: KRS 18A.075 and 18A.0751 requires the Personnel Board to adopt comprehensive administrative regulations consistent with the provisions of KRS 18A.005 to 18A.200.

Section 1. Definitions; Grievance. A grievance is a complaint filed by an employee which concerns some aspect of his conditions of employment over which his cabinet or agency has control and which has occurred or of which the employee has become aware, through the exercise of due diligence, within thirty (30) days prior to filing.

Section 2. General Provisions. (1) An[y] employee in the classified service who believes that he has been subjected to unfair or unjust treatment concerning his conditions of employment may file a grievance in accordance with this procedure.

(2) A[ny] grievance concerning an action which is appealable directly to the board pursuant to KRS 18A.095 may also be filed with the cabinet or agency. The filing of a grievance with the cabinet or agency shall [does] not prohibit the employee from also filing an appeal with the board, or [however it shall not] extend the statutory [sixty (60) day] appeal period.

(3) An employee[s] utilizing this procedure shall be entitled to file a grievance[s] without interference, coercion, discrimination, or reprisal.

(4) An appointing authority [authorities] shall inform its [all] employees of the provisions of this administrative regulation, or any modifications in the levels of review that [which] have been approved by the Personnel Board for the employee's cabinet or agency pursuant to Section 4(3) of this regulation.

(5)(a) The commissioner [of Personnel] shall provide [make available] to the employees, through the appointing authorities, a grievance form to be used for the filing a grievance.

(b) "Grievance Form (Revised 12-01-92)" is incorporated by reference.

(c) This form may be inspected, copied or obtained at the Personnel Board, 28 Fountain Place, Frankfort, Kentucky 40601, 8 a.m. to 4:30 p.m., Monday through Friday.

Section 3. Procedures. (1) A grievance shall be filed with an [the] employee's immediate supervisor within thirty (30) days following occurrence or the employee becoming aware, through the exercise of due diligence, of the action that [which] is the subject of the grievance. If [In the event] the action or conduct of the first line supervisor is the basis of an [the] employee's grievance, the grievance may be filed with the second line supervisor.

(2) An [The] employee shall state [set forth] in writing the basis of his grievance or complaint together with the corrective action desired. If an [the] employee wishes to submit additional information or documentation, he may attach it to the grievance.

(3) If [When] a grievance is filed that alleges discrimination on the basis of race, color, religion, national origin, sex, disability [handicap] or age forty (40) or over, the recipient of this grievance shall immediately notify the cabinet or agency EEO coordinator to comply with the affirmative action plan.

(4) Interviews to evaluate or investigate the grievance outside of normal work hours with the grievant or other employees shall entitle them [those employees] to compensatory time.

(5) Interviews to evaluate or investigate the grievance held with the grievant or other employees shall not require the use of leave time.

(6) [Both] Parties may have a representative present at each step of the grievance procedure.

Section 4. Grievance Levels. (1) Except as provided by Section 3(1) of this administrative regulation, the immediate supervisor [except as set forth in Section 3(1) of this administrative regulation] shall, upon investigation, issue findings and a decision in writing to the employee within five (5) work days after receipt of the grievance. If the responding supervisor is unable to resolve the complaint to the satisfaction of the employee, the employee may request review of the grievance within two (2) work days of receipt of the decision by [to] the next appropriate level.

(2) If the line supervisors are unable to resolve the grievance to the satisfaction of the employee, the employee may request review of the grievance within two (2) work days of receipt of the decision of the final line supervisor by [to] the appointing authority for a final determination. The appointing authority, upon investigation, shall issue findings and a final determination in writing to the employee within ten (10) work days.

(3) Unless the time limits have been extended by agreement of the parties, failure of supervisory or management personnel to respond within prescribed time limits shall automatically advance[s] the grievance to the next review level[~~, unless the time limits have been extended by agreement of the parties~~].

(4) An[y] intermediate grievance level may be waived by written agreement of the parties.

TERRI KING SCHOBORG, Chairperson

APPROVED BY AGENCY: July 8, 1994

FILED WITH LRC: July 14, 1994 at 1 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 23, 1994, at 9 a.m. at 5 Fountain Place, Frankfort, Kentucky. Individuals interested in being heard at this hearing shall notify this agency in writing by August 18, 1994, five days prior to the meeting, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who attends will be given the opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for at transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: R. Hanson Williams, Executive Director, Kentucky Personnel Board, 28 Fountain Place, Frankfort, Kentucky 40601, (502) 564-7830.

REGULATORY IMPACT ANALYSIS

Contact person: R. Hanson Williams

(1) Type and number of entities affected: All state agencies with classified employees.

(a) Direct and indirect costs or savings to those affected: None

1. First year:

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs (note any effects upon competition):

(b) Reporting and paperwork requirements: Minimal

(2) Effects on the promulgating administrative body: None

(a) Direct and indirect costs or savings: None

1. First year:

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs:

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: None

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: None

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: None

(6) Any additional information or comments: None

TIERING: Is tiering applied? No. This regulation must apply to all classified employees and all state agencies with classified employees. Further tiering has not been utilized in the administrative regulations of the Personnel Board in that the board is a quasi-judicial body and as such has no latitude not granted by statute to utilize tiering methods outlined in KRS 13A.210.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. The rules concerning standards for the establishment and maintenance of a merit system for state governmental units receiving federal grants in aid were issued by the Office of Personnel Management and became effective on February 9, 1979. These rules were revised April 4, 1983, and are now codified as 5 CFR, Part 900, Subpart F, Sections 900.601-900.606, (48 FR 9209, March 4, 1983).

2. State compliance standards. The purpose of this regulation is to implement provisions of Title II of the Intergovernmental Personnel Act of 1970, as amended, relating to federally required merit personnel systems in state agencies. Certain federal grant programs require, as a condition of eligibility, that state agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific federal grant statutes and in other cases are required by regulations of the federal grantor agencies.

3. Minimum or uniform standards contained in the federal mandate. The standards required for a merit system of personnel administration include such merit principles as:

(a) Recruiting, selecting and advancing employees on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure high quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? The provisions of the federal merit standards recognize fully the rights, powers and responsibility of state government and encourages innovation and allows for diversity in the design, execution and management of the system of personnel management, as provided by the Intergovernmental Personnel Act of 1970 if standards have certain specific requirements and options. The requirements and options have been exercised by the General Assembly in the enactment of KRS Chapter 18A and its delegation of duties and responsibilities to the State Personnel Board and the Department of Personnel

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This regulation to our knowledge is not stricter than the federal mandate.

PERSONNEL BOARD
(Proposed Amendment)

101 KAR 1:400. Promotion.

RELATES TO: KRS 18A.075, 18A.0751, 18A.115

STATUTORY AUTHORITY: KRS Chapter 13A, 18A.075

NECESSITY AND FUNCTION: KRS 18A.075 requires the Personnel Board to promulgate comprehensive administrative regulations consistent with the provisions of KRS 18A.005 to 18A.200. KRS 18A.0751 directs that comprehensive administrative regulations be promulgated by the Personnel Board for the classified service governing promotion. KRS 18A.115 relates to promotion of career

employees. The amendment to this administrative regulation is required to conform to Senate Bill 61 (1994 Session), and to the requirements of KRS 18A.112, 13A.200 and 13A.222.

Section 1. Promotion. (1) Agencies shall consider [~~give appropriate consideration to~~] an applicant's qualifications, record of performance, conduct, [~~and~~] seniority and performance evaluations in the selection of an employee for a promotion.

(2) Promotions may be interagency or intra-agency.

(3)(a) An[~~y~~] employee in the classified service, other than a career employee, may be promoted to a position in the unclassified service. [~~, but~~]

(b) He shall not have reversion rights to a[~~ny~~] position in the classified service.

(c) An[y] employee who was promoted or [~~otherwise~~] changed as a result of other action, with no break in service, from a position in the classified service to a position in the unclassified service prior to July 15, 1986, shall retain the reversion rights he held [~~as existed~~] at the time of promotion or other action.

TERRI KING SCHOBORG, Chairperson

APPROVED BY AGENCY: July 8, 1994

FILED WITH LRC: July 14, 1994 at 1 p.m.

PUBLIC HEARING: A public hearing on this proposed administrative regulation shall be held on August 23, 1994, at 9 a.m., at 5 Fountain Place, Frankfort, Kentucky. Individuals interested in being heard at this hearing shall notify this agency in writing by August 18, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on this proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: R. Hanson Williams, Executive Director, Kentucky Personnel Board, 28 Fountain Place, Frankfort, Kentucky 40601, (502) 564-7830.

REGULATORY IMPACT ANALYSIS

Contact Person: R. Hanson Williams

(1) Type and number of entities affected: All state agencies with classified employees.

(a) Direct and indirect costs or savings to those affected: None

1. First year:

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs (note any effects upon competition):

(b) Reporting and paperwork requirements: Minimal

(2) Effects on the promulgating administrative body: None

(a) Direct and indirect costs or savings: None

1. First year:

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs:

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: None

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: None

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: None

(6) Any additional information or comments: None

TIERING: Is tiering applied? No. This regulation must apply to all classified employees and all state agencies with classified employees. Further tiering has not been utilized in the administrative regulations of the Personnel Board in that the board is a quasi-judicial body and as such has no latitude not granted by statute to utilize tiering methods outlined in KRS 13A.210.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. The rules concerning standards for the establishment and maintenance of a merit system for state governmental units receiving federal grants in aid were issued by the Office of Personnel Management and became effective on February 9, 1979. These rules were revised April 4, 1983, and are now codified as 5 CFR, Part 900, Subpart F, Sections 900.601-900.606, (48 FR 9209, March 4, 1983).

2. State compliance standards. The purpose of this regulation is to implement provisions of Title II of the Intergovernmental Personnel Act of 1970, as amended, relating to federally required merit personnel systems in state agencies. Certain federal grant programs require, as a condition of eligibility, that state agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific federal grant statutes and in other cases are required by regulations of the federal grantor agencies.

3. Minimum or uniform standards contained in the federal mandate. The standards required for a merit system of personnel administration include such merit principles as:

(a) Recruiting, selecting and advancing employees on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure high quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? The provisions of the federal merit standards recognize fully the rights, powers and responsibility of state government and encourages innovation and allows for diversity in the design, execution and management of the system of personnel management, as provided by the Intergovernmental Personnel Act of 1970 if standards have certain specific requirements and options. The requirements and options have been exercised by the General Assembly in the enactment of KRS Chapter 18A and its delegation of duties and responsibilities to the State Personnel Board and the Department of Personnel.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This regulation to our knowledge is not stricter than the federal mandate.

DEPARTMENT OF PERSONNEL
(Proposed Amendment)

101 KAR 2:100. Leave regulations.

RELATES TO: KRS 18A.030, 18A.110, 18A.195 [~~1976~~], 61.394, 344.030, PL 103-3

STATUTORY AUTHORITY: KRS 18A.030, 18A.110, 18A.155, 344.030, PL 103-3

NECESSITY AND FUNCTION: KRS 18A.110 requires the Commissioner of Personnel to promulgate comprehensive administrative regulations, consistent with KRS Chapter 18A, which govern annual leave, sick leave, special leaves of absence, and for other conditions of leave. [~~The Family and Medical Leave Act of 1993 (PL 103-3) as implemented by 29 CFR Part 825 requires the granting of family leave.~~] This regulation is necessary to comply with these statutory requirements.

Section 1. Annual Leave. (1) Each full-time employee in the state service, except seasonal, temporary, per diem, and emergency employees, and each part-time employee who works at least 100 hours a month shall accumulate annual leave with pay at the following rate:

Months of Service	Annual Leave Days
0-59 months	1 leave day per month; 12 per year
60-119 months	1 1/4 leave days per month; 15 per year
120-179 months	1 1/2 leave days per month; 18 per year
180 months and over	1 3/4 leave days per month; 21 per year

A full-time employee must have worked more than half of the workdays in a month to qualify for annual leave. Each employee shall be credited with additional leave upon the first day of the month following the month in which the leave is earned. In computing months of total service for the purpose of earning annual leave, only those months for which an employee earned annual leave shall be counted or in the case of a part-time employee, only those months in which the employee worked at least 100 hours shall be counted. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing years of total service. Former employees who have been rehired and who have been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from a violation of KRS 18A.140, 18A.145, or 18A.990. In those cases where an employee is changed from full time to part time, those months for which the employee earned annual leave as a full-time employee shall be counted in computing months of total service. Employees serving on a part-time basis who work less than 100 hours a month shall not be entitled to annual leave.

(2) Annual leave may be accumulated and carried forward from one (1) calendar year to the next not to exceed the following maximum amounts:

Months of Service	Maximum Amount
0-59 months	Thirty (30) workdays
60-119 months	Thirty-seven (37) workdays
120-179 months	Forty-five (45) workdays
180-239 months	Fifty-two (52) workdays
240 months and over	Sixty (60) workdays

However, leave in excess of the above maximum amounts shall be converted to sick leave at the end of the calendar year, or upon retirement. Months of service for the purpose of determining the maximum amount of annual leave which may be accumulated and the amount to be converted to sick leave shall be computed as provided in subsection (1) of this section. Annual leave shall not be granted in excess of that earned prior to the starting date of leave.

(3) Absence due to sickness, injury, or disability in excess of that hereinafter authorized for such purposes may, at the request of the employee and within the discretion of the appointing authority, be charged against annual leave.

(4) Accumulated annual leave shall be granted by the appointing authority in accordance with operating requirements and, insofar as practicable, with the request of employees. An employee who makes a timely request for annual leave shall be granted annual leave by the appointing authority, during the calendar year, up to at least the amount of time he earned that year.

(5) Employees are charged with annual leave for absence only on days upon which they would otherwise work and receive pay.

(6) Annual leave shall accrue only when an employee is working or on authorized leave with pay. Annual leave shall not accrue when an employee is on educational leave with pay.

(7) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his accumulated annual leave in the receiving agency.

(8) Before an employee may be placed on leave of absence without pay in excess of thirty (30) working days, he must have used or have been paid for any accumulated annual leave unless he has requested to retain up to ten (10) days of accumulated annual leave.

(9) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave during the previous month subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(10) Employees shall be paid in a lump sum for accumulated annual leave, not to exceed the maximum amounts as set forth in paragraph (2) of this section, when separated by proper resignation or retirement. In the case of layoff, the employee shall be paid in a lump sum for all accumulated leave. An employee in the unclassified service who reverts to the classified service or an employee who resigns one day and is employed the next day shall retain his accumulated leave in the receiving agency. The effective date of the separation shall be the last workday.

(11) An employee who has been dismissed for cause or who has failed to give proper notice of resignation may, at the discretion of the appointing authority, be paid in a lump sum for accumulated annual leave not to exceed the maximum amounts set forth in Section 2(2) of this regulation.

(12) Upon the death of an employee, his estate shall be entitled to receive pay for the unused portion of the employee's accumulated annual leave.

(13) Absence for a fraction or part of a day that is charged to annual leave shall be charged in hours or increments of one-quarter

(1/4) hours.

Section 2. Sick Leave. (1) Each employee in the state service, except emergency, per diem and part-time employees who work less than 100 hours a month, shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. An employee must have worked more than half of the workdays in a month to qualify for sick leave with pay. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned. Employees serving on a part-time basis who work at least 100 hours a month shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned.

(2) Full-time employees completing 120 months of total service with the state shall be credited with ten (10) additional days of sick leave upon the first day of the month following the completion of 120 months of service. In computing months of total service for the purpose of crediting ten (10) additional days of sick leave, only those months for which an employee earned sick leave shall be used. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing months of total service. Part-time employees who work at least 100 hours a month completing 120 months of total service with the state shall be credited with ten (10) additional sick leave days upon the first day of the month following the completion of 120 months of service. In computing months of total service for part-time employees who work at least 100 hours a month for the purpose of crediting ten (10) additional sick leave days, only those months in which the employee worked at least 100 hours shall be used. In those cases where an employee is changed from full time to part time, those months for which the employee earned sick leave as a full-time employee shall be counted in computing years of total service. The total service must be verified before the leave is credited to the employee's record. Former employees who have been rehired and who had been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from the violation of KRS 18A.140, 18A.145, or 18A.990.

(3) Unused sick leave may be accumulated with no maximum on accumulation.

(4) Sick leave shall accrue only when an employee is working or on authorized leave with pay. Sick leave shall not accrue when an employee is on educational leave with pay.

(5) An appointing authority shall grant or require the use of accrued sick leave with pay when an employee:

(a) Receives medical, dental or optical examination or treatment;

(b) Is disabled by sickness, injury or pregnancy. The appointing authority may require a doctor's statement attesting to the inability to perform his/her duties;

(c) Is required to care for a sick or injured member of his immediate family for a reasonable period of time. The appointing authority may require a doctor's statement supporting the need for care by the employee;

(d) Would jeopardize the health of others at his duty post, because of exposure to a contagious disease;

(e) Has lost by death a parent, child, brother or sister, or the spouse of any of them, or any persons related by blood or affinity with a similarly close association. Leave under this paragraph is limited to three (3) days or a reasonable extension at the discretion of the appointing authority.

(6) At the termination of sick leave with pay not exceeding six (6) months, the appointing authority shall return the employee to his former position. At the termination of sick leave with pay exceeding six (6) months, the appointing authority shall return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit.

(7) An appointing authority shall grant sick leave without pay for so long as an employee is disabled by sickness, or illness, or pregnancy, and the total continuous leave does not exceed one (1) year. The appointing authority may require periodic doctor's statements during the year attesting to the continued inability to perform the essential functions of his duties with or without reasonable accommodation. When the employee has given notice of his ability to resume his duties, the appointing authority shall return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit. The employee shall inform the employer that reasonable accommodation is necessary and shall provide upon request supporting documentation from a certified professional. An employee who is unable to return to work at the end of one (1) year of sick leave without pay, after being requested to return to work at least ten (10) days prior to the expiration of such sick leave, shall be dismissed by the appointing authority only if the appointing authority has been unable to place the employee in a vacant, budgeted position, with the same agency, for which the employee qualifies. The employee shall be given priority consideration for such vacant position, if he is capable of performing its essential functions with or without reasonable accommodation. An employee granted sick leave without pay may, upon request, retain up to ten (10) days of accumulated sick leave.

(8) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave during the previous month subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee in within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(9) Absence for a fraction or part of a day that is chargeable to sick leave shall be charged in hours or increments of one-quarter (1/4) hours.

(10) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his accumulated sick leave in the receiving agency.

(11) Employees shall be credited for accumulated sick leave when separated by proper resignation, layoff, retirement, or when granted leave without pay. Former employees who are reinstated or reemployed shall have unused sick leave balances revived upon appointment and placed to their credit.

(12) In cases of absence due to illness or injury for which Workers' Compensation benefits are received, accumulated sick leave may be used in order to maintain regular full salary. If paid sick leave is used, Workers' Compensation pay benefits shall be assigned back to the state for whatever period of time an employee received paid sick leave. The employee's sick leave shall be immediately reinstated to the extent that Workers Compensation Benefits were assigned.

(13) Application for sick leave. An employee shall file a written application for sick leave with or without pay within a reasonable time.

Except in cases of emergency illness, an employee shall request advance approval for sick leave for medical, dental or optical examination, and for sick leave without pay. In all cases of illness, an employee is obligated to notify his immediate supervisor or other designated person. Failure to do so in a reasonable period of time may be cause for denial of sick leave for the period of absence.

(14) Supporting evidence.

(a) An appointing authority may require an employee to supply supporting evidence in order to receive sick leave. A supervisor's or employee's certificate may be accepted, but a medical certificate may be required, signed by a licensed practitioner and certifying to the incapacity, examination, or treatment. An appointing authority shall grant sick leave when the application is supported by acceptable evidence.

(b) An appointing authority may place on sick leave an employee whose health might be jeopardized by job duties, whose health might jeopardize others, or whose health prevents performance of duties and responsibilities, and who, on request, fails to produce a satisfactory medical certificate.

Section 3. Family Leave. (1) Effective August 5, 1993, every employee in state service who has completed twelve (12) months of service and has worked or been on paid leave at least 1,250 hours during the preceding twelve (12) months shall qualify for twelve (12) weeks of family leave without pay. On the first day of January of each year thereafter every employee in state service who has completed twelve (12) months of service and has worked at least 1,250 hours during the preceding calendar year shall qualify for twelve (12) weeks of family leave without pay. Unused family leave shall not be carried over from year to year.

(2)(a) A week of family leave is the amount of time an employee normally works each week.

(b) If an employee's schedule varies from week to week, a weekly average of the hours worked over the twelve (12) weeks prior to the beginning of the family leave shall be used for calculating the employee's normal work week.

(c) If there has been a permanent or long-term change in the employee's schedule (for reasons other than family leave), the hours worked under the new schedule shall be used for calculating the employee's normal work week.

(3) An appointing authority shall grant family leave, upon the receipt of a completed application from an employee. The appointing authority shall require the employee to utilize accumulated sick, annual and compensatory leave prior to granting unpaid family leave, provided that the employee may request to reserve ten (10) days of paid sick leave. The amount of available family leave shall be reduced by the amount of paid leave used. A completed application means the request form and the medical certification required by subsection (4) of this section. The employee shall make the application as far in advance of the start of the leave as reasonable. Family leave shall be granted:

(a) For the birth of a child of the employee, adoption by the employee of a child, or placement with the employee of a foster child under an agreement with an agency of the Commonwealth or other state government. An appointing authority may require a couple in the employ of an agency to limit the total amount of family leave to twelve (12) weeks where leave is sought in connection with the birth, adoption or placement of a child;

(b) Within one (1) year of the birth of a child of the employee, adoption by the employee or placement with the employee of a foster child, for the care of such newborn, adopted, or foster child;

(c) To an employee to care for the employee's spouse, parent, child (including biological, adopted, step, or foster), or other family member of similarly close blood or legal relationship (who has resided with the employee for not less than thirty (30) days prior to application), if the spouse, child, parent or family member has a serious health condition. A child includes one who is over eighteen (18) years of age and who is incapable of self-care because of a mental or physical disability. A serious health condition is a condition which requires inpatient care or continuing treatment by a health provider which renders the employee incapable of performing the duties of the employee's position. Where inpatient care is not involved, the expected absence from work, or from school, or incapacity in performing other daily activities of a family member shall be for a period of more than three (3) days.

(d) An appointing authority shall grant family leave because of a serious health condition, of the employee, that makes the employee temporarily unable to perform the essential functions of his position.

(4)(a) The appointing authority shall require an employee granted family leave for a serious health condition to supply a certification, on a form prescribed by the commissioner, from a health care provider that includes a statement that the employee is needed to care for a family member, or, that the employee's presence would be beneficial to the family member. An employee requesting intermittent leave or leave on a reduced leave schedule due to serious health condition of the employee or family member shall be required to supply a certification from a licensed health care provider that such leave is medically necessary and the expected duration and schedule of such leave. A "health care provider" includes: doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, chiropractor, nurse practitioner, and nurse midwife, or certified Christian Science practitioner.

(b) If an employee submits a complete certification signed by the health care provider, the appointing authority shall not request additional information from the employee's health care provider. If the appointing authority has reason to doubt the validity of a medical certification the appointing authority may require the employee to obtain a second opinion at the agency's expense. The appointing authority shall designate the health care provider to furnish the second opinion. The designated health care provider shall not be employed on a regular basis by the agency.

(c) If the opinions of the employee's health provider and the designated health care provider differ, the appointing authority may request the employee to obtain certification from a third health care provider who is approved by the employee. This third opinion shall be final and binding. If the appointing authority does not act in good faith to attempt to reach an agreement on the third health care provider, the appointing authority shall be bound by the original certification. If the employee does not act in good faith to attempt to reach an agreement on the third health care provider, the employee shall be bound by the opinion of the second health care provider. An appointing authority may require recertification of the need for family leave every thirty (30) working days.

(5) If an employee requests intermittent leave or a reduced work schedule to care for a seriously ill family member or for the employee's own serious health condition, and the need for leave is reasonably based on planned medical treatment, the appointing authority may temporarily reassign the employee to an available alternative position with equivalent pay and benefits if the employee is qualified for the position and it better accommodates recurring periods of leave than the employee's regular job.

(6) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave or shall have been on family leave during the previous month subject to the following conditions:

(a) Any combination of work days and paid leave and family leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month;

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively;

(c) When an employee is unable to work, and elects to use family leave as the sole qualification for the state contributions for life

insurance and health benefits, he shall utilize his family leave days consecutively.

(d) An employee who has exhausted paid leave and family leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the work days in a month. If the employee is unable to work for more than half of the work days in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contribution and the employee contributions for such benefits.

(e) An employee who uses family leave as the sole qualification for the state contribution for life insurance and health benefits who fails to return to work for thirty (30) calendar days after the family leave is exhausted, shall reimburse the Commonwealth for state contributions paid on behalf of the employee. The employee shall not be required to reimburse the Commonwealth if the reason the employee does not return is due to:

1. The continuation, recurrence or onset of a serious health condition which would entitle the employee to family leave under this regulation.

2. Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are where a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; or the employee is laid off while on leave. Examples of other circumstances which are not beyond the employee's control are where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care; or a parent's decision not to return to work to stay with a newborn child.

(f) An employee, on family leave, shall continue to be responsible for the employee's share of contributions for life insurance and health benefits. The contributions shall be due at the same time the contributions would be made if by payroll deduction. An employee shall be granted a thirty (30) calendar day grace period to make any employee contributions for life insurance and health benefits. If the employee does not make the contribution within the thirty (30) day grace period, the employee's life insurance and health benefits shall cease on the date the grace period ends. If the life insurance and health benefits cease as a result of nonpayment of premiums by the employee after the grace period, upon the employee's return to work for thirty (30) calendar days, the life insurance and health benefits shall be restored to the same level of coverages as were provided when the leave commenced, effective with the employee's return to work.

(7) At the conclusion of the family leave, an employee shall be restored to the same job that the employee held before going on leave. The employee shall be returned to the same shift or equivalent schedule. If special qualifications are required for a position and said qualifications have lapsed during the employee's leave, the employee may be reassigned to different duties and given a reasonable opportunity to fulfill the requirements after returning to work.

Section 4. Court Leave. An employee shall be entitled to leave of absence from duties during his scheduled working hours, without loss of time or pay for that amount of time necessary to comply with subpoenas by any court, or administrative agency or body of the federal or state government or any political subdivision thereof, to serve as a juror or a witness except in cases where the employee himself or a member of his family is a party to the court or administrative proceeding. This leave shall include necessary travel time. If relieved from duty as a juror or witness during his normal working hours, the employee shall return to work.

Section 5. Compensatory Leave and Overtime. (1) It shall be the responsibility of the appointing authorities to administer the overtime and compensatory leave provisions of the Fair Labor Standards Act (FLSA). An employee who is authorized to work in excess of the prescribed hours of duty shall be granted compensatory leave or paid overtime [~~on an hour for hour basis,~~] subject to the provisions of the Fair Labor Standards Act, the Kentucky Revised Statutes and this administrative regulation [~~and Kentucky Labor Laws~~]. Compensatory leave may be accumulated or taken off in one-quarter (1/4) hour increments. The maximum amount of compensatory leave that may be carried forward from one (1) pay period to another [~~accumulated~~] shall be 200 hours.

(2) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his compensatory leave in the receiving agency.

(3) Upon separation from state service, employees will be paid for all unused compensatory leave at the greater of their regular hourly rate of pay or at the average regular rate of pay for the final three (3) years of employment.

(4) An employee who has accrued compensatory leave shall be permitted by the appointing authority or his designee to take such time off if the use of such time does not unduly disrupt the operations of the agency. [~~when practicable. To maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave.~~]

(5) An appointing authority or his designee may direct an employee to take accumulated compensatory time off from work to maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave. Notice must be in writing specifying the number of hours to be taken and the pay period in which the hours must be used.

(6) [~~(5)~~] An employee deemed to be "nonexempt" in relation to the FLSA shall be compensated for all hours worked in excess of forty (40) per week in accordance with the following provisions: [~~shall be paid one and one-half (1 1/2) times his regular hourly rate of pay for all hours worked in excess of forty (40) per week.~~]

(a) An employee who has not accumulated the maximum amount of compensatory leave has the option to accumulate compensatory leave on an hour and one-half (1 1/2) basis for each hour worked in excess of forty (40) per week in lieu of paid overtime.

(b) The election to receive compensatory leave in lieu of paid overtime must be in writing and such election will remain in force for a minimum of six (6) months. The election can only be changed by submitting a new form. The effective date of any change will be the first day of the next workweek following receipt of the election.

(c) An employee who does not elect compensatory leave in lieu of paid overtime shall be paid one and one-half (1 1/2) times his regular hourly rate of pay for all hours worked in excess of forty (40) per week.

(7) An employee deemed to be "exempt" in relation to the FLSA shall accumulate compensatory time on an hour-for-hour basis for all hours worked in excess of his normal work schedule.

(8) [~~(6)~~] An employee except one who is in policy making position, may, after accumulating 151 hours of compensatory leave, request that he be paid for fifty (50) hours at his regular rate of pay. If the appointing authority or his designee approves the payment, then an employee's leave balance shall be reduced accordingly.

(9) [~~(7)~~] All employees, except those who are in policy making positions, shall be paid for fifty (50) hours at their regular hourly rate of pay upon accumulating at the end of the pay period 200 hours or more of compensatory leave. The employee's leave balance shall be reduced accordingly..

(10) [~~(8)~~] All employees whose prescribed hours of duty are normally less than forty (40) per week and who have not exceeded the maximum amount of compensatory time shall receive compensatory leave on an hour-for-hour basis until the total hours worked in that week reaches forty (40).

(11) [~~(9)~~] Compensatory leave used during the same workweek it is earned does not constitute "hours worked" for computing paid overtime or time and one-half (1 1/2) compensatory time.

(12) This administrative regulation shall become effective on

August 1, 1994.

Section 6. Military Leave. Any employee who is an active member of the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Public Health Service Reserve, or the Kentucky National Guard shall be relieved from his civil duties upon request therefor, to serve under orders on training duty without loss of his regular compensation for a period not to exceed ten (10) working days in any one (1) federal fiscal [~~calendar~~] year, and any such absence shall not be charged to leave. Absence in excess of this amount will be charged as annual leave, compensatory leave or leave without pay. The appointing authority may require a copy of the orders requiring the attendance of an employee before granting military leave. An appointing authority shall grant an employee entering military duty a leave of absence without pay for a period of such duty not to exceed six (6) years. All accumulated annual and compensatory leave may be paid in a lump sum, at the request of the employee, upon receiving this leave.

Section 7. Voting Leave. All employees who are eligible and registered to vote shall be allowed, upon prior request, four (4) hours, for the purpose of voting. Such absence shall not be charged against leave. Employees who are not scheduled to work during voting hours shall not receive voting leave and shall not be entitled to compensatory leave in lieu of time off to vote. Employees who are permitted to work in lieu of voting leave shall be granted compensatory leave on an hour-for-hour basis.

Section 8. Special Leave of Absence. (1) In addition to leaves as above provided, an appointing authority may grant leave without pay for a period or periods not to exceed thirty (30) working days in any calendar year.

(2) An appointing authority, with approval of the commissioner, may grant leave of absence when requested by an employee for a period not to exceed twenty-four (24) months, with or without pay for assignment to and attendance at college, university, vocational or business school for the purpose of training in subjects related to the work of the employee and which will benefit the state service.

(3) An appointing authority, with approval of the commissioner, may grant an employee a leave of absence without pay for a period not to exceed one (1) year for purposes other than specified in this regulation that are deemed in the best interest of the state.

(4) An appointing authority, with approval of the commissioner, may place an employee on leave without pay for a period not to exceed thirty (30) working days pending an investigation into allegations of employee misconduct. The employee shall be notified in writing by the appointing authority that he is being placed on leave without pay and of the reasons therefor. If such investigation reveals no misconduct on behalf of the employee, he shall be made whole for the period of such leave and all records relating to the investigation will be purged from agency and Department of Personnel files. The appointing authority shall notify the employee in writing of the completion of the investigation and the action taken, including those cases where the employee voluntarily resigns in the interim.

(5) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave during the previous month subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work, and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

Section 9. Absence Without Leave. An employee who is absent from duty without approval shall report the reason therefor to his supervisor immediately. Unauthorized and/or unreported absence shall be considered absence without leave and deduction of pay may be made for each period of such absence. Such absence may constitute grounds for disciplinary action.

LOWELL W. CLARK, Commissioner
BRERETON C. JONES, Governor
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 4 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 24, 1994 at 10 a.m. in Conference Room 508, 200 Fair Oaks Lane, Frankfort, Kentucky 40601. Individuals interested in attending this hearing shall notify this agency in writing by August 19, 1994 five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Daniel F. Egbers, Managing Attorney, Department of Personnel, 200 Fair Oaks Lane, Suite 516, Frankfort, Kentucky 40601, (502) 564-7430.

REGULATORY IMPACT ANALYSIS

Agency Contact: Daniel F. Egbers

(1) Type and number of entities affected: All appointing authorities and employees in the executive department subject to KRS Chapter 18A.

(a) Direct and indirect costs or savings to those affected:

1. First year: None

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: No change is anticipated.

(2) Effects on the promulgating administrative body: The Department of Personnel shall continue to maintain records on use of and availability of compensatory leave.

(a) Direct and indirect costs or savings: Since it is not known how many employees will take advantage of the option to elect compensatory time at the rate of time and a half rather than straight pay, an accurate estimate of the savings expected cannot be made at this time.

1. First year: Some savings are expected but cannot be estimated at this time.

2. Continuing costs or savings: The savings would be continuous.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: Agencies shall report the election of compensatory time rather than overtime pay to the department.

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternative available.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: KRS 61.394 was amended in the 1994 Session of the General Assembly to change military leave computations from the calendar year to the federal fiscal year. The section dealing with military leave is being amended to conform with this statutory change.

(a) Necessity of proposed regulation if in conflict: None

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: No

(6) Any additional information or comments: No

TIERING: Was tiering applied? Yes. The Fair Labor Standards Act makes distinctions between exempt and nonexempt employees. These distinctions are implicit in this proposed regulatory amendment.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. The rules concerning standards for the establishment and maintenance of a merit system for state governmental units receiving federal grants in aid were issued by the Office of Personnel Management and became effective on February 9, 1979. These rules were revised April 4, 1983, and are now codified as 5 CFR Part 900, Subpart F, Sections 900.601-900.606 (48 FR 9209, March 4, 1983). PL 103-3 requires employees to have 12 weeks of unpaid family leave each year. The United States Department of Labor issued in their regulations on June 4, 1993 (2§CER Par 825).

2. State compliance standards. The purpose of this amendment is to implement provisions of Title II of the Intergovernmental Personnel Act of 1970, as amended, relating to federally required merit personnel systems in state agencies. Certain federal grant programs require, as a condition of eligibility, that state agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific federal grant statutes and in other cases are required by regulations of the federal grantor agencies.

3. Minimum or uniform standards contained in the federal mandate. The standards required for a merit system of personnel administration include such merit principles as:

(a) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? The provisions of the federal merit standards recognizes fully the rights, powers and responsibility of state government and encourages innovation and allows for diversity in the design, execution and management of the system of personnel management, as provided by the Intergovernmental Personnel Act of 1970 if standards have certain specific requirements and options. The requirements and options have been exercised by the General Assembly in the enactment of KRS Chapter 18A and its delegation of duties and responsibilities to the State Personnel Board and the Department of Personnel.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This regulation to our knowledge is not stricter than the federal mandate.

DEPARTMENT OF PERSONNEL
(Proposed Amendment)

101 KAR 3:010. Leave regulations for unclassified service.

RELATES TO: KRS 18A.155, 61.394, PL 103-3

STATUTORY AUTHORITY: KRS 18A.155, 18A.195, PL 103-3 [~~197~~]

NECESSITY AND FUNCTION: KRS 18A.155 requires the Commissioner of Personnel to submit to the Governor proposed administrative regulations for the unclassified service persons in positions enumerated in KRS 18A.115(1)(g), (h), (i), (j), (k), (p), (u) and (v). KRS 18A.155 further provides that these regulations shall be approved by the Governor. In practice, the leave regulations (101 KAR 2:100) which apply to merit system employees in the following specific areas have also been applied to the aforementioned categories of employees in the unclassified service.

Section 1. Annual leave. (1) Each full-time employee in the state service, except seasonal, temporary, per diem, and emergency employees, or each part-time employee who works at least 100 hours a month shall accumulate annual leave with pay at the following rate:

Months of Service	Annual Leave Days
0-59 months	1 leave day per month; 12 per year
60-119 months	1 1/4 leave days per month; 15 per year
120-179 months	1 1/2 leave days per month; 18 per year
180 months and over	1 3/4 leave days per month; 21 per year

A full-time employee must have worked more than half of the workdays in a month to qualify for annual leave. Each employee shall be credited with additional leave upon the first day of the month following the month in which the leave is earned. In computing months of total service for the purpose of earning annual leave, only those months for which an employee earned annual leave shall be counted or in the case of a part-time employee, only those months in which the employee worked at least 100 hours shall be counted. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing years of total service. Former employees who have been rehired and who have been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from a violation of KRS 18A.140, 18A.145, or 18A.990. In those cases where an employee is changed from full time to part time, those months for which the employee earned annual leave as a full-time employee shall be counted in computing months of total service. Employees serving on a part-time basis who work less than 100 hours a month shall not be entitled to annual leave.

(2) Annual leave may be accumulated and carried forward from

one (1) calendar year to the next not to exceed the following maximum amounts:

Months of Service	Maximum Amount
0-59 months	Thirty (30) workdays
60-119 months	Thirty-seven (37) workdays
120-179 months	Forty-five (45) workdays
180-239 months	Fifty-two (52) workdays
240 months and over	Sixty (60) workdays

However, leave in excess of the above maximum amounts shall be converted to sick leave at the end of the calendar year, or upon retirement. Months of service for the purpose of determining the maximum amount of annual leave which may be accumulated and the amount to be converted to sick leave shall be computed as provided in subsection (1) of this section. Annual leave shall not be granted in excess of that earned prior to the starting date of leave.

(3) Absence due to sickness, injury, or disability in excess of that authorized for such purposes may, at the request of the employee and within the discretion of the appointing authority, be charged against annual leave.

(4) Accumulated annual leave shall be granted by the appointing authority in accordance with operating requirements and, insofar as practicable, with the request of employees. An employee who makes a timely request for annual leave shall be granted annual leave by the appointing authority, during the calendar year, up to at least the amount of time he earned that year.

(5) Employees are charged with annual leave for absence only on days upon which they would otherwise work and receive pay.

(6) Annual leave shall accrue only when an employee is working or on authorized leave with pay. Annual leave shall not accrue when an employee is on educational leave with pay.

(7) An employee who is transferred or otherwise changed from the jurisdiction of one (1) agency to another shall retain his accumulated annual leave in the receiving agency.

(8) Before an employee may be placed on leave of absence without pay in excess of thirty (30) working days, he must have used or have been paid for any accumulated annual leave unless he has requested to retain up to ten (10) days of accumulated annual leave.

(9) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave for more than half of the workdays in a month, subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(10) Employees shall be paid in a lump sum for accumulated annual leave, not to exceed the maximum amounts as set forth in Section 1(2) of this regulation, when separated by proper resignation or retirement. In the case of layoff, the employee shall be paid in a lump sum for all accumulated annual leave. An employee in the unclassified service who reverts to the classified service or an employee who resigns one day and is employed the next day shall retain his accumulated leave in the receiving agency. The effective date of the separation shall be the last workday.

(11) An employee who has been dismissed for cause or who has failed to give proper notice of resignation may, at the discretion of the appointing authority, be paid in a lump sum for accumulated annual leave not to exceed the maximum amounts set forth in Section 1(2) of this regulation.

(12) Upon the death of an employee, his estate shall be entitled to receive pay for the unused portion of the employee's accumulated annual leave.

(13) Absence for a fraction or part of a day that is charged to annual leave shall be charged in hours or increments of one-quarter (1/4) hours.

Section 2. Sick Leave. (1) Each employee in the state service, except an emergency, per diem and part-time employees who work less than 100 hours a month, shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. An employee must have worked more than half of the workdays in a month to qualify for sick leave with pay. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned. Employees serving on a part-time basis who work at least 100 hours a month shall accumulate sick leave with pay at the rate of one (1) working day for each month of service. Each employee shall be credited with additional sick leave upon the first day of the month following the month in which the sick leave is earned.

(2) Full-time employees completing 120 months of total service with the state shall be credited with ten (10) additional days of sick leave upon the first day of the month following the completion of 120 months of service. In computing months of total service for the purpose of crediting ten (10) additional days of sick leave, only those months for which an employee earned sick leave shall be used. In those cases where an employee is changed from part time to full time, those months in which the employee worked at least 100 hours as a part-time employee shall be counted in computing months of total service. Part-time employees who work at least 100 hours a month completing 120 months of total service with the state shall be credited with ten (10) additional sick leave days upon the first day of the month following the completion of 120 months of service. In computing months of total service for part-time employees who work at least 100 hours a month for the purpose of crediting ten (10) additional sick leave days, only those months in which the employee worked at least 100 hours shall be used. In those cases where an employee is changed from full time to part time, those months for which the employee earned sick leave as a full-time employee shall be counted in computing years of total service. The total service must be verified before the leave is credited to the employee's record. Former employees who have been rehired and who had been previously dismissed for cause from state service shall receive credit for service prior to the dismissal, except where such dismissal resulted from the violation of KRS 18A.140, 18A.145, or 18A.990.

(3) Unused sick leave may be accumulated with no maximum on accumulation.

(4) Sick leave shall accrue only when an employee is working or on authorized leave with pay. Sick leave shall not accrue when an employee is on educational leave with pay.

(5) An appointing authority shall grant accrued sick leave with pay when the employee:

(a) Receives medical, dental or optical examination or treatment;

(b) Is disabled by sickness, injury or pregnancy. The appointing authority may require a doctor's statement attesting to the inability to perform his/her duties;

(c) Is required to care for a sick or injured member of his

immediate family for a reasonable period of time. The appointing authority may require a doctor's statement supporting the need for care;

(d) Would jeopardize the health of others at his duty post, because of exposure to a contagious disease;

(e) Has lost by death a parent, child, brother or sister, or the spouse of any of them, or any persons related by blood or affinity with a similarly close association. Leave under this paragraph is limited to three (3) days or a reasonable extension at the discretion of the appointing authority.

(6) At the termination of sick leave with pay not exceeding six (6) months, the appointing authority may return the employee to his former position. At the termination of sick leave with pay exceeding six (6) months, the appointing authority may return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit.

(7) An appointing authority shall grant sick leave without pay for so long as an employee is disabled by sickness, or illness, or pregnancy, and the total continuous leave does not exceed one (1) year. The appointing authority may require periodic doctor's statements during the year attesting to the continued inability to perform his/her duties. When the employee has given notice of his ability to resume his duties, the appointing authority may return the employee to a position for which he is qualified and which resembles his former position as closely as circumstances permit. An employee who is unable to return to work at the end of one (1) year of sick leave without pay, after being requested to return to work at least ten (10) days prior to the expiration of such sick leave, shall be dismissed by the appointing authority. An employee granted sick leave without pay may, upon request, retain up to ten (10) days of accumulated sick leave.

(8) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave for more than half of the workdays in a month, subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state contribution for life insurance and health benefits in the following month.

(9) Absence for a fraction or part of a day that is chargeable to sick leave shall be charged in hours or increments of one-quarter (1/4) hours.

(10) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his accumulated sick leave in the receiving agency.

(11) Employees shall be credited for accumulated sick leave when separated by proper resignation, layoff, retirement, or when granted leave without pay in excess of thirty (30) working days. Former employees who are reinstated or reemployed shall have unused sick leave balances revived upon appointment and placed to their credit.

(12) In cases of absence due to illness or injury for which Workers' Compensation benefits are received, accumulated sick leave may be used in order to maintain regular full salary. If paid sick leave is used, Workers' Compensation pay benefits shall be assigned back to the state for whatever period of time an employee received paid sick leave. The employee's sick leave shall be immediately reinstated to the extent that Workers' Compensation Benefits were assigned.

(13) Application for sick leave. An employee shall file a written application for sick leave with or without pay within a reasonable time. Except in cases of emergency illness, an employee shall request advance approval for sick leave for medical, dental or optical examination, and for sick leave without pay. In all cases of illness, an employee is obligated to notify his immediate supervisor or other designated person. Failure to do so in a reasonable period of time may be cause for denial of sick leave for the period of absence.

(14) Supporting evidence.

(a) An appointing authority may require an employee to supply supporting evidence in order to receive sick leave. A supervisor's or employee's certificate may be accepted, but a medical certificate may be required, signed by a licensed practitioner and certifying to the incapacity, examination, or treatment. An appointing authority shall grant sick leave when the application is supported by acceptable evidence.

(b) An appointing authority may place on sick leave an employee whose health might be jeopardized by job duties, whose health might jeopardize others, or whose health prevents performance of duties and responsibilities, and who, on request, fails to produce a satisfactory medical certificate.

Section 3. Family Leave. It shall be the responsibility of the appointing authority to administer family leave in compliance with the Federal Family and Medical Leave Act of 1993 and regulations promulgated thereunder found in 29 CFR Part 825. Each employee in a nonexempt, nonpolicy making position shall be entitled to family leave as set out in 101 KAR 2:100, Section 3.

Section 4. Court Leave. An employee shall be entitled to leave of absence from duties during his scheduled working hours, without loss of time or pay for that amount of time necessary to comply with subpoenas by any court, or administrative agency or body of the federal or state government or any political subdivision thereof, to serve as a juror or a witness except in cases where the employee himself or a member of his family is a party to the court or administrative proceeding. This leave shall include necessary travel time. If relieved from duty as a juror or witness during his normal working hours, the employee shall return to work.

Section 5. Compensatory Leave and Overtime. (1) It shall be the responsibility of the appointing authorities to administer the overtime and compensatory leave provisions of this section and the Fair Labor Standards Act (FLSA). An employee who is authorized to work in excess of the prescribed hours of duty shall be granted compensatory leave or paid overtime [~~on an hour for hour basis,~~] subject to the provisions of the Fair Labor Standards Act, the Kentucky Revised Statutes and this administrative regulation. [~~and Kentucky Labor Laws.~~] Compensatory leave may be accumulated or taken off in one-quarter (1/4) hour increments. The maximum amount of compensatory leave that may be carried forward from one (1) pay period to another [~~accumulated~~] shall be 200 hours.

(2) An employee who is transferred or otherwise changed from the jurisdiction of one agency to another shall retain his compensatory leave in the receiving agency.

(3) Upon separation from state service, employees will be paid for all unused compensatory leave at the greater of their regular hourly rate of pay or at the average regular rate of pay for the final three (3) years employment.

(4) An employee who has accrued compensatory leave shall be permitted by the appointing authority or his designee to take such

time off if the use of such time does not unduly disrupt the operations of the agency. [~~To maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave.~~]

(5) An appointing authority or his designee may direct an employee to take accumulated compensatory time off from work to maintain a manageable level of accumulated compensatory time and for the specific purpose of reducing an employee's compensatory leave. Notice must be in writing specifying the number of hours to be taken and the pay period in which the hours must be used.

(6) [~~(5)~~] An employee deemed to be "nonexempt" in relation to the FLSA shall be compensated for all hours worked in excess of forty (40) per week in accordance with the following provisions: [~~shall be paid at one and one-half (1 1/2) times his regular hourly rate of pay for all hours worked in excess of forty (40) per week.~~]

(a) An employee who has not accumulated the maximum amount of compensatory leave has the option to accumulate compensatory leave on an hour and one-half (1 1/2) basis for each hour worked in excess of forty (40) per week in lieu of paid overtime.

(b) The election to receive compensatory leave in lieu of paid overtime must be in writing and such election will remain in force for a minimum of six (6) months. The election can only be changed by submitting a new form. The effective date of any change will be the first day of the next workweek following receipt of the election.

(c) An employee who does not elect compensatory leave in lieu of paid overtime shall be paid one and one-half (1 1/2) time his regular hourly rate of pay for all hours worked in excess of forty (40) per week.

(7) An employee deemed to be "exempt" in relation to the FLSA shall accumulate compensatory time on an hour-for-hour basis for all hours worked in excess of his normal work schedule.

(8) [~~(6)~~] An employee except one who is in policy making position, may, after accumulating 151 hours of compensatory leave, request that he be paid for fifty (50) hours at his regular rate of pay. If the appointing authority or his designee approves the payment, then an employee's leave balance shall be reduced accordingly.

(9) [~~(7)~~](a) All employees, except those who are in policy making positions, shall be paid for fifty (50) hours at their regular hourly rate of pay. upon accumulating at the end of the pay period 200 hours or more of compensatory leave. The employee's leave balance shall be reduced accordingly.

(b) An employee in a policy making position shall be paid for all accrued compensatory leave, not to exceed 200 hours, only upon termination from the unclassified service. An employee who reverts to a position in the classified service or an employee who resigns one day and is employed the next day shall retain his accrued compensatory leave in the receiving agency.

(10) [~~(8)~~] All employees whose prescribed hours of duty are normally less than forty (40) per week and who have not exceeded the maximum amount of compensatory time shall receive compensatory leave on an hour-for-hour basis until the total hours worked in that week reaches forty (40).

(11) [~~(9)~~] Compensatory leave used during the same workweek it is earned does not constitute "hours worked" for computing paid overtime or time and one-half (1 1/2) compensatory time.

(12) This administrative regulation shall become effective on August 1, 1994.

Section 6. Military Leave. Any employee who is an active member of the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Public Health Service Reserve, or the Kentucky National Guard shall be relieved from his civil duties upon request therefor, to serve under orders on training duty without loss of his regular compensation for a period not to exceed ten (10) working days in any one (1) federal fiscal [~~calendar~~] year, and any such absence shall not be charged to leave. Absence in excess of this amount will be charged as annual leave, compensatory leave or leave without pay. The appointing authority may require a copy of the orders requiring the attendance of an employee before granting military leave. An appointing authority shall grant an employee entering military duty a leave of absence without pay for a period of such duty not to exceed six (6) years. All accumulated annual and compensatory leave may be paid in a lump sum, at the request of the employee, upon receiving this leave.

Section 7. Voting Leave. All employees who are eligible and registered to vote shall be allowed, upon prior request, four (4) hours, for the purpose of voting. Such absence shall not be charged against leave. Employees who are not scheduled to work during voting hours shall not receive voting leave and shall not be entitled to compensatory leave in lieu of time off to vote. Employees who are permitted to work in lieu of voting leave shall be granted compensatory leave on an hour-for-hour basis.

Section 8. Special Leave of Absence. (1) In addition to leaves as above provided, an appointing authority may grant leave without pay for a period or periods not to exceed thirty (30) working days in any calendar year.

(2) An appointing authority, with approval of the commissioner, may grant leave of absence when requested by an employee for a period not to exceed twenty-four (24) months, with or without pay for assignment to and attendance at college, university, vocational or business school for the purpose of training in subjects related to the work of the employee and which will benefit the state service, or for other purposes that are deemed to be in the best interests of the state service.

(3) An appointing authority, with approval of the commissioner, may grant an employee a leave of absence without pay for a period not to exceed one (1) year for purposes other than specified in this regulation that are deemed in the best interest of the state.

(4) An appointing authority, with approval of the commissioner, may place an employee on leave without pay for a period not to exceed thirty (30) working days pending an investigation into allegations of employee misconduct. The employee shall be notified in writing by the appointing authority that he is being placed on leave without pay and of the reasons therefor. If such investigation reveals no misconduct on behalf of the employee, he shall be made whole for the period of such leave and all records relating to the investigation will be purged from agency and Department of Personnel files. The appointing authority shall notify the employee in writing of the completion of the investigation and the action taken.

(5) Employees eligible for state contributions for life insurance and health benefits under the provisions of KRS Chapter 18A shall have worked or been on paid leave for more than half of the workdays in a month, subject to the following conditions:

(a) Any combination of workdays and paid leave used by the employee within a month shall entitle the employee to state-paid contributions for life insurance and health benefits in the following month.

(b) When an employee is unable to work and elects to use paid leave to qualify for state contribution for life insurance and health benefits, he shall utilize his paid leave days consecutively.

(c) An employee who has exhausted paid leave shall not qualify for state contribution for life insurance and health benefits unless he works for more than half of the workdays in a month. If the employee is unable to work for more than half of the workdays in a month, the employee may continue his group health and life insurance benefits for the following month by paying the total cost of the state contributions and any employee contributions for such benefits.

(d) Any employee who leaves state government on or prior to the 15th day of the month, before working or being on paid leave for over half of the workdays in the month shall remain eligible for state

contribution for life insurance and health benefits in the following month.

Section 9. Absence Without Leave. An employee who is absent from duty without approval shall report the reason therefor to his supervisor immediately. Unauthorized and/or unreported absence shall be considered absence without leave and deduction of pay may be made for each period of such absence. Such absence may constitute grounds for disciplinary action.

BRERETON C. JONES, Governor
LOWELL W. CLARK, Commissioner
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 4 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 24, 1994 at 10 a.m. in Conference Room 508, 200 Fair Oaks Lane, Frankfort, Kentucky 40601. Individuals interested in attending this hearing shall notify this agency in writing by August 19, 1994 five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to: Daniel F. Egbers, Managing Attorney, Department of Personnel, 200 Fair Oaks Lane, Suite 516, Frankfort, Kentucky 40601, (502) 564-7430.

REGULATORY IMPACT ANALYSIS

Agency Contact: Daniel F. Egbers

(1) Type and number of entities affected: All appointing authorities and employees in the executive department subject to KRS Chapter 18A.

(a) Direct and indirect costs or savings to those affected:

1. First year: None

2. Continuing costs or savings:

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: No change is anticipated.

(2) Effects on the promulgating administrative body: The Department of Personnel shall continue to maintain records on use of and availability of compensatory leave.

(a) Direct and indirect costs or savings: Since it is not known how many employees will take advantage of the option to elect compensatory time at the rate of time and a half rather than straight pay, an accurate estimate of the savings expected cannot be made at this time.

1. First year: Some savings are expected but cannot be estimated at this time.

2. Continuing costs or savings: The savings would be continuous.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: Agencies shall report the election of compensatory time rather than overtime pay to the department.

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternative available

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication KRS 61.394 was amended in the 1994 Session of the General Assembly to change military leave computations from the calendar year to the federal fiscal year. The section dealing with military leave is being amended to conform with this statutory change.

(a) Necessity of proposed regulation if in conflict: None

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: No

(6) Any additional information or comments: No

TIERING: Was tiering applied? Yes. The Fair Labor Standards Act makes distinctions between exempt and nonexempt employees. These distinctions are implicit in this proposed regulatory amendment.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. The rules concerning standards for the establishment and maintenance of a merit system for state governmental units receiving federal grants in aid were issued by the Office of Personnel Management and became effective on February 9, 1979. These rules were revised April 4, 1983, and are now codified as 5 CFR Part 900, Subpart F, Sections 900.601-900.606 (48 FR 9209, March 4, 1983). PL 103-3 requires employees to have 12 weeks of unpaid family leave each year. The United States Department of Labor issued in their regulations on June 4, 1993 (2§CER Par 825).

2. State compliance standards. The purpose of this amendment is to implement provisions of Title II of the Intergovernmental Personnel Act of 1970, as amended, relating to federally required merit personnel systems in state agencies. Certain federal grant programs require, as a condition of eligibility, that state agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific federal grant statutes and in other cases are required by regulations of the federal grantor agencies.

3. Minimum or uniform standards contained in the federal mandate. The standards required for a merit system of personnel administration include such merit principles as:

(a) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? The provisions of the federal merit standards recognizes fully the rights, powers and responsibility of state government and encourages innovation and allows for diversity in the design, execution and management of the system of personnel management, as provided by the Intergovernmental Personnel Act of 1970 if standards have certain specific requirements and options. The requirements and options have been exercised by the General Assembly in the enactment of KRS Chapter 18A and its delegation of duties and responsibilities to the State Personnel Board and the

Department of Personnel.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This regulation to our knowledge is not stricter than the federal mandate.

GENERAL GOVERNMENT CABINET
Board of Medical Licensure
(Proposed Amendment)

201 KAR 9:005. Ethical conduct.

RELATES TO: KRS 311.530 to 311.620, 311.990
STATUTORY AUTHORITY: KRS Chapter 13A
NECESSITY AND FUNCTION: KRS 311.565(2)(c) authorizes the State Board of Medical Licensure to promulgate a code of conduct governing the practice of medicine and osteopathy based upon generally recognized principles of professional and ethical conduct. This regulation incorporates the Principles of Medical Ethics of the American Medical Association and the American Osteopathic Association [~~adopted July 1, 1980~~].

Section 1. No code or set of rules can be framed which will particularize all ethical responsibilities of the physician in the various phases of his professional life. The enumeration of obligations in the code of ethics is not exhaustive and does not constitute a denial of the existence of other obligations, equally imperative, though not specifically mentioned. [~~A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.~~]

Section 2. 201 KAR 9:015 is hereby repealed. [~~A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.~~

~~Section 3. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.~~

~~Section 4. A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law.~~

~~Section 5. A physician shall continue to study, apply and advance scientific knowledge, make relevant information available to patients, colleagues and the public, obtain consultation, and use the talents of other health professionals when indicated.~~

~~Section 6. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.~~

~~Section 7. A physician shall recognize a responsibility to participate in activities contributing to an improved community.~~]

ROYCE E. DAWSON, President
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.
PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 22, 1994 at 9 a.m. at 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40202. Individuals wishing to attend this hearing shall notify this agency in writing by Wednesday, August 17, 1994, five days prior to the meeting, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given the opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for at transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222, (502) 429-8046.

REGULATORY IMPACT ANALYSIS

Contact person: C. William Schmidt
(1) Type and number of entities affected: All physicians who are licensed to practice medicine in the Commonwealth of Kentucky.
(a) Direct and indirect costs or savings to those affected: N/A
1. First year: See 1(a) above.
2. Continuing costs or savings: See 1(a) above.
3. Additional factors increasing or decreasing costs (note any effects upon competition): N/A
(b) Reporting and paperwork requirements: N/A
(2) Effects on the promulgating administrative body: N/A
(a) Direct and indirect costs or savings: N/A
1. First year: See 3(2)(a) above.
2. Continuing costs or savings: See 3(2)(a) above.
3. Additional factors increasing or decreasing costs: None anticipated.
(b) Reporting and paperwork requirements: N/A
(3) Assessment of anticipated effect on state and local revenues: No changes anticipated.
(4) Assessment of alternative methods; reasons why alternatives were rejected: Alternative considered was leaving this regulation in its current form which is outdated. The board feels that this regulation change is necessary as a matter of housekeeping and updating.
(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: Board is not aware of any statute, regulation, or government policy which is in conflict or is duplicated by this proposed regulation.
(a) Necessity of proposed regulation if in conflict: N/A - see 3(5) above.
(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A - see 3(5) above.
(6) Any additional information or comments: The board feels that this regulation will assure the public of continued competency of Kentucky physicians.
TIERING: Is tiering applied? No. Increase in fees shall pertain to all licensees of the board. There is no valid reason to impose varying requirements.

GENERAL GOVERNMENT CABINET
Board of Medical Licensure
(Proposed Amendment)

201 KAR 9:041. Fee schedule.

RELATES TO: KRS 311.530 to 311.620, 311.990
STATUTORY AUTHORITY: KRS 311.565
NECESSITY AND FUNCTION: KRS 311.565 empowers the State Board of Medical Licensure to exercise all the administrative functions of the state in the prevention of empiricism and in the regulation of the practice of medicine and osteopathy and authorizes the board to establish requirements and standards relating thereto. The purpose of this regulation is to establish a schedule of fees for services

rendered by the board.

Section 1. Fee Schedule. (1) Fee for sitting the state medical examination administered by the board:

(a) Examination fee - $375.

(b) Examination application fee - $50.

(2) Fee for initial issuance of regular license - $225.

(3) Fee for initial issuance of limited license - $75.

(4) Fee for annual registration or renewal of regular [~~any~~] license - $100 [~~65~~].

(5) Fee for annual registration or renewal of limited license - $65.

(6) Penalty for late annual registration or renewal:

(a) March 1 - April 1 - $50.

(b) After April 1 - $100.

(7) [~~(6)~~] Fee for reregistration of inactive license - $90.

(8) [~~(7)~~] Endorsement of licensee to licensing agency of another jurisdiction - $50.

(9) [~~(8)~~] Certification of licensee's examination grades to licensing agency of another jurisdiction - $10.

(10) [~~(9)~~] Fee for temporary permit (credited to fee for regular license if subsequently issued) - $50.

(11) [~~(10)~~] Fee for emergency permit - $25.

(12) [~~(11)~~] Fee for duplicate license certificate - $10.

(13) [~~(12)~~] Fee for copy of "Kentucky Medical Directory" - $15.

(14) [~~(13)~~] Fee for one (1) year subscription to Newsletter (fee waived for licensees) - $10.

(15) [~~(14)~~] Fee for license application - $25.

(16) [~~(15)~~] Fee for sitting for competency examination administered by board - $275.

(17) [~~(16)~~] Fee for initial issuance of regular license for graduates of Kentucky medical schools who remain in this state for postgraduate training - $150.

ROYCE E. DAWSON, President

APPROVED BY AGENCY: July 14, 1994

FILED WITH LRC: July 14, 1994 at 2 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 22, 1994 at 9 a.m. at 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40202. Individuals wishing to attend this hearing shall notify this agency in writing by Wednesday, August 17, 1994, five days prior to the meeting, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given the opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for at transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222, (502) 429-8046.

REGULATORY IMPACT ANALYSIS

Contact person: C. William Schmidt

(1) Type and number of entities affected: All physicians who are licensed to practice medicine in the Commonwealth of Kentucky.

(a) Direct and indirect costs or savings to those affected: Assistance to impaired physicians and treatment for those physicians.

1. First year: See 1(a) above.

2. Continuing costs or savings: See 1(a) above.

3. Additional factors increasing or decreasing costs (note any effects upon competition): Indirectly will cause decrease in malpractice insurance.

(b) Reporting and paperwork requirements: N/A

(2) Effects on the promulgating administrative body: Paperwork and staff workload will increase.

(a) Direct and indirect costs or savings: Increased workload would require additional staff, financed by this increase in fees.

1. First year: See 3(2)(a) above.

2. Continuing costs or savings: See 3(2)(a) above.

3. Additional factors increasing or decreasing costs: None anticipated.

(b) Reporting and paperwork requirements: Anticipate paperwork and reporting requirements to increase.

(3) Assessment of anticipated effect on state and local revenues: No changes anticipated.

(4) Assessment of alternative methods; reasons why alternatives were rejected: Alternative considered was having no assistance for impaired physicians. The board feels that the public and profession need assurances of continued competency.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: Board is not aware of any statute, regulation, or government policy which is in conflict or is duplicated by this proposed regulation.

(a) Necessity of proposed regulation if in conflict: N/A - see 3(5) above.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A - see 3(5) above.

(6) Any additional information or comments: The board feels that this regulation will assure the public of continued competency of Kentucky physicians.

TIERING: Is tiering applied? No. Increase in fees shall pertain to all licensees of the board. There is no valid reason to impose varying requirements.

GENERAL GOVERNMENT CABINET
Board of Medical Licensure
(Proposed Amendment)

201 KAR 9:084. Fee schedule.

RELATES TO: KRS 311.530 to 311.620, 311.990

STATUTORY AUTHORITY: KRS Chapter 13A

NECESSITY AND FUNCTION: KRS 311.565(22) authorizes the State Board of Medical Licensure to exercise all the administrative functions of the state in regard to the regulation of physician assistants. The purpose of this regulation is to establish a schedule of fees for services rendered by the board in performing its administrative functions.

Section 1. Fee Schedule. The board shall charge the following fees:

(1) Application for a certificate, $100.

(2) Application for a temporary certificate, fifty (50) dollars.

(3) Conversion from a temporary certificate to a certificate, fifty (50) dollars.

(4) Fee for biennial renewal of certificate, fifty (50) dollars.

(5) Penalty fee for late renewal of certificate, twenty-five (25) dollars.

(6) Issuance of a duplicate certificate, ten (10) dollars.

(7) Application by a physician for approval to employ a physician assistant, $100.

(8) Application to transfer the responsibility of the supervising physician to an approved supervising physician agent, fifty (50) dollars.

(9) Fee for emergency permit, fifteen (15) dollars.

(10) Fee for supervising physician of physician assistant holding an emergency permit, fifteen (15) dollars.

ROYCE E. DAWSON, President
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 2 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 22, 1994 at 9 a.m. at 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40202. Individuals wishing to attend this hearing shall notify this agency in writing by Wednesday, August 17, 1994, five days prior to the meeting, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given the opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for at transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222, (502) 429-8046.

REGULATORY IMPACT ANALYSIS

Contact person: C. William Schmidt

(1) Type and number of entities affected: All physician assistants who are certified to practice as a physician assistant in the Commonwealth of Kentucky.

(a) Direct and indirect costs or savings to those affected: N/A

1. First year: See 1(a) above.

2. Continuing costs or savings: See 1(a) above.

3. Additional factors increasing or decreasing costs (note any effects upon competition): See 1(a) above.

(b) Reporting and paperwork requirements: N/A

(2) Effects on the promulgating administrative body: N/A

(a) Direct and indirect costs or savings:

1. First year: See 3(2)(a) above.

2. Continuing costs or savings: See 3(2)(a) above.

3. Additional factors increasing or decreasing costs: None anticipated.

(b) Reporting and paperwork requirements: Minimal increase in paperwork by agency employees.

(3) Assessment of anticipated effect on state and local revenues: No changes anticipated.

(4) Assessment of alternative methods; reasons why alternatives were rejected: Alternative considered was having no increase in fees. The board feels that the increase is a necessary matter of housekeeping and updating to the existing regulation.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: Board is not aware of any statute, regulation, or government policy which is in conflict or is duplicated by this proposed regulation.

(a) Necessity of proposed regulation if in conflict: N/A - see 3(5) above.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A - see 3(5) above.

(6) Any additional information or comments: See (4) above.

TIERING: Is tiering applied? No. Increase in fees shall pertain to all physician assistants certified by the board. There is no valid reason to impose varying requirements.

GENERAL GOVERNMENT CABINET
Board of Medical Licensure
(Proposed Amendment)

201 KAR 9:175. Physician assistants; certification and supervision.

RELATES TO: KRS 311.565
STATUTORY AUTHORITY: KRS 311.565(22)

NECESSITY AND FUNCTION: It is the purpose of this regulation to promote the efficient and effective utilization of the skills of physicians by allowing them to delegate health care tasks to qualified physician assistants and in so doing, promote, sustain and enhance the health and welfare of the people of the Commonwealth.

Section 1. Definitions. As used in this regulation:

(1) "Physician assistant" means a person who successfully completes an approved program and an approved examination, and who is certified by the board to assist a registered physician in the provision of medical care under the physician's supervision. The physician assistant is not an independent practitioner of the healing arts but only an adjunct to the supervising physician;

(2) "Anesthesia (or anesthesiology) assistant" means a physician assistant who assists in the provision of general or regional anesthesia;

(3) "Board" means the Kentucky Board of Medical Licensure;

(4) "Supervising physician" means a physician currently licensed to practice medicine in the Commonwealth who has been approved by the board to supervise physician assistants for whom the supervising physician takes responsibility;

(5) "Advisory committee" means the committee appointed by the board to advise the board on all matters related to physician assistants;

(6) "Approved program" means a program for the education and training of physician assistants which meets standards acceptable to the board;

(7) "Supervision" means control and direction of the services of physician assistants by their supervising physicians;

(8) "Approved examination" means an examination to test the knowledge and skills of physician assistants which meets standards acceptable to the board;

(9) "Certificate" means the board's official documentary authorization allowing a physician assistant to practice in the Commonwealth for the time specified; and

(10) "Trainee" means a person who is currently enrolled in an approved program for the training of physician assistants.

Section 2. Certification of Physician Assistants. (1) To be certified by the board as a physician assistant, a person must:

(a) Submit a completed application with the required fee;

(b) Be of good character and reputation;

(c) Be a graduate of an approved program; and

(d) Have passed an examination approved by the board within three (3) attempts.

(2) If grounds for denial of certification do not exist, a temporary certificate may be issued by the board's executive director to a physician assistant after graduation from an approved program and prior to taking the first available approved examination after graduation. This temporary certificate shall enable the holder to practice as a certified physician assistant pursuant to 201 KAR 9:175 only under the direct supervision of a supervising physician at the same practice location. The holder of this temporary certificate shall take the first available approved examination after graduation. If the holder receives a passing score on this examination, the temporary certificate shall be effective until the board approves the holder for permanent certification. If the holder receives a failing score, or fails to take the first available approved examination after graduation, the

temporary certificate shall automatically expire. This temporary certificate shall not be renewed or reissued subsequent to expiration or cancellation. The executive director may also issue a temporary certificate to an applicant who otherwise meets all requirements of 201 KAR 9:175, Section 2(1). The temporary certificate shall remain in effect until the board approves the holder for permanent certification. This temporary certificate shall allow the applicant to practice as a physician assistant pursuant to 201 KAR 9:175, Section 6. However, under no circumstances shall this temporary certificate remain in effect for longer than six (6) months and the temporary certificate shall not be renewable. Any temporary certificate may be cancelled at any time, without a hearing, for reasons deemed sufficient to the executive director, and who shall cancel it immediately upon direction by the board or the board's physician assistant advisory committee or upon the board's denial of the holder's application for permanent certification. When cancelling a temporary certificate, the executive director shall promptly notify, by certified United States mail, the holder of the temporary certificate, at the last known address as reflected by the files of the board, and the temporary certificate shall become terminated and of no further force and effect upon receipt of the notice.

(3) Physician assistants duly authorized to practice in other states and in good standing may apply for certification by endorsement from the state of their original certification if the endorsing state has standards substantially equivalent to those of the Commonwealth.

(4) Certification shall be renewed on or before July 1, 1989, and thereafter biennially according to the procedure established by the executive director. In conjunction with the renewal of his/her certification, the physician assistant shall provide evidence of having completed in the previous two (2) years a minimum of 100 hours of continuing education accepted by the National Commission on Certification of Physician Assistants or the American Medical Association. In addition, all physician assistants shall recertify every six (6) years as required by the NCCPA, unless they are not eligible because they hold physician assistant certification approved by the board pursuant to 201 KAR 9:175, Section 6.

(5) In conjunction with the renewal process the physician assistant shall provide evidence of having completed in the previous two (2) years an education course on the human immunodeficiency virus and acquired immunodeficiency syndrome which meets the requirements of the Cabinet for Human Resources as described in KRS 214.610.

Section 3. Approved Examination. The following examinations are approved by the board:

(1) The examination of the National Commission on Certification of Physician Assistants;

(2) The official certification examination of any state if the board determines the examination to be an adequate measure of physician assistant competency; or

(3) Any other formally administered examination if the board determines, upon review of proof provided by the applicant, that the examination is substantially equivalent to the examination of the National Commission on Certification of Physician Assistants.

Section 4. Approved Programs. (1) The following programs are approved by the board:

(a) Programs that are accredited by the Committee on Allied Health Education and Accreditation of the American Medical Association (CAHEA) and that provide interdisciplinary training in at least the following areas: family medicine, internal medicine, surgery, pediatrics, psychiatry, and obstetrics/gynecology; or

(b) Any other training program if the board determines, upon review of proof submitted by the applicant, that the training received was substantially equivalent to that received in a program as described in paragraph (a) of this subsection.

(2) Programs specifically designed to train the individual to assist in the provision of general or regional anesthesia shall have been accredited by CAHEA.

(3) Trainees enrolled in approved programs shall be under the supervision of the program which, is responsible for their services. Trainees shall be bound by the same practice limitations imposed upon physician assistants generally, but will not be considered to be practicing without authorization while enrolled in the program.

Section 5. Physician Assistant Scope of Practice. (1) A physician assistant may perform any medical services that are within the scope of training received in an approved program and which are also within the scope of the supervising physician's practice as designated by the specialty code in the most current revision of the Kentucky Medical Directory. The physician assistant shall not make a definitive diagnosis or prescribe or employ any treatment modality independent of the supervising physician. A physician assistant may, without specific approval, initiate evaluation and treatment in emergency situations.

(2) A physician assistant shall not administer or monitor general or regional anesthesia without satisfying the applicable requirements of Section 6 of this regulation.

(3) A physician assistant may render services in the offices or clinics of the supervising physician, or in hospitals and other licensed health care facilities. However, physician assistants shall not render services in these facilities without the express written permission of the respective facility's governing body. The facility may restrict the physician assistant's scope of practice within the facility as the facility deems appropriate.

(4) Neither the physician assistant nor the supervising physician shall require any individual or entity to perform any act relative to the provision of services by the physician assistant that the individual or entity is specifically forbidden to perform pursuant to law.

Section 6. Physician Assistants Practicing as Anesthesia (or Anesthesiology) Assistants. (1) Any physician assistant practicing as an anesthesia (or anesthesiology) assistant in Kentucky prior to July 15, 1986 may continue to practice if:

(a) The physician assistant has complied with all the practice requirements and conditions of Sections 2, 3, 4(2), and 5 of this regulation;

(b) The physician assistant is a graduate of a program specifically designed to train the individual to administer general or regional anesthesia which is accredited by CAHEA;

(c) The physician assistant is only employed by a supervising physician who has postgraduate training in anesthesiology from an anesthesiology program accredited by the Accreditation Council for Graduate Medical Education (ACGME); and

(d) Notwithstanding Section 9 of this regulation, the physician assistant shall not administer or monitor general or regional anesthesia unless the supervising physician is physically present in the operating room during induction, and thereafter physically present in the operating suite and not concurrently performing any other anesthesia procedure which would prevent the supervising physician's immediate physical presence in the operating room where the anesthesia procedure is being performed.

(2) Any physician assistant not already practicing as an anesthesia (or anesthesiology) assistant in Kentucky prior to July 15, 1986 must meet the following requirements:

(a) The physician assistant shall be a graduate of an approved program as defined in Section 4(1)(a) of this regulation which is of four (4) years duration, and, in addition to this training, be a graduate of a two (2) year program specifically designed to train the individual to assist in the provision of general and regional anesthesia, which consists of specialized academic and clinical training in anesthesia, and which is accredited by CAHEA;

(b) The physician assistant shall have complied with all of the practice requirements and conditions of Sections 2, 3, 4, and 5 of this

regulation;

(c) The physician assistant shall only be employed by a supervising physician who is a board certified anesthesiologist; and

(d) Notwithstanding Section 9 of this regulation, the physician assistant shall not administer or monitor general or regional anesthesia unless the supervising physician, who must be a board certified anesthesiologist, is physically present in the operating room during induction and emergence, and thereafter physically present in the operating suite and not concurrently performing any other clinical procedure.

Section 7. Approval of Supervising Physicians. (1) To seek approval by the board as a supervising physician, a physician must:

(a) Be currently licensed in good standing and primarily practicing in the Commonwealth;

(b) Submit a completed application with the required fee.

(2) In addition to other information the board's executive director may deem appropriate, the supervising physician shall, briefly, on the face of the application:

(a) Describe the nature of the practice;

(b) Describe the responsibilities the physician wishes the physician assistant to assume;

(c) Describe the means by which the physician will maintain a line of communication with the physician assistant when they are not in the same location; and

(d) Denote the name, address and area of practice of one (1) or more alternate physicians who agree in writing to accept the responsibility of supervising the physician assistant in the supervising physician's absence.

(3) A physician shall not supervise a physician assistant without being approved by the board. The board may impose restrictions on the scope of practice of a particular physician assistant or on the methods of supervision employed by the supervising physician. Physicians must obtain specific approval for each physician assistant they wish to supervise and the board will not approve any physician to supervise more than two (2) physician assistants at any one (1) time.

Section 8. Duties of Supervising Physicians. A supervising physician shall:

(1) Restrict the services of the physician assistant to those services within the limitations of the physician assistant's scope of practice as set forth in Section 5 of this regulation and, as applicable, Section 6 of this regulation, and as may be specifically limited by the board;

(2) Prohibit physician assistants from prescribing or dispensing controlled substances or other drugs;

(3) Inform all patients with whom the physician assistant comes in contact of the status of the physician assistant;

(4) Post a notice in all offices or clinics where the physician assistant may practice stating that a physician assistant practices on the premises;

(5) Require physician assistants to wear a name tag or other identification clearly stating that the physician assistant is a "physician assistant - certified";

(6) Prohibit the physician assistant from independently billing any patient or other payor for services rendered by the physician assistant;

(7) Negotiate with the medical staff or governing body of any hospital, long-term care facility or institution to establish and limit the scope of practice of the physician assistant;

(8) Not require a physician assistant to perform services or other acts that the physician assistant feels incapable of carrying out safely and properly;

(9) Criticize every two (2) years the physician assistant's reliability, accountability, and fund of medical knowledge. Recommend the approval or disapproval of other physician assistant's certification to the committee. This critical survey process shall be performed by the supervising physician biennially on the date of the physician assistant's original certification in the Commonwealth of Kentucky;

(10) Submit, in conjunction with the physician assistant's renewal of certification, a statement evidencing the physician assistant's completion of a minimum of 100 hours of continuing education as set forth in Section 2(4) of this regulation;

(11) Maintain adequate, active and continuous supervision of the physician assistant's activities to assure the physician assistant is performing as directed and complying with these regulations. The supervising physician shall timely sign all records of services rendered by the physician assistant as certification that the physician assistant carried out the services as delegated;

(12) Notify the board within three (3) business days if the supervising physician ceases to employ or supervise the physician assistant; and

(13) Notify the board within twenty (20) days if the supervising physician believes in good faith that the physician assistant violated any disciplinary rule set forth in this regulation.

Section 9. Supervision and Satellite Clinics. (1) The supervising physician need not be physically present at all times when the physician assistant is providing services in the physician's office or clinic if the physician assistant has a reliable means of having direct communication with the supervising physician at all times. Except as may be provided by this regulation or the board, the supervising physician need not be present in a hospital or other licensed health care facility while the physician assistant is providing services if the physician assistant has a reliable means of direct communication with the supervising physician at all times, and the facility has given specific approval for the provision of the services by the physician assistant without the presence of the supervising physician.

(2) Any supervising physician utilizing the services of a physician assistant in an office or clinic separate from the physician's primary office shall submit to the board a specific written request delineating the services to be provided by the physician assistant, the distance between the primary office, the setting in which the physician assistant will practice, and the mechanism by which the physician assistant shall have access, at all times, to direct communication with the supervising physician. The board may approve or disapprove the requests and may approve a request with specified limitations. A physician assistant shall not practice in this setting without first having two (2) continuous years of experience in a nonsatellite setting.

Section 10. Discipline of Physician Assistants. The board may revoke, suspend, deny, decline to renew, limit or restrict the certificate of a physician assistant, or may reprimand or place a physician assistant on probation for no more than five (5) years under conditions the board deems appropriate, upon proof that the physician assistant has:

(1) Knowingly made or presented, or caused to be made or presented, any false, fraudulent or forged statement, writing, certificate, diploma or other document in connection with an application for certification;

(2) Practiced, or aided or abetted in the practice, of fraud, forgery, deception, collusion or conspiracy in connection with an examination for certification;

(3) Been convicted, by any court within or without the Commonwealth of Kentucky, of an act which is, or would be, a felony under the laws of the Commonwealth of Kentucky, or of the United States, or of a misdemeanor crime involving moral turpitude;

(4) Become addicted to or an abuser of alcohol, drugs or any illegal substance;

(5) Developed a physical or mental disability or other condition which renders a danger in continued practice to patients, the public or other health care personnel;

(6) Knowingly made, or caused to be made, or aided or abetted

in the making of, a false statement in any document executed in connection with the practice of the profession;

(7) Practiced as a physician assistant outside the practice of the designated supervising physician;

(8) Aided, assisted, or abetted the unlawful practice of medicine or osteopathy or any other healing art, including the unlawful practice of physician assistants;

(9) Willfully violated a confidential communication;

(10) Had a physician assistant certificate by another state, territory, or foreign nation revoked, suspended, restricted, limited or subjected to other disciplinary action;

(11) Performed the services of a physician assistant in an unprofessional, incompetent, grossly negligent or chronically negligent manner;

(12) Exceeded the authority delegated by the supervising physician;

(13) Exceeded the scope of practice duly established by the governing authority of any hospital or other licensed health care facility;

(14) Been removed, suspended, expelled or placed on probation by any health care facility or professional society for unprofessional conduct, incompetence, negligence or violation of any provision of this regulation;

(15) Violated any applicable provision of regulations regarding physician assistant practice;

(16) Violated any term of probation or other discipline imposed by the board;

(17) Failed to complete the required number of hours of approved continuing education; or

(18) Performed any act as a physician assistant without having a designated supervising physician.

Section 11. Discipline of Supervising Physicians. Failure of a physician to obtain approval as a supervising physician, or failure of a supervising physician to observe applicable responsibilities established by regulations promulgated by the board regarding physician assistants, shall be unprofessional conduct subject to disciplinary action pursuant to the board's rules regarding physician discipline. In addition to other discipline, the board may revoke, suspend, restrict, or place on probation the supervising physician's right to supervise a physician assistant.

Section 12. Physician Assistant Advisory Committee. (1) The board shall establish a physician assistant advisory committee consisting of nine (9) members, four (4) of whom shall be physician assistants from (as practicable) different regions of the Commonwealth, two (2) supervising physicians, one (1) resident of the Commonwealth who is not associated with or financially interested in the health care business, one (1) advanced registered nurse practitioner who shall be selected from a list of three (3) nominees submitted by the Kentucky Board of Nursing and who shall be licensed in good standing in the Commonwealth, and one (1) member of the board. The members of the committee shall hold office for terms of three (3) years and until their successors are appointed and qualified. The terms of all members of the committee shall expire on August 31st of the last year of their respective terms.

(2) The committee shall hold meetings at least semiannually, and more often as necessary, to review and make recommendations to the board regarding:

(a) Applications of physician assistants and supervising physicians;

(b) Statutes and regulations; and

(c) Any other matter relating to the practice of physician assistants.

(3) The committee shall review all grievances relating to physician assistants. The board's investigational powers relating to physicians shall apply equally to physician assistants. Upon review of any grievance, the committee shall make a recommendation to the appropriate inquiry panel. Disciplinary proceedings against physician assistants shall be conducted in the same manner as proceedings against physicians and physician assistants shall have the same right to judicial review enjoyed by physicians. The board may temporarily suspend or restrict a physician assistant's certification during the pendency of a proceeding and may order a physician assistant to undergo physical or mental examination in accordance with the procedures set forth in KRS 311.592 and KRS 311.599, respectively.

Section 13. Emergency Permits. (1) Upon satisfactory completion of all forms, a physician assistant certified in good standing in another state or Canadian province may obtain an emergency permit to practice as a physician assistant in the Commonwealth for a period not to exceed thirty (30) days when in the executive director's opinion, based on verifiable information, the physician assistant satisfies the requirements for regular certification pursuant to 201 KAR 9:175, Section 2, and an actual medical emergency exists. A medical emergency shall be considered to exist if, in the executive director's opinion, a real and substantial threat to public health or the health of an individual exists which cannot be cured except upon the issuance of the emergency permit. The emergency permit may not be renewed or reissued and shall be immediately cancelled if the medical emergency ceases to exist prior to the passage of thirty (30) days from issuance. An emergency permit may be cancelled by the executive director without a prior hearing when in the executive director's opinion, based upon reasonable cause, the continuance of the permit would not be in the best interest of the Commonwealth. An emergency permit does not enable a physician assistant to practice beyond the geographical area, the scope of practice encompassed by the medical emergency, or without the supervision of a supervising physician.

(2) Upon satisfactory completion of all forms, a physician assistant certified in good standing to practice and a physician assistant in the Commonwealth of Kentucky may obtain an emergency permit to practice under an additional supervising physician for a period not to exceed thirty (30) days when in the executive director's opinion, based on verifiable information, the physician assistant satisfies the requirements for regular certification pursuant to 201 KAR 9:175, Section 2, and an actual medical emergency exists. A medical emergency shall be considered to exist if, in the executive director's opinion, a real and substantial threat to public health or the health of an individual exists which cannot be cured except upon the issuance of the emergency permit. The emergency permit may not be renewed or reissued and shall be immediately cancelled if the medical emergency ceases to exist prior to the passage of thirty (30) days from issuance. An emergency permit may be cancelled by the executive director without a prior hearing when in the executive director's opinion, based upon reasonable cause, the continuance of the permit would not be in the best interest of the Commonwealth. An emergency permit does not enable a physician assistant to practice beyond the geographical area, the scope of practice encompassed by the medical emergency, or without the supervision of a supervising physician.

ROYCE E. DAWSON, President

APPROVED BY AGENCY: July 14, 1994

FILED WITH LRC: July 14, 1994 at 2 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 22, 1994 at 9 a.m. at 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40202. Individuals wishing to attend this hearing shall notify this agency in writing by Wednesday, August 17, 1994, five days prior to the meeting, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given the opportunity to comment on the proposed administrative regulation.

A transcript of the public hearing will not be made unless a written request for at transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to: C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222, (502) 429-8046.

REGULATORY IMPACT ANALYSIS

Contact person: C. William Schmidt

(1) Type and number of entities affected: All physician assistants who are certified to practice as a physician assistant in the Commonwealth of Kentucky.

(a) Direct and indirect costs or savings to those affected: N/A

1. First year: See 1(a) above.

2. Continuing costs or savings: See 1(a) above.

3. Additional factors increasing or decreasing costs (note any effects upon competition): N/A

(b) Reporting and paperwork requirements: Minimal increase in reporting requirements.

(2) Effects on the promulgating administrative body: N/A

(a) Direct and indirect costs or savings: N/A

1. First year: See 3(2)(a) above.

2. Continuing costs or savings: See 3(2)(a) above.

3. Additional factors increasing or decreasing costs: None anticipated.

(b) Reporting and paperwork requirements: N/A

(3) Assessment of anticipated effect on state and local revenues: No changes anticipated.

(4) Assessment of alternative methods; reasons why alternatives were rejected: Alternative considered was not to require this education. The board feels that this regulation change is necessary for the safety of the public.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: Board is not aware of any statute, regulation, or government policy which is in conflict or is duplicated by this proposed regulation.

(a) Necessity of proposed regulation if in conflict: N/A - see 3(5) above.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: N/A - see 3(5) above.

(6) Any additional information or comments: The board feels that this regulation will assure the public of continued competency of Kentucky physician assistants.

TIERING: Is tiering applied? No. This education requirement will apply to all physician assistants. There is no valid reason to impose varying requirements.

GENERAL GOVERNMENT CABINET
Board of Ophthalmic Dispensers
(Proposed Amendment)

201 KAR 13:040. Licensing; application, examination; temporary permit; inactive status.

RELATES TO: KRS 326.020

STATUTORY AUTHORITY: KRS 326.020(3)

NECESSITY AND FUNCTION: To provide for the licensure of ophthalmic dispensers, apprentice ophthalmic dispensers, and temporary permits; specification of requirements for licensure and applications for licenses.

Section 1. Application for License. (1) Any person wishing to obtain the right to practice the vocation of ophthalmic dispenser [~~dispensing optician~~], under KRS Chapter 326, shall make application to the Kentucky Board of Ophthalmic Dispensers upon Form O.D. No. 3-1, adopted by the board May 17, 1966, herein filed by reference; and shall obtain a license from the board permitting him to do so. [~~Unless such person shall have obtained a license as above stated, it shall be unlawful for him to engage in the vocation of dispensing optician within the state of Kentucky, and he shall be subject to the penalties prescribed under the statute.~~]

(2) The board shall admit to the practical examination any candidate who pays the required nonrefundable fee of twenty-five (25) dollars and who submits satisfactory evidence to the board, under oath, that he qualifies under the administrative [~~rules and~~] regulations adopted by the board.

(3) [~~(2)~~] The applicant shall:

(a) [~~must~~] Be eighteen (18) years of age;

(b) Be of good moral character;

(c) [~~a citizen of the United States, must~~] Have passed all examinations required by the board prior to admission to the practical examination; and

(d) [~~must~~] Have completed at least two (2) years of satisfactory training and experience in ophthalmic dispensing under the supervision of a licensed ophthalmic dispenser, licensed physician, osteopath or optometrist, or be a graduate of an accepted school of ophthalmic dispensing. The [~~Such two (2) years of~~] training and experience shall [~~must~~] be as a licensed apprentice as hereinafter mentioned unless it is clearly shown to the satisfaction of the board, in its sole discretion, that the training and experience of the applicant is otherwise satisfactory, provided, however, that any time spent in a recognized school for ophthalmic dispensing or in an optical laboratory as an ophthalmic technician may, at the discretion of the board, be considered as a part of the two (2) years of satisfactory training and experience.

(4) [~~(3)~~] Applicants for the practical examination may be examined by the board upon matters pertaining to:

(a) Mathematics and physics;

(b) Ophthalmic materials and laboratory techniques;

(c) Ophthalmic optics;

(d) Ophthalmic dispensing; and

(e) Practical subjects.

(5) When any applicant passes the necessary examination and meets the qualifications as set forth, and upon payment of an original license fee of twenty-five (25) dollars, the board shall issue a license to such person to engage in the vocation of dispensing optician within the state of Kentucky.

(6) Each [~~Such~~] license shall be subject to renewal on December 31 of each year, upon renewal application Form No. 2, herein filed by reference, and upon the payment of the required fee of fifty (50) [~~ten (10)~~] dollars, wherein a renewal certificate will be issued. The renewal form and the required fee shall [~~of ten (10) dollars must~~] be received by January 2 of each year. There shall [~~will~~] be a penalty fee of ten (10) [~~five (5)~~] dollars for any renewal form or fee received after January 2.

(7)(a) An applicant training as an apprentice shall be required to apply to the board to take the examination to be licensed as an ophthalmic dispenser at the earliest date after the expiration of two (2) years of apprenticeship training.

(b) He shall be required to pass the examination within five (5) years of the date of his original licensure.

(c) If an applicant fails to pass the examination within that period of time, he may apply for, and the board may grant, at its discretion, permission to have his license reinstated under a different sponsor.

(d) If the board approves the reinstatement of the applicant's licensure, the applicant shall be subject to the same requirements that are contained in paragraphs (a) and (b) of this subsection.

(e) An applicant shall only be allowed to apply for this reinstatement one (1) time.

[~~(4) An applicant training as an apprentice must pass the examination within five (5) years of expiration of his apprenticeship term. Those having fully served an apprenticeship prior to August 3, 1983 shall be deemed to begin the five (5) year period as of that date.~~]

Section 2. Apprentice License Application. (1) For the encouragement and protection of those desiring to enter the vocation of ophthalmic dispensing as defined by KRS Chapter 326, the board has provided an apprentice training program.

(2) Applicants for apprentice licenses shall use the same form provided for other applicants in Section 1 of this administrative regulation, and shall answer all questions except Sections (3) and (7)a, b, c, and d.

(3) All other questions shall [~~must~~] be filled out and the applicant shall [~~must~~] show:

(a) Good faith of his intention to learn the vocation of ophthalmic dispensing;

(b) That he intends to apply himself to the subject; and

(c) That at the earliest date after the expiration of two (2) years apprenticeship training, he intends to apply to the board for examination to be licensed as an ophthalmic dispenser. [~~Since this program is designed to encourage apprenticeship training and the development of highly skilled and well qualified ophthalmic dispensers, the board will limit the number of apprentices to not more than one (1) apprentice to each active registered ophthalmic dispenser in each establishment.~~]

Section 3. Temporary Permit Application. (1) The board may issue a temporary permit to qualified ophthalmic dispensers, who otherwise would qualify for a license but are in the state on a temporary basis or who have not yet had an opportunity to take an examination to procure a license and whose immediate employment depends upon being licensed by the board.

(2) Applicants for temporary permits shall use the same form provided for other applicants in Section 1 of this administrative regulation, and shall answer only Sections (7) and (8).

(3) The permit shall be valid only until the next regular examination date and in no case shall exceed six (6) months following date of issuance.

(4) The fee for a temporary permit shall be twenty-five (25) [~~ten (10)~~] dollars, which amount shall accompany the application.

Section 4. Board Action, Notification. (1) The board shall [~~will~~] act only upon those applications which are completely and properly filled out by the applicant.

(2) Each applicant shall [~~must~~] enclose the prescribed license fee in the form of a check or money order made payable to the Commonwealth of Kentucky State Treasurer.

(3) [~~(2)~~] Applicants shall [~~will~~] be notified of the action of the board; and, if favorable, when and where the examination will be held.

Section 5. Inactive Status. (1) Upon application, the board may grant inactive status to a licensee. While on inactive status, the licensee shall not engage in the practice of ophthalmic dispensing.

(2) The fee for licensure on inactive status shall be ten (10) dollars per year.

(3) Continuing education requirements shall be waived for licensees on inactive status during the time they remain inactive. If at any time the inactive licensee applies to the board to return to active status, the licensee shall submit proof that he has completed six (6) hours of continuing education for ophthalmic dispenser licensees and four (4) hours of continuing education for apprentice ophthalmic dispenser licensees within the last twelve (12) month period immediately preceding the date on which the application is submitted. The licensee may request that he be allowed to return to active status immediately, with the provision that he shall receive the appropriate number of continuing education hours within six (6) months of the date on which he returns to active status. Additionally, the licensee shall be responsible for meeting the requirements set forth in 201 KAR 13:055 in order to qualify for renewal.

(4) The reactivation fee for changing from inactive status to active status shall be forty (40) dollars for an ophthalmic dispenser licensee and fifteen (15) dollars for an apprentice ophthalmic dispenser licensee.

JON DURKIN, Board Chairman

APPROVED BY AGENCY: July 11, 1994

FILED WITH LRC: July 13, 1994 at 4 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 22, 1994, at 9:30 a.m. at the offices of the Division of Occupations and Professions, located at the Berry Hill Annex, 700 Louisville Road, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by August 17, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: David L. Nicholas, Director, Division of Occupations and Professions, P.O. Box 456, Frankfort, Kentucky 40602, (502) 564-3296.

REGULATORY IMPACT ANALYSIS

Contact Person: David Nicholas

(1) Type and number of entities affected: All ophthalmic dispensers and all applicants for licensure.

(a) Direct and indirect costs or savings to those affected:

1. First year: Original license fee of $25.

2. Continuing costs or savings: Renewal fee will be increased from $10 per year to $50 per year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: Renewal forms and application forms must be filed with the board.

(2) Effects on the promulgating administrative body: This amendment will increase the fees received by the board.

(a) Direct and indirect costs or savings: None

1 . First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: Application forms and renewal forms must be processed.

(3) Assessment of anticipated effect on state and local revenues: There will be an increase in revenues for the board, which has not had a fee increase in forty years.

(4) Assessment of alternative methods; reasons why alternatives were rejected: This regulation provides clarity to scope of practice.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments:

TIERING: Is tiering applied? No. All credentialed practitioners will be subject to this regulation in the same ways.

GENERAL GOVERNMENT CABINET
Board of Ophthalmic Dispensers
(Proposed Amendment)

201 KAR 13:050. Apprentices.

RELATES TO: KRS 326.020
STATUTORY AUTHORITY: KRS 326.020(3)
NECESSITY AND FUNCTION: To define the terms "Ophthalmic Dispenser" and "Apprentice Ophthalmic Dispenser" and to specify the rights, powers and duties of the board with regard to Apprentice Ophthalmic Dispensers.

Section 1. Definition. The term "ophthalmic dispenser" whenever used herein includes licensed physician, osteopath, optometrist and opticians licensed under KRS Chapter 326.

Section 2. Apprentices. (1) An apprentice ophthalmic dispenser is one who is in training for the vocation of ophthalmic dispenser and as such dispenses ophthalmic lenses, frames and appurtenances thereto to the intended wearer only under the supervision of a licensed ophthalmic dispenser.

(2) An apprentice license shall be required of any person who is not a licensed ophthalmic dispenser, but who is in training as such and while in training works under the [~~direct~~] supervision of a licensed ophthalmic dispenser, and whose duties require that he perform the [~~such~~] services as would be normally performed by a licensed ophthalmic dispenser. The board may revoke the apprentice license at any time if [~~should~~] either the employer or the apprentice fail to carry out the provisions of this administrative regulation.

(3) A licensed apprentice ophthalmic dispenser shall at all times work under the [~~direct~~] supervision of, and in the same establishment with, a licensed ophthalmic dispenser, and the licensed ophthalmic dispenser shall be responsible for his acts.

(4) The board shall [~~will~~] issue an apprentice [a] license for a period ending December 31 of the current year, upon receipt and board approval of the required application and a fee of twenty-five (25) dollars. [~~at which time an application for renewal may be presented. The chairman is authorized to issue a temporary apprentice permit which becomes effective as a permanent apprentice license pending approval by the board at its next regular meeting.~~] The [~~permanent~~] apprentice license may be renewed at the end of the calendar year, for a period of one (1) year, upon application to the board[;] accompanied by the required fee of twenty-five (25) [~~ten (10)~~] dollars. In the event the apprentice's employment under the sponsoring ophthalmic dispenser is terminated for any reason, the board shall be notified immediately.

(5) In the interest of adequate training for the apprentice, the sponsor shall file an outline of the training schedule he proposes to follow in training the apprentice, and also shall satisfy the board that the facilities of his establishment are sufficient to provide such training. [~~The board will limit the number of apprentices to not more than one (1) apprentices to each licensed ophthalmic dispenser in each establishment.~~]

(6) The applicant shall [~~must~~] give evidence of good faith in his intention to learn the vocation of ophthalmic dispensing; that he intends to apply himself to the subject and at the earliest date possible, after the expiration of two (2) years apprenticeship training, he intends to apply to the board for examination and to qualify as a licensed ophthalmic dispenser. The board may at its discretion refuse to further renew the license if [~~should~~] he fails to carry out the provisions of this administrative regulation.

(7) The board shall [~~will~~] supply, upon request, a list of approved textbooks covering the subjects on which the examination is [~~will be~~] based. For those who are interested in attending a college or university where courses of ophthalmic dispensing are offered, the board shall [~~will~~] cooperate and offer every assistance possible.

(8) The board reserves the right to reject the application for an apprentice license or to rescind a license already issued if, upon inspection, it is found that any of the requirements for an apprentice license, as outlined in the administrative [~~rules and~~] regulations, are being violated. All rules of conduct, paying of fees, suspensions or revocations and all other administrative [~~rules and~~] regulations not specifically excluding apprentice licenses shall apply to the licensed apprentice ophthalmic dispenser.

JON DURKIN, Board Chairman
APPROVED BY AGENCY: July 11, 1994
FILED WITH LRC: July 13, 1994 at 4 p.m.
PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 22, 1994, at 9:30 a.m. at the offices of the Division of Occupations and Professions, located at the Berry Hill Annex, 700 Louisville Road, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by August 17, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.
CONTACT PERSON: David L. Nicholas, Director, Division of Occupations and Professions, P.O. Box 456, Frankfort, Kentucky 40602, (502) 564-3296.

REGULATORY IMPACT ANALYSIS

Contact Person: David Nicholas
(1) Type and number of entities affected: All licensed apprentice ophthalmic dispensers.
(a) Direct and indirect costs or savings to those affected:
1. First year: Original license fee of $25.
2. Continuing costs or savings: Renewal fee will be increased from $10 per year to $25 per year.
3. Additional factors increasing or decreasing costs (note any effects upon competition): None
(b) Reporting and paperwork requirements: Renewal forms and application forms must be filed with the board.
(2) Effects on the promulgating administrative body: This amendment will increase the fees received by the board.
(a) Direct and indirect costs or savings: None
1 . First year: None
2. Continuing costs or savings: None
3. Additional factors increasing or decreasing costs: None
(b) Reporting and paperwork requirements: Application forms and renewal forms must be processed.
(3) Assessment of anticipated effect on state and local revenues: There will be an increase in revenues for the board, which has not had a fee increase in forty years.
(4) Assessment of alternative methods; reasons why alternatives were rejected: This regulation provides clarity to scope of practice.
(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None
(a) Necessity of proposed regulation if in conflict:
(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:
(6) Any additional information or comments:
TIERING: Is tiering applied? No. All credentialed practitioners will be subject to this regulation in the same ways.

GENERAL GOVERNMENT CABINET
Board of Nursing
(Proposed Amendment)

201 KAR 20:390. Nursing incentive scholarship fund.

RELATES TO: KRS 314.025, 314.026, 314.027
STATUTORY AUTHORITY: KRS 314.131
NECESSITY AND FUNCTION: The nursing incentive scholarship fund program was created by the General Assembly. This regulation implements the administration of the program.

Section 1. Definitions. (1) "Academic year" means, for a registered nursing program, a minimum of two (2) semesters; and for a practical nursing program, the completion of the required program.

(2) "Health facility" as used in this regulation shall have the same meaning as "health facility" as defined at KRS 216B.015(12).

(3) "Resident" as used in this regulation shall be determined pursuant to 13 KAR 2:040.

(4) "Rural area" means a county with less than 50,000 population or a county which is not part of a federally designated metropolitan statistical area.

(5) "Board" means the Kentucky Board of Nursing.

(6) "Committee" means the Nursing Incentive Scholarship Fund Committee.

(7) "Successful academic progression" means:

(a) For prelicensure nursing programs, the completion of a minimum of eight (8) credit hours per semester of published requirements for the program of nursing and maintenance of a minimum grade point average which would allow admission or continuation in a program of nursing; or

(b) For graduate nursing programs, the completion of a minimum of six (6) credit hours per semester of published requirements for the program of nursing and maintenance of a minimum grade point average which would allow continuation in the graduate program.

(8) "Program of nursing" means either a prelicensure or graduate nursing program.

Section 2. Application. (1) To be eligible for a nursing incentive scholarship, an applicant:

(a) Shall be a Kentucky resident;

(b) Shall have applied for admission to an educational institution with an approved program of nursing in Kentucky;

(c) Shall have declared nursing as the major course of study; and

(d) Shall have obtained a Kentucky health facility or Kentucky educational institution as a sponsor.

(2) An applicant shall complete an application, on a form provided by the board. The application shall be received by the board between January 1 and June 1.

(3) The applicant shall send or cause to be sent to the board by June 1 an official high school transcript or equivalent (GED) or official transcripts showing postsecondary work completed, whichever is most recent.

(4) The applicant shall attach to the application a copy of the Student Aid Report from the Free Application for Federal Student Aid (FAFSA) for the current year.

Section 3. The Committee. (1) Members of the committee shall serve for one (1) year and may be reappointed.

(2) The committee shall meet at least annually by July 15 and more often if necessary to decide on scholarships for the upcoming academic year.

(3) The committee shall serve without compensation but may be reimbursed for actual and necessary expenses related to serving on the committee.

Section 4. Criteria for Awards. The committee may consider the following criteria in evaluating applicants:

(1) Prior health care work experience or education;

(2) Previous academic achievement as indicated by transcripts;

(3) Current acceptance as a declared nursing major in an educational institution with an approved program of nursing;

(4) Current admission or enrollment in an approved program of nursing.

Section 5. Amount of Award. (1) The committee shall be notified as to the current fund balance prior to making awards.

(2) The committee shall defer awarding a portion of the amount collected in odd-numbered fiscal years to the following fiscal year. The amount of the deferred portion shall be determined as follows: add the number of licensed RNs renewing as of the current year to the number of licensed LPNs who renewed in the previous year. Divide by two (2). Multiply by five (5). Subtract that figure from the amount collected, less administrative costs.

(3) The committee shall first make awards to those recipients who received awards in the previous year and remain eligible to receive awards pursuant to Section 7 of this regulation in the current year.

(4) The committee shall divide the remaining funds among the remaining applicants based on KRS 314.025(2), 314.026(3), 314.027(2) and on the criteria considered in Section 4 of this regulation. [~~If insufficient applications are received from LPNs, these funds earmarked pursuant to KRS 314.027(2) and unexpended shall be used for other applicants.~~]

(5) The maximum award granted each year shall be the highest tuition charged per academic year for a full-time student in a program of nursing in a public institution at Kentucky enrolled in a comparable program. By June 1 of each year, the committee shall determine the highest annual tuition rate charged by a practical nursing program in a public institution in Kentucky, the highest annual tuition rate charged by an associate degree registered nursing program in a public institution in Kentucky, and the highest annual tuition rate charged by a prelicensure baccalaureate degree registered nursing program in a public institution in Kentucky, and the highest annual tuition rate charged by a graduate nursing program in a public institution in Kentucky. For students who will not be enrolled for an entire academic year, the award shall be one-half (1/2) the maximum. Upon request of the recipient and the sponsor, the committee may award less than the maximum.

Section 6. Procedure for Disbursement of Awards. (1) Disbursement of funds shall be made directly to the school by the board on behalf of the recipient.

(2) Disbursement shall be made by semester. Disbursement of the second semester's payment shall be contingent on successful academic progression during the first semester upon verification by the educational institution on a form supplied by the board.

(3) Each educational institution shall certify to the board that the recipient has enrolled in school. The educational institution shall send the certification to the board.

Section 7. Continuing Eligibility Criteria. (1) A recipient of a nursing incentive scholarship shall be eligible to continue to receive an award provided successful academic progression through the program is maintained and there is continued maintenance of any preference categories. The recipient shall submit to the board by June, the following:

(a) Verification of successful academic progression from the academic advisor of record on a form supplied by the board;

(b) A request for continuation;

(c) Grade reports, verified by an official transcript for the preceding academic year when available, and within thirty (30) days after the recipient has enrolled each semester. The educational institution shall immediately notify the board of any change in a recipient's enrollment status;

(d) A student aid report for the current year.

(2) The amount of the award shall be determined pursuant to Section 5(5) of this administrative regulation.

(3) Award recipients in practical nursing programs are not eligible for continued awards while enrolled in such programs.

(4) Award recipients in practical nursing programs are not eligible for continued awards while enrolled in such programs.

Section 8. Disbursement Contract. Prior to disbursement of funds for a particular year, the recipient shall sign a written contract and a promissory note in a form prescribed by the board.

Section 9. Repayment and Deferral. (1) If a recipient fails to complete the nursing program in which he is enrolled within the time specified by the program of nursing or if he fails to complete the required employment with the sponsor as specified in the contract, he shall immediately become liable to the board to pay the sum of all scholarships received and accrued interest thereon.

(2) Written notification of demand for repayment shall be sent by the board to the scholarship recipient's last known address and shall be effective upon mailing. The board may agree, in its sole discretion, to accept repayment in installments in accordance with a schedule established by the board. Payments shall first be applied to interest and then to principal on the earliest unpaid contracts.

(3) Repayment may be deferred in the case of disability, major illness or accident which prevents a recipient from completing an approved program of nursing or being employed by the sponsor.

(4) [~~In the case of prenursing students,~~] Repayment may be deferred if the recipient fails to obtain acceptance to a program of nursing. This deferral shall only apply for two (2) consecutive academic years. If the recipient fails to obtain acceptance to a program of nursing after that time, repayment shall be due. If the recipient obtains acceptance to a program of nursing within the allotted time, he may apply for a continuation award pursuant to Section 7 of this administrative regulation.

(5) In the case of students enrolled in a program of nursing, repayment may be deferred if the student fails to achieve successful academic progression. This deferral shall only apply for two (2) consecutive academic years. If the student fails to achieve successful academic progression after that time, repayment shall be due. If the student achieves successful academic progression within the allotted time, he may apply for a continuation award pursuant to Section 7 of this administrative regulation.

(6) In any situation where a deferral is requested, the recipient shall submit the request in writing to the committee on a form supplied by the board.

Section 10. Miscellaneous. (1) Verification of employment with the health facility or educational institution shall be submitted by the sponsor to the board when the recipient's employment commitment begins and when it is completed. Any termination of employment prior to completion shall be reported to the board within thirty (30) days.

(2) Recipients shall notify the board immediately of any change of name or address or enrollment status in school.

(3) The forms required by this administrative regulation are included by reference as if fully incorporated herein and shall be on file in the Office of the Board of Nursing, 312 Whittington Parkway, Suite 300, Louisville, Kentucky 40222, and shall be available for public inspection during regular business hours.

(4) Recipients shall be required to pass the licensure examination within two (2) years of graduation. Failure to pass the examination within this period shall cause the sum of all nursing incentive scholarships received and accrued interest thereon to become due and payable.

(5) Applicants may apply for scholarship funds for prenursing courses only to the extent of the published prerequisites of the college or university in which the applicant is enrolled.

ROBERTA G. SCHERER, President

APPROVED BY AGENCY: June 23, 1994

FILED WITH LRC: July 8, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 29, 1994 at 9 a.m. in the office of the Kentucky Board of Nursing, 312 Whittington Parkway, Suite 300, Louisville, Kentucky. Individuals interested in being heard at this hearing shall notify this agency in writing by August 24, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Nathan Goldman, General Counsel, Kentucky Board of Nursing, 312 Whittington Parkway, Suite 300, Louisville, Kentucky 40222, (502) 329-7000.

REGULATORY IMPACT ANALYSIS

Contact person: Nathan Goldman

(1) Type and number of entities affected: Potential scholarship recipients. Number will vary. This year it was 43.

(a) Direct and indirect costs or savings to those affected:

1. First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: None were considered as none are applicable.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed administrative regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments:

TIERING: Is tiering applied? Tiering is not applicable, as the regulation applies to all affected equally.

GENERAL GOVERNMENT CABINET
Board of Examiners of Social Work
(Proposed Amendment)

201 KAR 23:070. Specialty certification.

RELATES TO: 335.080, 335.090, 335.100

STATUTORY AUTHORITY: KRS 335.070

NECESSITY AND FUNCTION: This regulation further clarifies descriptions of specialty certification and the functions evolving therefrom, in addition to clarifying terms used KRS Chapter 335.

Section 1. Definitions. (1)(a) "Educational institution approved by

the board" means graduate schools of social work accredited by the Council on Social Work Education, except that the board shall evaluate credentials of foreign graduates on a case-by-case basis; and

(b) "A social work or social welfare program" not accredited by the Council on Social Work Education shall demonstrate to the satisfaction of the board that they meet the Council on Social Work Education standards for accreditation of graduate programs.

(2) Supervision for the independent practice of clinical social work means the educational process of utilizing a partnership aimed at enhancing the professional development of supervisees in providing services which focus upon the evaluation and treatment of emotional disorders and mental illness as related to the total health of the individual, and on helping with problems of living and activities designed to stimulate growth and development.

(3) "Certification for the independent practice of clinical social work" means the process whereby the board recognizes a certified social worker to have special training [~~and/~~]or competence to engage in the independent practice of clinical social work.

(4) "Independent practice of clinical social work" means that practice in which an individual who, wholly or in part, practices clinical social work outside of those settings specifically exempted by KRS 335.010, and has responsibility for his own practice and sets up his own conditions of exchange with his clients and identifies himself in any manner as a clinical social work practitioner in offering services. In addition, a social work employee of any individual, institution, or organization except those exempted by KRS 335.010 providing clinical social work services and paid by the [~~such~~] persons, institutions or organizations rather than by direct arrangement with the client is considered within the definition of the private independent practice of clinical social work.

(5) "Clinical social work" means practice which focuses on the evaluation and treatment of emotional disorders and mental illness as related to the total health of the individual. The [~~Such~~] practice is based on knowledge of psychodynamics, human relations, crisis intervention, psychopathology, and group dynamics. Practitioners have numerous skills including those necessary for individual, marital, family and group psychotherapy, as well as other treatment modalities. The responsibility of the clinical social worker shall establish a therapeutic relationship which leads to correction of the dysfunction. This [~~Such~~] relationship includes diagnosis using professionally recognized clinical nomenclature; treatment planning which includes development, implementation, and modification of the plan; evaluation of progress; and termination of the treatment process. This relationship shall be characterized by face-to-face contact with the client system throughout the treatment process. Because the clinical social worker holds the welfare of the client/patient in high regard, all persons seen in a therapeutic capacity shall be informed of the regulatory authority of this board. This notice shall be in a written format as specified by the board.

(6) "Supervisor of record" means a licensed clinical social worker who enters into a plan of supervised activities for clinical social work experience with a certified social worker for any authorized purpose. This person shall assume responsibility for the CSW's practice and shall supervise in accordance with Section 3 of this regulation, and KRS 335.100(b) during the period covered by the plan.

Section 2. (1) A certified social worker who is an employee of an individual LCSW, nonexempt institution, or a nonexempt organization may engage in the practice of clinical social work by contracting, in writing, with a person who holds a valid Kentucky certification for clinical practice, who shall assume responsibility for the employee's practice and shall supervise in accordance with Section 3 of this regulation, and KRS 335.100(b), over the qualifying period of eligibility for taking the specialty certification exam.

(a) The certified social worker shall, for purposes of this section, be an employee of a nonexempt institution or nonexempt organization in which he has no direct or indirect interest other than his [~~such~~] employment.

(b) He shall not enter into the [~~such~~] practice of clinical social work until this contract has been approved by the board and shall cease the [~~such~~] practice of clinical social work immediately upon the termination of the [~~said~~] contract.

(c) At the termination of the contract the employee shall apply for the speciality certification or request an extension of the contract from the board.

(2) The supervisory contract required in subsection (1) of this section shall contain all of the following:

(a) The name and license number of the supervisee.

(b) The name and license number of the supervisor.

(c) The nature of the [~~such~~] practice.

(d) The nature, duration and frequency of the supervision.

(e) The conditions or procedures for termination of the supervision.

(f) The explicit statement that the supervisor understands that he shall be held accountable to the board for the care given to the supervisee's clients.

(g) The explicit statement that the certified social worker is a bona fide employee, and [~~as such~~] has social security and income tax deducted from his salary.

(h) The explicit statement that the supervisor meets the criteria set out in subsection (4) [~~(3)~~] of this section.

(3) While practicing under supervision, the employee shall notify each client/patient of this fact in the following format:

(a) This notice shall be in writing and include the name, office address, telephone number, and license number of the supervisor of record.

(b) It shall also contain information regarding the regulatory authority of this board.

(4) For purposes of the contractual arrangement mentioned in subsection (1) of this section only, the criteria for a supervisor shall be a person who:

(a) [~~A person who~~] Has been in the independent practice of clinical social work for three (3) [~~five (5)~~] years following licensure for the independent practice of clinical social work; and

(b) [~~A person who~~] Has no unresolved complaints filed before the board; and

(c) [~~A person who~~] Has no more than six (6) certified social workers with whom they have a contract to be held accountable to the board; or

(d) [~~A person who~~] Has demonstrated to the board's satisfaction a level of competence equivalent to that contained in paragraph (a) of this subsection.

Section 3. To be certified for the independent practice of clinical social work the licensee shall [~~must~~] have:

(1) Had the required number of hours of experience in clinical social work under supervision. The [~~Such~~] supervision shall have been provided by an individual meeting the requirement set forth in subsection (5) [~~(4)~~] of this section;

(2) Spent at least sixty (60) percent of the required experience in a direct client-professional relationship;

(3) Had direct responsibility for specific individual or groups of clients;

(4) Qualifying experience which provides broad exposure and opportunity for skill development with a variety of dysfunctions, diagnoses, acuity levels and population groups.

(5) Supervision provided by one (1) of the following:

(a) An individual certified for the independent practice of clinical social work by this board;

(b) A person who has demonstrated to the board's satisfaction a level of competence equivalent to that contained in paragraph (a) of this subsection.

(6) Supervision related specifically to the experience which is

proffered as the qualifying experience for the clinical certificate. The [~~Such~~] supervision shall focus on:

(a) The accurate diagnosis of client problems leading to proficiency in applying professionally recognized clinical nomenclature;

(b) The development and modification of the treatment plan;

(c) The development of treatment skills suitable to each phase of the therapeutic process;

(d) Ethical problems in independent practice; and

(e) The development and use of the professional self in the therapeutic process.

(7) Supervision which totals a minimum of 200 hours equitably distributed throughout the qualifying period; not more than 100 hours of which, excepting hours of supervision received prior to December 31, 1981, may be obtained through group supervision in groups of six (6) or fewer members;

(8) Supervision congruent with the board's code of ethical practice;

(9) Passed an examination developed by the board.

Section 4. The period of supervised experience required by KRS 335.100(1)(b) and the supervisory requirements set forth in Section 3 of this regulation shall be evaluated by the board according to one (1) of the two (2), or a combination of the two (2) following methods at the option of the candidate:

(1) Postexperience evaluation. The candidate submits his application along with appropriate documentation of supervision upon completion of the experience [~~on forms provided by the board~~].

(2) Preexperience evaluation. The candidate submits a detailed description of the plan for experience which will be taking place over the required time period [~~on forms provided by the board~~]. This plan shall be evaluated by the board and shall be approved or disapproved within ninety (90) days of its submission. The plan shall include all of the following:

(a) The name and license number of the supervisee;

(b) The name and license number of the supervisor;

(c) The agency where the experience will be received;

(d) A detailed description of the nature of the practice, which includes all of the following:

1. The type of clients which shall [~~will~~] be seen;

2. The type of therapies and treatment modalities which shall [~~will~~] be used including the prospective length of treatment;

3. The type of problems which shall [~~will~~] be treated;

(e) The nature, duration and frequency of the supervision which includes all of the following:

1. The number of hours of supervision per week;

2. The amount of group and individual supervision;

3. The methodology for transmission of case information;

(f) The conditions or procedures for termination of the supervised experience;

(g) The explicit statement that the supervisor meets the criteria set forth in Section 3(5) [~~(4)~~] of this regulation.

JANICE JAMES, Chairman

APPROVED BY AGENCY: July 11, 1994

FILED WITH LRC: July 13, 1994 at 11 a.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 22, 1994, at 1:30 p.m. at the offices of the Division of Occupations and Professions, located at the Berry Hill Annex, 700 Louisville Road, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by August 17, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: David L. Nicholas, Director, Division of Occupations and Professions, P.O. Box 456, Frankfort, Kentucky 40602, (502) 564-3296.

REGULATORY IMPACT ANALYSIS

Contact Person: David Nicholas

(1) Type and number of entities affected: All persons working toward licensure as a clinical social worker or providing supervision.

(a) Direct and indirect costs or savings to those affected:

1. First year: There are no additional costs associated with this regulation.

2. Continuing costs or savings: There are no continuing costs.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: The applicant will be required to file an application or an employment contract.

(2) Effects on the promulgating administrative body: This regulation establishes the supervision requirements for LCSW.

(a) Direct and indirect costs or savings:

1 . First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: Contract approval will be granted through a letter.

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: This regulation will facilitate the beginning of practice for applicants as LCSW's.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments:

TIERING: Is tiering applied? No. All applicants will be subject to this regulation in the same ways.

TOURISM CABINET
Department of Fish and Wildlife Resources
(Proposed Amendment)

301 KAR 1:015. Boats and outboard motors; restrictions.

RELATES TO: KRS 150.010, 150.090, 150.620, 150.625, 150.990

STATUTORY AUTHORITY: KRS 13A.350, 150.620, 150.625

NECESSITY AND FUNCTION: [~~It is necessary~~] To regulate the size of outboard motors and boats on state-owned lakes to minimize the conflict with the primary purposes of the lakes which are the perpetuation of fish or game populations and the associated sports. This amendment is necessary to change the motor size and speed limit at Greenbo Lake and bring this administrative regulation into compliance with the provisions of KRS Chapter 13A. [~~set the motor limit on Goose, Island and South Lakes (Peabody WMA).~~]

Section 1. Boat Size Restrictions. (1) A person shall not operate on the lakes listed in this administrative regulation:

(a) Houseboats.

(b) Monohull boats, except canoes, with a centerline length exceeding eighteen (18) feet, six (6) inches.

(c) Except on Lake Malone or Lake Beshear, pontoon boats with floats and decking exceeding twenty-two (22) feet.

(d) On Lake Malone or Lake Beshear, pontoon boats with floats and decking exceeding thirty (30) feet.

(2) There is no size restriction on canoes. [~~No boat shall be permitted on any of the herein named lakes with a centerline exceeding eighteen (18) feet six (6) inches in length as measured on deck or from bow to stern, except canoes which have no length limit and float boats which shall have pontoons and decking no longer than twenty-two (22) feet. On Lake Malone and Lake Beshear only float boats may have pontoons and decking up to thirty (30) feet in length.~~

~~Section 2. No houseboats of any description shall be permitted on any of the herein named lakes.~~]

Section 2. A person shall not operate electric or internal combustion motors on: [~~3. No motor of any type is permitted on the following lakes:~~]

(1) Lake Chumley, Lincoln County;
(2) Dennie Gooch Lake, Pulaski County;
(3) Martin County Lake, Martin County; and
(4) Kingdom Come Lake, Harlan County.

Section 3. Persons shall not use internal combustion motors on: [~~4. Electric motors only may be used on the following lakes:~~]

(1) Carter Caves Lake, Carter County;
(2) Spurlington Lake, Taylor County;
(3) Marion County Lake, Marion County;
(4) Lake Washburn, Ohio County;
(5) Bert Combs Lake, Clay County;
(6) McNeely Lake, Jefferson County;
(7) Lake Mauzy, Union County;
(8) Carpenter Lake and Kingfisher Lakes, Daviess County;
(9) Metcalfe County Lake, Metcalfe County;
(10) Briggs Lake, Logan County;
(11) Big Turner, Ballard County;
(12) Little Turner, Ballard County;
(13) Shelby, Ballard County;
(14) Mitchell, Ballard County;
(15) Happy Hollow, Ballard County;
(16) Burnt Slough, Ballard County;
(17) Butler, Ballard County;
(18) Sandy Slough, Ballard County;
(19) Long Pond, Ballard County;
(20) Cross Slough, Ballard County;
(21) Little Green Sea, Ballard County;
(22) Burnt Pond, Ballard County;
(23) Arrowhead Slough, Ballard County;
(24) Deep Slough, Ballard County;
(25) Beaver Dam Slough, Ballard County;
(26) Cypress Slough, Ballard County;
(27) Twin Pockets Slough, Ballard County;
(28) Lake Reba, Madison County;
(29) Lincoln Homestead Lake, Washington County;
(30) Goose, Muhlenberg County;
(31) Island, Ohio County;
(32) South, Ohio County.

Section 4. On the following lakes, a person shall not:

(1) Use motors [~~5. No motor~~] larger than ten (10) horsepower.

(2) Operate motors faster than slow speeds which cause no disturbance or interference with fishing. [~~shall be used on the following state owned lakes, and motors shall only be operated at slow speeds which cause no disturbance or interference with fishing at:~~]

(a) [~~(1)~~] Shanty Hollow Lake, Warren County;
(b) [~~(2)~~] Bullock Pen Lake, Grant County;
(c) [~~(3)~~] Lake Boltz, Grant County;
(d) [~~(4)~~] Kincaid Lake, Pendleton County;
(e) [~~(5)~~] Elmer Davis Lake, Owen County;
(f) [~~(6)~~] Beaver Creek Lake, Anderson County,
(g) [~~(7)~~] Herb Smith Lake, Harlan County;
(h) [~~(8)~~] Corinth Lake, Grant County;
[~~(9) Greenbo Lake, Greenup County;~~]
(i) [~~(10)~~] Swan Lake, Ballard County.

Section 5. A person shall not operate a [~~6. No~~] boat motor larger than 150 horsepower or [~~shall be used, and all~~] boat motors without [~~used shall have~~] an underwater exhaust on: [~~the following state owned lakes:~~]

(1) Guist Creek Lake, Shelby County;
(2) Lake Malone, Todd, Muhlenberg and Logan Counties; and
(3) Lake Beshear, Christian and Caldwell Counties.

Section 6. Persons shall not exceed idle speed on Greenbo Lake, Greenup County; [~~7. Boat motors of any size may be used on~~] Pan Bowl Lake, Breathitt County; and Wilgreen Lake, Madison County[~~; however, boat speed on the entire lake shall not exceed idle speed~~].

C. THOMAS BENNETT, Commissioner
CRIT LUALLEN, Secretary
DAVID H. GODBY, Chairman

APPROVED BY AGENCY: June 10, 1994
FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 29, 1994 at 9 a.m. in the meeting room of the Arnold L. Mitchell Building, #1 Game Farm Road, Frankfort, Kentucky. Individuals interested in being heard shall notify this agency in writing by August 24, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Peter W. Pfeiffer, Director, Division of Fisheries, Department of Fish & Wildlife Resources, Frankfort, Kentucky 40601, (502) 564-3596.

REGULATORY IMPACT ANALYSIS

Agency Contact: C. Thomas Bennett

(1) Type and number of entities affected: It is estimated that approximately 10,000 individuals use Greenbo Lake annually. This amendment will allow owners of motors larger than 10 horsepower to operate them on Greenbo Lake.

(a) Direct and indirect costs or savings to those affected:

1. First year: There are no measurable direct or indirect costs or savings.

2. Continuing costs or savings: Same as for first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): There are not other factors which would increase or decrease costs.

(b) Reporting and paperwork requirements: No reporting or paperwork are required.

(2) Effects on the promulgating administrative body: Some additional effort may be required to enforce the provision that boats on Greenbo Lake operate at idle speed.

(a) Direct and indirect costs and savings:

1. First year. None are anticipated.

2. Continuing costs or savings. Same as for first year.

3. Additional factors increasing or decreasing costs: No additional factors have been identified.

(b) Reporting and paperwork requirements: No additional reporting and paperwork required.

(3) Assessment of anticipated effect on state and local revenues: There is no anticipated effect on funding, budgets, manpower levels or equipment needs.

(4) Assessment of alternative methods; reasons why alternatives were rejected: One alternative was to leave the 10-horsepower restriction in place. Another alternative was to remove horsepower limits without imposing a speed limit. The first alternative was rejected because many boats now have motors larger than 10 horsepower; the second, because larger motors run at speed are a potential safety hazard.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping or duplication: There are no statutes, administrative regulations or government policies which are in conflict, overlapping or a duplication.

(6) Any additional information or comment: None

TIERING: Was tiering applied? No. Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it. Disparate treatment of any person or entity subject to this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the Fourteenth Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

TOURISM CABINET
Department of Fish and Wildlife Resources
(Proposed Amendment)

301 KAR 1:115. Propagation of [~~fish, frogs, crayfish or~~] aquatic organisms.

RELATES TO KRS 150.025, 150.280, 150.290, 150.450, 150.485

STATUTORY AUTHORITY: KRS 13A.350, 150.025

NECESSITY AND FUNCTION: [~~It is necessary~~] To regulate the manner of propagation in order to protect [~~the~~] native wild species from exploitation, disease, and parasites. This amendment will eliminate the requirement for a fisheries pet permit to keep undersized sport fish in aquaria and meet the formatting and language requirements of KRS Chapter 13A.

Section 1. Definitions. "Aquatic organisms" means fishes, frogs, crayfish and other aquatic vertebrates and invertebrates. [~~A commercial propagation permit shall be required for the propagation of all species of fish, frogs, crayfish, or aquatic organisms.~~]

Section 2. Propagation Permit Requirements and Application Procedures. (1) Before acquiring or propagating aquatic organisms, a person shall obtain a permit.

(2) Permit applicants shall obtain forms from a conservation officer.

(3) The conservation officer shall inspect the applicant's facilities and complete the fishery propagation application form.

(4) The permit application form is incorporated by reference. This form may be obtained, inspected or copied at the Division of Fisheries, Department of Fish and Wildlife Resources, #1 Game Farm Road, Frankfort, Kentucky 40601 between 8 a.m. and 4:30 p.m., Monday through Friday. [~~All applications for fishes, frogs, crayfish, or aquatic organisms propagation farm permits shall be made on standard forms available from any conservation officer and shall carry the approval of such officer. Upon notification by the applicant, the conservation officer shall inspect the applicant's ponds and other equipment needed for propagation and enter all information on the standard fishery propagation application form.~~]

[~~Section 3. Should there be need for a seine larger than ten (10) feet, such may be authorized in the propagation permit. Each seine authorized shall have a metal tag attached which states the name of the owner, size of seine and date permit expires; this tag to be furnished by the Department of Fish and Wildlife Resources. No seine authorized under the permit shall be used except in waters designated in the application.~~]

Section 3. Acquisition of Brood Stock from Public Waters. (1) A permit holder [~~4. A propagater~~] may obtain from public waters a maximum of [~~under the supervision of a conservation officer~~] 1,500 minnows or crayfish per [~~for brood stock, one (1) time only, from public waters for stocking each~~] surface acre of water [~~to be~~] used for propagation of a particular species.

(2) Each permit holder shall obtain brood stock from public waters no more than one (1) time for minnows and one (1) time for crayfish.

(3) A conservation officer shall supervise the acquisition of brood stock from public waters.

(4) Permit holders shall use gear authorized by 301 KAR 1:130, Live bait for personal use, to acquire aquatic organisms from public waters.

(a) Upon request at the time of application for a permit, the department may authorize applicants to use seines larger than ten (10) feet in length.

(b) Permit holders shall attach a metal tag, furnished by the department, to authorized seines over ten (10) feet, showing:

1. The name of the owner;
2. The length of the seine; and
3. The date the permit expires.

(c) Permit holders shall use these seines only in waters designated in the application.

Section 4. Inspections of Facilities and Revocation of Permits. (1) [~~5.~~] The [~~propagation farm or~~] permit holder shall allow [~~inspection by~~] a conservation officer to inspect his facilities [~~at any time~~].

(2) If [~~Should~~] the officer finds a violation of [~~any of~~] the terms of this administrative regulation, the department shall immediately revoke the [~~such shall be cause for the immediate cancellation of said~~] permit.

(3) Fees paid for revoked permits shall [~~will~~] not be refunded [~~in case permit is revoked. Permits shall remain valid one (1) year from date of issue~~].

Section 5. Sale of Aquatic Organisms. Permit holders may sell propagated [~~6. Any or all species of fish, frogs, crayfish, or~~] aquatic organisms [~~propagated may be sold at the discretion of the permit holder at all times and the permit form itself shall be proof that these species were legally obtained.~~]

[~~Section 7. When any propagation permit expires and is not renewed or when any permit is revoked for a violation of the game and fish codes, all equipment that is approved under this permit that is illegal without the permit shall be confiscated.~~]

[~~Section 8. Those individuals who wish to hold undersize game fish in an aquarium must obtain a fisheries pet permit and purchase said fish from a licensed commercial propagator or obtain from the department when such species are conveniently handled.~~]

C. THOMAS BENNETT, Commissioner
CRIT LUALLEN, Secretary
DAVID H. GODBY, Chairman
APPROVED BY AGENCY: June 10, 1994

FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 29, 1994 at 9 a.m. in the meeting room of the Arnold L. Mitchell Building, #1 Game Farm Road, Frankfort, Kentucky. Individuals interested in being heard shall notify this agency in writing by August 24, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Peter W. Pfeiffer, Director, Division of Fisheries, Department of Fish & Wildlife Resources, Frankfort, Kentucky 40601, (502) 564-3596.

REGULATORY IMPACT ANALYSIS

Agency Contact: C. Thomas Bennett

(1) Type and number of entities affected: Fewer than 25 individuals who in the past have been required to purchase a fisheries pet permit.

(a) Direct and indirect costs or savings to those affected:

1. First year: Individuals keeping undersize fish in aquaria will save the $10 permit fee.

2. Continuing costs or savings: Same as for the first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): No additional factors have been identified.

(b) Reporting and paperwork requirements: Holders of undersized fish will no longer have to apply for a permit.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs and savings:

1. First year: The department will lose less than $250 in revenue.

2. Continuing costs or savings: Same as for first year.

3. Additional factors increasing or decreasing costs: No additional factors have been identified.

(b) Reporting and paperwork requirements: The department will no later have to issue permits to keep undersized fish in aquaria.

(3) Assessment of anticipated effect on state and local revenues: This amendment will have no effect on state or local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: The alternative of continuing to require this permit was rejected because it serves no purpose in protecting the Commonwealth's fishery resource.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping or duplication: None have been identified.

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. This amendment removed a requirement completely. Tiering is not appropriate under these circumstances.

TOURISM CABINET
Department of Fish and Wildlife Resources
(Proposed Amendment)

301 KAR 1:155. Commercial fishing requirements.

RELATES TO: KRS 150.010, [~~150.025,~~] 150.120, 150.170, 150.175, 150.445, 150.450, 150.990

STATUTORY AUTHORITY: KRS 13A.350, 150.450 [~~150.025~~]

NECESSITY AND FUNCTION: [~~It is necessary~~] To regulate [~~the manner of~~] taking [~~of rough~~] fish[~~es~~] for commercial use, to avoid conflicts with other interests, and to utilize and conserve the populations of these fishes. This amendment is necessary to allow commercial fishermen to have unlicensed helpers and to bring this administrative regulation into compliance with the wording and format requirements of KRS Chapter 13A.

Section 1. Definitions. (1) "Commercial fisherman" means a person holding a valid resident or nonresident commercial fishing license.

(2) "Commercial fishing gear" means the equipment described in 301 KAR 1:146.

(3) "Overflow lake" means a permanent or temporary body of water that receives overflow flood waters from an adjacent stream.

(4) "Sport fish" means those species so designated by 301 KAR 1:060.

(5) "Unlicensed helper" means a person without a commercial fishing license who is assisting a commercial fisherman. [~~Each person fishing with any commercial gear, or assisting another in the doing of such acts, must have in possession an appropriate commercial fishing license and an appropriate tag or tags attached to each piece of gear in such a manner and in such a position that enforcement officers can, without undue difficulty, determine whether or not the fishing gear in use or possession has been properly licensed, and the operator of the gear at the time of inspection is complying with statute and regulation.~~]

Section 2. Unlicensed Helpers. (1) A commercial fisherman shall not utilize more than one (1) unlicensed helper.

(2) An unlicensed helper shall not use commercial fishing gear or sell fish unless he is accompanied by a licensed commercial fisherman. [~~No person shall have in possession any seines, nets or commercial tretlines, except that gear permitted in a specific permit from this department, or that gear legal under live bait regulations, unless he has procured an appropriate commercial fishing license and legal tags for each piece of gear and has such tag or tags attached to the gear at all times. This section shall not be construed to require manufacturers, retail or wholesale dealers, who have such gear in their possession for sale only, to obtain licenses or tags.~~]

Section 3. Tagging And Using Commercial Gear. (1) Persons shall tag commercial gear so that enforcement officers can find and read the tag without undue difficulty.

(2) Persons shall not use commercial gear:

(a) [~~shall not be fished~~] Within fifty (50) yards of the [~~any~~] outlet or inlet of an overflow lake.

(b) Within fifty (50) yards of the mouth of a [~~any~~] stream except the mouth of the Ohio River.

(c) [~~or~~] Within 200 yards below a [~~any~~] dam [~~on any stream~~].

(3) From April 1 through October 31, persons shall not use commercial nets:

(a) In bays and inlets of Kentucky or Barkley Lakes; and

(b) For a distance of 200 yards from the mouth of bays or inlets in Kentucky or Barkley Lakes.

Section 4. Sport Fish and Endangered Species. Persons taking sport [~~Any~~] fish or endangered species [~~, taken~~] by commercial gear

shall [~~, designated as sport fish, largemouth bass, smallmouth bass, Kentucky bass, coosa bass, rock bass, white crappie, black crappie, walleye, sauger, rockfish (striped bass), white bass, yellow bass, musky, northern pike, chain pickerel and trouts must be returned~~] immediately return the fish, without undue injury, to the waters from which it was taken[~~, without undue injury. All other species are designated as rough fish and may be taken as herein described, except those species which are designated as endangered species by regulation and duly advertised~~].

Section 5. Tending Gear and Removing Fish. (1) Commercial fishermen shall tend and remove the fish from baited hoop nets or slat traps at least every seventy-two ~~(~~72) hours.

(2) Commercial fishermen shall tend and remove the fish from other [~~Each piece of~~] commercial fishing gear at least [~~in use in any of the waters of the Commonwealth must be tended~~] every twenty-four (24) hours.

(3) Fishermen shall remove commercial fishing gear from the water when they have finished fishing. [~~, and all fish caught by that piece of gear removed, except baited hoop nets or slat traps may be left three (3) days without disturbing. In addition, each piece of commercial gear must be removed from the waters in which it has been fished at the termination of its use in fishing. Failure to comply shall constitute a violation and sufficient grounds for the enforcement officer to confiscate the gear not tended or abandoned. Also, the owner of the gear shall be charged with violating this regulation and penalized according to KRS 150.990.~~]

(4) The department may confiscate gear abandoned, not tended regularly, or otherwise used contrary to the statutes and administrative regulations governing commercial fishing.

[~~Section 6. The use of commercial nets of any type is illegal in the bays and inlets and for a distance of 200 yards from the mouth of each bay or inlet in Kentucky and Barkley lakes except November 1 through March 31.~~]

C. THOMAS BENNETT, Commissioner
CRIT LUALLEN, Secretary
DAVID H. GODBY, Chairman

APPROVED BY AGENCY: June 10, 1994
FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on Monday, August 29, 1994 at 9 a.m. in the meeting room of the Arnold L. Mitchell Building, #1 Game Farm Road, Frankfort, Kentucky. Individuals interested in being heard shall notify this agency in writing by August 24, 1994, five days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Peter W. Pfeiffer, Director, Division of Fisheries, Department of Fish & Wildlife Resources, Frankfort, Kentucky 40601, (502) 564-3596.

REGULATORY IMPACT ANALYSIS

Agency Contact: C. Thomas Bennett

(1) Type and number of entities affected: Approximately 500 commercial fishermen.

(a) Direct and indirect costs or savings to those affected:

1. First year: Commercial fishermen will no longer have to buy a $100 license for a helper.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): There are no other factors which would increase or decrease costs.

(b) Reporting and paperwork requirements: No extra reporting requirements are required by this amendment.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs and savings:

1. First year: It is estimated that fewer than 25 commercial fishermen will employ unlicensed helpers, representing a decrease in departmental revenue of approximately $2500.

2. Continuing costs or savings: Continuing costs should be equal to those of the first year.

3. Additional factors increasing or decreasing costs: No additional factors have been identified.

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: This amendment will have no impact on state or local revenues other than those listed in Section 2.

(4) Assessment of alternative methods; reasons why alternatives were rejected: The alternative was to continue to require those assisting commercial fishermen to purchase a commercial fishing license. This alternative was rejected because musselers and special net fishermen are allowed unlicensed helpers and commercial fishermen should be included.

(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping or duplication: None have been identified.

(a) Necessity of proposed regulation if in conflict:

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

(6) Any additional information or comments:

TIERING: Was tiering applied? No. All commercial fishermen should receive the same opportunity to employ an unlicensed helper. Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it. Disparate treatment of any person or entity subject to this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the Fourteenth Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department of Law
(Proposed Amendment)

400 KAR 1:030. Administrative [~~rules of procedure,~~] service of process, computation of time and filing of documents.

RELATES TO: KRS 146.200 to 146.360, 146.990, 151.182, 151.184, 151.297, 151.990, Chapter 223, 224, [~~224.10, 224.30, 224.46, 224.99,~~] 350.028, 350.070, 350.085, 350.093, 350.130, 350.465, 350.990, 30 CFR Parts 730, 731, 732, 733, 735, 917, 30 USC 1253, 1255

STATUTORY AUTHORITY: KRS 151.125, 224.10-100, 224.10-410, 224.10-420, 224.10-430, 224.10-440, 224.40-310, 350.028, 350.255, 350.465, 30 CFR Parts 730, 731, 732, 733, 735, 917, 30 USC 1253, 1255

NECESSITY AND FUNCTION: KRS Chapter 146, 151, 223, 224, and 350 authorize [~~require~~] the cabinet to conduct administrative hearings and investigations concerning a wide variety of matters. This administrative regulation establishes procedures for [~~initiation of an~~

~~administrative action and for~~] service of process, computation of time and filing of documents.

Section 1. Service of [~~Commencement of Action. An administrative action is commenced upon the filing of an initiating document with the cabinet. An initiating document is a complaint, petition, or notice of investigation under KRS 151.182 (1) and (2), 151.297, 224.10-100(11), 224.10-270(2), 2210-410, 224.10-420(1) and (2), 224.30-140, 224.43-310(4), 350.028(2), 350.070, 350.085(6), 350.093(6)(b), 350.130(1) and 350.465(3)(i). These rules shall apply to formal hearings initiated pursuant to 405 KAR 7:090, Section 5, but shall not apply to preliminary hearings pursuant to 405 KAR 7:090, Sections 3 and 4.~~

~~Section 2.~~] Process. (1) Summons issuance, by whom served.

[~~(a)~~] Upon the filing of the initiating document the Office of Administrative Hearings [~~docket coordinator~~] shall issue an administrative summons and shall employ the methods for service of process identified in 405 KAR 7:091, 405 KAR 5:095 or 401 KAR 100:010. [~~either:~~

~~1. Place a copy of the administrative summons and initiating document to be served in an envelope, address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished by the initiating party. The docket coordinator shall affix adequate postage and place the sealed envelope in the United States mail as certified mail return receipt requested. The docket coordinator shall forthwith enter the fact of mailing in the record and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the docket coordinator shall enter that fact in the record. The docket coordinator shall file the return receipt or returned envelope in the record. Service by certified mail is complete upon delivery of the envelope or as provided by paragraph (b) of this subsection. The return receipt shall be proof of the time, place and manner of service. To the extent that the United States postal regulations permit authorized representatives of local, state, or federal governmental offices to accept and sign for "addressee only" mail, signature by such authorized representative shall constitute service on the officer; or~~

~~2. Cause the administrative summons and initiating document, with necessary copies, to be transferred for service to any person authorized by the Secretary or by any statute or rule, other than by subparagraph 1 of this paragraph, to deliver them, who shall serve the administrative summons and initiating documents, and the return endorsed thereon shall be proof of the time and manner of service.~~

~~(b) As an alternative to other methods of service specified by statute, regulation, or these rules, service of process upon a person issued a permit by the cabinet may be made by placing in the United States mail as certified mail, return receipt requested, a copy of the administrative summons and initiating document directed to the named permittee as specified on the face of the permit at the permanent address specified in the permit application or by the permittee. Service is effective upon acceptance of the administrative summons and initiating document by any person at the permanent address, or upon refusal to accept the administrative summons and initiating document by any person at the permanent address, or upon failure to claim the administrative summons and initiating document prior to its return to the cabinet by the United States Postal Service. The return receipt shall be proof of the acceptance, refusal, or failure to claim the administrative summons and initiating document.~~

~~(c) The methods of service of process specified by these rules shall be supplemental to and shall be accepted as an alternative to any other method of service specified by other applicable statutes, rules or regulations.~~

~~(2) Administrative summons. The administrative summons shall be issued in the name of the cabinet, be dated and signed by the docket coordinator or other authorized individual, contain the name of the presiding hearing officer and the style and number of the action, and be directed to each party, giving notice that a legal action has been filed and that failure to appear in person or by counsel as directed may result in a decision adverse to the party's position. The administrative summons shall be served with the initiating document and may include notices of hearing.~~]

(2) [~~(3)~~] Personal service.

(a) Service shall be made upon an individual within this Commonwealth, other than an unmarried infant or person of unsound mind, by delivering a copy of the administrative summons and initiating document to such person or, if acceptance is refused, by offering personal delivery to such person, or by delivering a copy of the administrative summons and initiating document to an agent authorized by appointment or by law to receive service of process for such individuals.

(b) Service shall be made upon an unmarried infant or a person of unsound mind by serving the person's resident guardian or committee if there is one known to the initiating party or, if none, by serving either the person's father or mother within this state or, if none, by serving the person within this state having control of such individual. If there are no such persons enumerated above, application shall be made to the appropriate court to appoint a practicing attorney as guardian ad litem who shall be served. If any of the persons directed by this section to be served is an initiating party, the person who stands first in the order named who is not an initiating party shall be served.

(c) Service shall be made upon a partnership or unincorporated association subject to suit under a common name by serving a partner or managing agent of the partnership or an officer or managing agent of the association, or an agent authorized by appointment or by law to receive service on its behalf.

(d) Service shall be made upon a corporation by serving an officer or managing agent thereof, or any other agent authorized by appointment or by law to receive service on its behalf.

(e) Service shall be made upon the Commonwealth or any agency other than the cabinet by serving the attorney general or any assistant attorney general. Service of a request for hearing shall be made upon the cabinet by serving the Commissioner of the Department of Law [~~general counsel or any cabinet representative designated in any notice~~].

(f) Service shall be made upon a county by serving the county judge or, if the [~~said~~] judge is absent from the county, the county attorney. Service shall be made upon a city by serving the chief executive officer thereof or an official attorney thereof. Service on any public board or other administrative [~~such~~] body, except state agencies, shall be made by serving a member thereof.

(g) Service may be made upon an individual out of this state, other than an unmarried infant, a person of unsound mind or a prisoner, by certified mail [~~in the manner prescribed in subsection (1) of this section~~], by personal delivery of a copy of the administrative summons and initiating document by a person over eighteen (18) years of age, or by other methods allowed by law. Proof of service may be made either by the return receipt [~~mentioned in subsection (1) of this section~~] or by affidavit of the person making such service, upon or appended to a copy of the initiating document, stating the time and place of service and the fact that the individual served was personally known to the person making service.

(h) Service may be made upon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in any action growing out of or connected with the business of such office or agency, by serving the person in charge thereof.

(i) [~~(4) Unknown party.~~] In an action against a person whose name is unknown to the initiating party, the person shall be described in the initiating document and administrative summons as unknown party. If the person's name or place of residence be discovered pending the action, then the initiating document shall be amended

accordingly.

Section 2. [3.] Service and Filing of Pleadings and Other Papers. (1) Service; when required. Every order required by its terms to be served, every pleading subsequent to the original initiating document unless the hearing officer otherwise orders because of numerous responding parties, every paper relating to discovery required to be served upon a party unless the hearing officer otherwise orders, every written motion other than one (1) which may be heard ex parte, and every written notice, appearance, demand, and similar papers shall be served upon each party except those in default for failure to appear. Parties so in default shall be given notice of pleadings asserting new or additional claims for relief against them by an initiating document issued thereon [as provided in Section 2 of this regulation].

(2) Service; how made. Whenever [under these rules] service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the hearing officer. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney's or party's last known address. Delivery of a copy [within this rule] means handing it to the attorney or to the party; or leaving it at the attorney's or party's office with the person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(3) Service; proof of. Whenever any pleading or other paper is served [under subsection (1) or (2) of this section], proof of the time and manner of such service shall be filed before action is to be taken thereon by the hearing officer or the parties. Proof may be by certificate of a member of the bar or by affidavit of the person who served the papers, or by any other proof satisfactory to the hearing officer. The [Such] certificate or affidavit shall identify by name the persons so served.

(4) Service; numerous responding parties. If the initiating or responding parties are numerous, the hearing officer upon motion or of the hearing officer's own initiative, may designate one (1) initiating or responding party for the service of the pleadings. The filing of any such pleading with the cabinet and service thereof upon the party constitutes due notice of it to the parties. The hearing officer upon motion or of the hearing officer's own initiative may order that any party not appearing at a prehearing [pretrial] conference [or preliminary hearing] not be served with further pleadings. A copy of every such order shall be served upon the parties in such manner and form as the hearing officer directs.

(5) Filing.

(a) All papers after the initiating document required to be served upon a party shall be filed with the cabinet either before service or within a reasonable time thereafter.

(b) The filing of pleadings and other papers with the cabinet [as required by these rules] shall be made by filing them with the Office of Administrative Hearings [docket coordinator].

(c) The Office of Administrative Hearings [docket coordinator] shall endorse upon every pleading and other paper filed [in an action] the date of its filing. The [Such] endorsement shall constitute the filing of the pleading or other paper and no order of the hearing officer shall be required.

(d) Filing of discovery material.

1. Except as provided by subparagraph 2 of this paragraph, the following documents shall not be filed with the Office of Administrative Hearings unless the hearing officer orders otherwise:

a. Interrogatories;

b. Requests for production or inspection;

c. Requests for admission; and

d. Subpoenas.

Section 3. [4.] Time. (1) Computation. In computing any period of time prescribed or allowed by [these rules, by] order of the hearing officer[,] or by any applicable administrative [statute or] regulation, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. Unless otherwise directed by the hearing officer, when the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation.

(2) Enlargement. When by administrative [statute,] regulation[, these rules] or by order of the hearing officer an act is required or allowed to be done at or within a specified time, the hearing officer for cause shown may, at any time in the hearing officer's discretion, order the period enlarged with or without motion or notice if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect. The hearing officer may not enlarge a time frame established by statute.

(3) [For motions; affidavits.

(a) A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not less than five (5) days before the time specified for the hearing, unless a specific period is fixed by statute, regulation, these rules or by order of the hearing officer. Such an order may for cause shown be made on ex parte application. All written motions shall be accompanied by a brief statement of the grounds and reasons for the motion.

(b) When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the hearing officer permits them to be served at some other time.

(4)] Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceeding within a [prescribed] period prescribed by order of the hearing officer or by administrative regulation after the service of a notice or other paper upon the party and the notice or paper is served by mail, three (3) days shall be added to the prescribed period. This provision shall not apply to the service of administrative summons and initiating documents by mail [under Section 2(1) of this regulation].

PHILLIP J. SHEPHERD, Secretary
E. DOUGLAS STEPHAN, Commissioner
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 26, 1994, at 9 a.m. local time in the Auditorium, Capital Plaza Tower, Frankfort, Kentucky. Persons interested in being heard at this hearing shall notify this agency in writing by August 21, 1994 of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. To assure an accurate record, the cabinet requests that each person testifying at the hearing provide the cabinet with a written copy of his or her testimony. No transcript or recording will automatically be taken of the hearing unless a written request for a transcript or recording is made, in which case the person making the request shall have the responsibility of paying for same. Written comments on the proposed amendment may be submitted at any time before 4:30 p.m. on August 26, 1994. Comments received after that time will not be considered. Written notification of intent to be heard at the public hearing and written

comments must be submitted to the following contact person: Kathryn M. Hargraves, Department of Law, Fifth Floor Capital Plaza Tower, Frankfort, Kentucky 40601, (502) 564-5576.

REGULATORY IMPACT ANALYSIS

Agency Contact: Kathryn M. Hargraves

(1) Type and number of entities affected: This administrative regulation amends existing procedures for conducting adjudicatory administrative hearings authorized by KRS Chapter 146 relating to wild rivers, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers, KRS Chapter 224 relating generally to environmental protection, and KRS Chapter 350 relating to mining. The procedures affect petitions for hearing on orders and final determinations of the cabinet under those statutes, as well as administrative complaints filed by the cabinet under those statutes. No impact on persons filing petitions for hearing or named as defendants in administrative complaints is expected, since this administrative regulation is consistent with existing statutory and regulatory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

(a) Direct and indirect costs or savings to those affected:

1. First year: No additional costs or savings are expected.

2. Continuing costs or savings: None expected.

3. Additional factors increasing or decreasing costs: None expected.

(b) Reporting and paperwork requirements: This administrative regulation imposes filing and service requirements for persons engaged in administrative adjudication before the cabinet, but those requirements are not additional to or more stringent than current filing and service requirements, and they are consistent with existing statutory and regulatory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: No additional costs or savings are expected.

2. Continuing costs or savings: None are expected.

3. Additional factors increasing or decreasing costs: None expected.

(b) Reporting and paperwork requirements: This administrative regulation imposes filing and service requirements for the cabinet when engaged in administrative adjudication, but those requirements are not additional to or more stringent than current filing and service requirements, and they are consistent with existing statutory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

(3) Assessment of anticipated effect on state and local revenues: None expected.

(4) Assessment of alternative methods; reasons why alternatives were rejected: The procedures are outlined in existing statutes, and the cabinet does not have the power to alter those statutory requirements. In addition, by being consistent with current administrative practice, the Kentucky Rules of Civil Procedure and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350, the cabinet believes the public will be better served than by differing requirements.

(5) Identify any statute, rule, regulation or governmental policy which may be in conflict, overlapping, or duplication: None identified.

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments:

TIERING: Was tiering applied? No. Tiering was not applied because procedural requirements should be the same for all persons engaged in administrative adjudication.

FISCAL NOTE ON LOCAL GOVERNMENT

1. Does this administrative regulation relate to any aspect of a local government, including any service provided by that local government? Yes

2. State what unit, part of division of local government this administrative regulation will affect. This administrative regulation will affect any division of local government filing a petition for hearing under KRS Chapter 146 relating to wild rivers, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers and KRS Chapter 224 relating generally to environmental protection, and the administrative regulations promulgated pursuant thereto. This administrative regulation will also affect any division of local government named as a defendant in an administrative complaint filed under those chapters and the administrative regulations promulgated pursuant thereto. This administrative regulation also applies to administrative hearings relating to mining conducted under KRS Chapter 350 and the regulations promulgated pursuant thereto, but it is not expected to affect divisions of local government.

3. State the aspect or service of local government to which this administrative regulation relates. This administrative regulation relates to administrative hearings to which divisions of local government are parties.

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a local government for the first full year the regulation is to be in effect. If specific dollars estimate cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): None

Expenditures (+/-): None

Other Explanation: No effect on expenditures and revenues of divisions of local government that are parties to administrative hearings authorized under KRS Chapters 146, 151, 223 and 224 and the administrative regulations promulgated pursuant thereto is expected, since this administrative regulation is consistent with existing statutory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. 30 USC 1253, 1255; 30 CFR Parts 730, 731, 732, 733, 735, 724, 917. The cabinet's Department for Environmental Protection administers under state statutes some programs that have federal counterparts administered by the U.S. Environmental Protection Agency (EPA). The federal statutes authorize EPA to approve state programs which are consistent with and no less stringent than the federal programs. However, none of the programs EPA has delegated to the cabinet require adjudicatory administrative hearings to have certain procedural requirements.

2. State compliance standards. This administrative regulation amends existing procedures for conducting adjudicatory administrative hearings authorized by KRS Chapter 146 relating to wild rivers, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers, KRS Chapter 224 relating generally to environmental protection, and KRS Chapter 350 relating to mining. The procedures affect petitions for hearing on orders or final determinations of the cabinet under those statutes and administrative regulations promulgated pursuant thereto, as well as administrative complaints filed by the cabinet under those statutes, and administrative regulations promulgated pursuant thereto. This administrative regulation governs service of process, computation of

time, and filing of documents.

3. Minimum or uniform standards contained in the federal mandate. The federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 USC 1201 et seq. establishes the basis whereby state and federal authorities regulate surface mining. Title 5 of SMCRA contains the provisions whereby persons aggrieved by an action of the regulatory authority may challenge that action through an adjudicative process. Kentucky's implementation of these federal provisions will be achieved in part under this regulation. The controlling standard is that the state enforcement program must be as effective as the federal surface mining program, 30 USC 1253, 1255. This federal mandate, however, does not prescribe specific procedural standards other than it requires that a process be in place by which persons having an interest that may be adversely affected may be heard at any significant part of the administrative and judicial process, as well as the proper administration of such cases. There is no federal mandate for procedural standards for administrative hearings under KRS 146, 151, 223, and 224.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department of Law
(Proposed Amendment)

400 KAR 1:040. Administrative [~~rules of procedure,~~] discovery.

RELATES TO: 146.200 to 146.360, 146.990, 151.182, 151.184, 151.297, 151.990, Chapter 223, 224, [~~224.10, 224.30, 224.46, 224.99,~~] 350.028, 350.070, 350.085, 350.093, 350.130, 350.465, 350.990, 30 CFR Parts 730, 731, 732, 733, 735, 917, 30 USC 1253, 1255

STATUTORY AUTHORITY: KRS 151.125, 224.10-100, 224.10-410, 224.10-420, 224.10-430, 224.10-440, 224.40-310, 350.028, 350.255, 350.465, 30 CFR Parts 730, 731, 732, 733, 735, 917, 30 USC 1253, 1255

NECESSITY AND FUNCTION: KRS Chapters 146, 151, 223, 224 and 350 authorize [~~require~~] the cabinet to conduct administrative hearings and investigations concerning a wide variety of matters. This administrative regulation establishes procedures for discovery.

Section 1. General Provisions Governing Discovery. (1) Discovery methods. Parties to administrative hearings [~~In all proceedings under these rules except preliminary hearings pursuant to 405 KAR 7:090, Sections 3 and 4, parties~~] may obtain discovery by one (1) or more of the following methods:

(a) Depositions upon oral examination or written questions; (b) Written interrogatories;

(c) Production of documents or things or, for parties other than the cabinet, permission to enter upon land or other property, for inspection and other purposes; and

(d) Requests for admission. Unless the hearing officer orders otherwise under subsection (3) of this section, the frequency of use of these methods is not limited.

(2) Scope of discovery.

(a) In general. Parties may obtain discovery regarding any matter, not privileged or confidential under KRS 224.10-210, 224.10-212 or under any other privilege recognized by statute or at common law, whether it relates to a claim or defense of the party seeking discovery or to a claim or defense of any other party, which is relevant to the subject matter involved in the administrative hearing [~~proceeding~~], including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the administrative hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(c) Hearing preparation: materials.

1. Subject to the provisions of paragraph (d) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (1) of this section and prepared in anticipation of the administrative hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the hearing officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

2. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order of the hearing officer. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) Hearing preparations: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under this administrative regulation and acquired or developed in anticipation of or preparation for the administrative hearing, may be obtained only as follows:

1. A [~~The parties shall exchange all information directed by the hearing officer, which may include facts known and opinions held by experts and acquired or developed in anticipation of a hearing. In addition, a~~] party may[,] through interrogatories[,] require any other party to identify each person whom the other party expects to call as an expert witness at the administrative hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Upon motion, the hearing officer may order further discovery by other means, subject to those [~~such~~] restrictions as to scope as the hearing officer may deem appropriate.

2. A party may discover facts known or opinions held by an expert who has been retained or employed by another party in anticipation of or preparation for an administrative hearing and who is not expected to be called as a witness at the administrative hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(3) Protective orders.

(a) Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an

effort to resolve the dispute without administrative action, and for good cause shown, the hearing officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one (1) or more of the following:

1. That the discovery not be had;

2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

3. That the discovery may be had only by a method of discovery other than selected by the party seeking discovery;

4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

5. That discovery be conducted with no one present except persons designated by the hearing officer;

6. That a deposition after being sealed be opened only by order of the cabinet; or

7. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

(b) If the motion for a protective order is denied in whole or in part, the hearing officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Section 10(1)(c) of this administrative regulation apply to the award of expenses incurred in relation to the motion.

(4) Sequence and timing of discovery. Unless the hearing officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(5) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement that response to include information thereafter acquired, except as follows:

(a) A party is under a duty seasonably to supplement a response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, or the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party knows that the response was incorrect when made, or the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the hearing officer, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

Section 2. Persons Before Whom Depositions May Be Taken. [~~(1) Within the state.~~] Depositions [~~taken in this state~~] shall be taken before an examiner; a judge, clerk, commissioner or official reporter of a court; a notary public; or before such other persons and under such other circumstances as shall be authorized by law. [~~The term "officer" in Sections 4(3), (5), (6), 5(1), (2), and 6(4) of this regulation means any person before whom a deposition may be taken under this section.~~

~~(2) Without the state. Depositions may be taken out of this state before a commissioner appointed by the Governor of the state where taken or before any person empowered by a commission directed to the person by consent of the parties or by order of the hearing officer; or before a judge of a court, a justice of the peace, mayor of a city, or notary public; or before such other persons and under such circumstances as shall be authorized by the law of this state or the place where the deposition is taken.~~]

Section 3. Stipulations Regarding Discovery Procedure. Unless the hearing officer orders otherwise, the parties may, by agreement [~~written stipulation~~], provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and modify the procedures provided by this administrative regulation [~~these rules~~] for other methods of discovery[~~, except that stipulations extending the time for responses to discovery may be made only with the approval of the hearing officer~~].

Section 4. Depositions Upon Oral Examination. (1) When depositions may be taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of a court having appropriate jurisdiction and on such terms as the court prescribes.

(2) General requirements.

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the administrative hearing [~~action~~]. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, the matter upon which each person will be examined, and the name or descriptive title and address of the person before whom the deposition is to be taken. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) The hearing officer may for cause shown enlarge or shorten the time for taking the deposition.

(c) The hearing officer may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at the party's own expense.

(d) The notice to a party deponent may be accompanied by a request made in compliance with Section 8 of this administrative regulation for the production of documents and tangible things at the taking of the deposition. The procedure of Section 8(2) of this administrative regulation shall apply to the request.

(e) A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one (1) or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in this administrative regulation [~~these rules~~].

(3) Examination and cross-examination.

(a) Examination and cross-examination of witnesses may proceed as permitted at the administrative hearing. The person [~~officer~~] before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the person's [~~officer's~~] direction and in the person's [~~officer's~~] presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (2)(c) of this section. If requested by one (1) of the parties, the testimony shall be transcribed at that party's expense.

(b) All objections made at the time of the examination to the qualifications of the person [officer] taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the person taking the deposition [officer] upon the deposition. Evidence objected to shall be taken subject to the objections. [In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.]

(4) Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the hearing officer may order the person conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Section 1(3) of this administrative regulation. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the hearing officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Section 10(1)(c) of this administrative regulation apply to the award of expenses incurred in relation to the motion.

(5) Submission to witness. Any party to an action may make a written request before the person [officer] taking a deposition therein that it be submitted to the witness. In such an event, when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the person taking the deposition [officer] with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the person [officer] before whom the deposition is taken shall sign it and state on the record the fact of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress the hearing officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(6) Certification and filing by person taking deposition [officer].

(a) The person [officer] before whom the deposition is taken shall certify on the deposition that the witness was duly sworn by that person [the officer] and that the deposition is a true record of the testimony given by the witness. [The officer before whom the deposition is taken shall promptly deliver the deposition to the docket coordinator or send it by certified mail to the docket coordinator for filing.]

(b) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if a fair opportunity is afforded all parties to verify the copies by comparison with the originals, and if the person producing the materials requests their return, the person [officer] before whom the deposition is taken shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition [to the hearing officer,] pending final disposition of the case.

(c) Upon payment of reasonable charges therefor, not to exceed those fixed by statute, the person taking the deposition [officer] shall furnish a copy of the deposition to any party or to the deponent.

(7) Failure to attend or to serve subpoena; expenses.

(a) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the hearing officer may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by the party and the party's attorney in so attending, including reasonable attorney's fees.

(b) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the hearing officer may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by the party and the party's attorney in so attending, including reasonable attorney's fees.

Section 5. Depositions Upon Written Questions. (1) Serving questions; notice.

(a) After service of the summons [commencement of the action], any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoenas. The deposition of a person confined in prison may be taken only by leave of court of appropriate jurisdiction on such terms as that court prescribes.

(b) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and the name or description title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Section 4(2)(e) of this administrative regulation.

(c) The hearing officer may establish an expeditious schedule for the service of cross, redirect, and recross questions.

(2) The officer before whom the deposition is to be taken to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Section 4(3), (5) and (6) of this administrative regulation, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions which were received. Neither party agent, or attorney shall be present at the examination of the witness.

Section 6. Use of Depositions in Administrative Hearings [Proceedings]. (1) Use of depositions. At the administrative hearing any part or all of a deposition so far as admissible may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Section 4(2)(e) or 5(1)(b) of this administrative regulation to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the hearing officer finds that:

1. The witness is dead; [or]

2. The party offering the deposition has been unable to procure the attendance of the witness by subpoena; [or]

3. The witness is at a greater distance than 100 miles from the place of the administrative hearing or out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; [or]

4. The witness is the Governor, Secretary, Auditor or Treasurer of the state; or the witness is a judge or clerk of a court; or the witness is a postmaster; or the witness is a president, cashier, teller or clerk of a bank; or the witness is a practicing physician, dentist or lawyer; or the witness is a keeper, officer or guard of a penitentiary; [or]

5. The witness is of unsound mind, having been of sound mind when his deposition was taken; [or]

6. The witness is prevented from attending the trial by illness, infirmity, or imprisonment; [or]

7. The witness is in the military service of the United States or of this state; or

8. [if] The hearing officer finds that such circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the administrative hearing, to allow the deposition to be used.

(d) If only a part of a deposition is offered in evidence by a party, an adverse party may require introduction of any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(e) Substitution of parties does not affect the right to use depositions previously taken.

(2) Objections to admissibility. Objection may be made at the administrative hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) Effect of taking or using depositions. The taking of a deposition or the questioning of a deponent shall not make evidence admissible which is otherwise incompetent or constitute a waiver of objections to its admissibility.

(4) Effect of errors and irregularities.

(a) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to disqualification of person before whom deposition is to be taken. Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to taking of deposition.

1. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one (1) which might have been obviated or removed if presented at that time.

2. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

3. Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within three (3) days after service of the last questions authorized.

(d) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the person [officer] before whom the deposition was taken under this section and Section 5 of this administrative regulation are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Section 7. Interrogatories to Parties. (1) Availability; procedures for use.

(a) Any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served upon any party at any time after the commencement of the action. A copy of the interrogatories, answers and all related pleadings shall be served [filed with the docket coordinator and, unless otherwise ordered,] upon all parties.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days of service or within such other time as specified by the hearing officer or agreed upon. The party submitting the interrogatories may move for an order under Section 10(1) of this administrative regulation with respect to any objection to or other failure to answer an interrogatory.

(c) Each party may propound a maximum of thirty (30) interrogatories and thirty (30) requests for admission to each other party; for purposes of this section, each subpart of an interrogatory or request shall be counted as a separate interrogatory or request. The following interrogatories shall not be included in the maximum allowed:

1. A request for the names and addresses of persons answering the interrogatories;

2. A request for the names and addresses of the witnesses; and

3. A request as to whether the persons answering are willing to supplement their answers if information subsequently becomes available. Any party may move the hearing officer for permission to propound either interrogatories or requests for admission in excess of the limit of thirty (30).

(2) Scope; use at administrative hearing [trial].

(a) Interrogatories may relate to any matters which may be inquired into under Section 1(2) of this administrative regulation, and the answers may be used to the extent permitted by the rules of evidence.

(b) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the hearing officer may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(3) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Section 8. Production of Documents and Things. (1) Scope. Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the party's

behalf, to:

(a) Inspect and copy any designated documents, [(] including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form; [),] or

(b) [to] Inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Section 1(2) of this administrative regulation and which are in the possession, custody or control of the party upon whom the request is served. However, this subsection [; provided, however, that nothing herein] shall not be construed so as to limit or impose additional requirements on the cabinet with respect to its authority to enter property or to conduct inspections authorized by law.

(2) Procedure. The request may be served on any party without leave of the hearing officer at any time after service of the summons [commencement of the action]. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is made shall serve written response within thirty (30) days or within such other time as specified by the hearing officer. The party submitting the request may move for an order under Section 10 of this administrative regulation with respect to any objection to or failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Section 9. Requests for Admission. (1) A party may serve upon any other party a written request for admission, for purposes of the pending administrative hearing [action] only, of the truth of any matters within the scope of Section 1(2) of this administrative regulation set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request may be served at any time after the commencement of the action. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the hearing officer may allow or the parties may agree, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that a reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for the hearing may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the matter cannot be admitted or denied.

(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objection is justified, the hearing officer shall order that an answer be served. If the hearing officer determines that an answer does not comply with the requirements of this section, the hearing officer may order either that the matter is admitted or that an amended answer be served. The hearing officer may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference [or at a designated time prior to the hearing]. The provisions of Section 10(3) of this administrative regulation apply to the award of expenses incurred in relation to the motion.

(4) Effect of admission. Any matter admitted under this section is conclusively established unless the hearing officer on motion permits withdrawal or amendment of the admission. The hearing officer may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the hearing officer that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. An admission made by a party under this section is for the purpose of the pending administrative hearing [action] only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Section 10. Failure to Make Discovery: Sanctions. (1) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) Motion.

1. If a deponent fails to answer a question propounded or submitted under Section 4 or 5 of this administrative regulation or a corporation or other entity fails to make a designation under Sections 4(2)(e) or 5(1)(b) of this administrative regulation, or a party fails to answer an interrogatory submitted under Section 7 of this administrative regulation, or a party fails to allow examination under Section 8 of this administrative regulation, the discovering party may move for an order compelling an answer or a designation or an order compelling examination in accordance with the request. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without administrative action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

2. If the motion is denied in whole or in part, the hearing officer may make such protective order as the hearing officer would have been empowered to make on a motion made pursuant to Section 1(3) of this administrative regulation.

(b) Evasive or incomplete answer. For the purposes of this section [rule] an evasive or incomplete answer is to be treated as a failure to answer.

(c) Award of expenses of motion.

1. If the motion is granted the hearing officer shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the hearing officer finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

2. If the motion is denied, the hearing officer shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the hearing officer finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

3. If the motion is granted in part and denied in part, the hearing officer may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(2) Failure to comply with order.

(a) Sanctions by the hearing officer. If a party or an officer, director, or managing agent of a party or a person designated under Section 4(2)(e) or 5(1)(b) of this administrative regulation to testify on

behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (1) of this section, the hearing officer may make such orders in regard to the failure as are just, and among others the following:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(b) Expenses on failure to obey order. In lieu of any of the foregoing orders or in addition thereto, the hearing officer shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the hearing officer finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(3) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Section 9 of this administrative regulation, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the hearing officer for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The hearing officer shall make the order unless it finds that the request was held objectionable pursuant to Section 9(1) of this administrative regulation, or the admission sought was of no substantial importance, or the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or there was other good reason for the failure to admit.

(4) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

(a) If a party or an officer, director, or managing agent of a party or a person designated under Section 4(2)(e) or 5(1)(b) of this administrative regulation to testify on behalf of a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, or to serve answers or objections to interrogatories submitted under Section 7 of this administrative regulation, after proper service of the interrogatories, or to serve a written response to a request for examination submitted under Section 8 of this administrative regulation, after proper service of the request, the hearing officer on motion may make such orders in regard to the failure as are just, and among others, the hearing officer may take any action authorized under subparagraphs 1, 2, and 3 of subsection (2)(a) of this section. In lieu of any order or in addition thereto, the hearing officer shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure unless the hearing officer finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(b) The failure to act described in this section [~~rule~~] may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Section 1(3) of this administrative regulation.

(5) Expenses against the Commonwealth. Expenses and attorney's fees are not to be imposed upon the Commonwealth under this section, except as otherwise provided in 405 KAR 7:092, Section 14.

PHILLIP J. SHEPHERD, Secretary
E. DOUGLAS STEPHAN, Commissioner
APPROVED BY AGENCY: July 14, 1994
FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this administrative regulation shall be held on August 26, 1994, at 9 a.m. local time in the Auditorium, Capital Plaza Tower, Frankfort, Kentucky. Persons interested in being heard at this hearing shall notify this agency in writing by August 21, 1994 of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. To assure an accurate record, the cabinet requests that each person testifying at the hearing provide the cabinet with a written copy of his or her testimony. No transcript or recording will automatically be taken of the hearing unless a written request for a transcript or recording is made, in which case the person making the request shall have the responsibility of paying for same. Written comments on the proposed amendment may be submitted at any time before 4:30 p.m. on August 26, 1994. Comments received after that time will not be considered. Written notification of intent to be heard at the public hearing and written comments must be submitted to the following contact person: Kathryn M. Hargraves, Department of Law, Fifth Floor Capital Plaza Tower, Frankfort, Kentucky 40601, (502) 564-5576.

REGULATORY IMPACT ANALYSIS

Agency Contact: Kathryn M. Hargraves

(1) Type and number of entities affected: This administrative regulation amends existing procedures for conducting adjudicatory administrative hearings authorized by KRS Chapter 146 relating to wild rivers, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers, KRS Chapter 224 relating generally to environmental protection, and KRS Chapter 350 relating to mining. The procedures affect petitions for hearing on orders and final determinations of the cabinet under those statutes, as well as administrative complaints filed by the cabinet under those statutes. No impact on persons filing petitions for hearing or named as defendants in administrative complaints is expected, since this administrative regulation is consistent with existing statutory and regulatory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

(a) Direct and indirect costs or savings to those affected:

1. First year: No additional costs or savings are expected.

2. Continuing costs or savings: None expected.

3. Additional factors increasing or decreasing costs: None expected.

(b) Reporting and paperwork requirements: This administrative regulation imposes filing and service requirements for persons engaged in administrative adjudication before the cabinet, but those requirements are not additional to or more stringent than current filing and service requirements, and they are consistent with existing statutory and regulatory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: No additional costs or savings are expected.

2. Continuing costs or savings: None are expected.

3. Additional factors increasing or decreasing costs: None expected.

(b) Reporting and paperwork requirements: This administrative regulation imposes filing and service requirements for the cabinet when engaged in administrative adjudication, but those requirements are not additional to or more stringent than current filing and service requirements, and they are consistent with existing statutory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative

hearings authorized by KRS Chapter 350.

(3) Assessment of anticipated effect on state and local revenues: None expected.

(4) Assessment of alternative methods; reasons why alternatives were rejected: The procedures are outlined in existing statutes, and the cabinet does not have the power to alter those statutory requirements. In addition, by being consistent with current administrative practice, the Kentucky Rules of Civil Procedure and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350, the cabinet believes the public will be better served than by differing requirements.

(5) Identify any statute, rule, regulation or governmental policy which may be in conflict, overlapping, or duplication: None identified.

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments:

TIERING: Was tiering applied? No. Tiering was not applied because procedural requirements should be the same for all persons engaged in administrative adjudication.

FISCAL NOTE ON LOCAL GOVERNMENT

1. Does this administrative regulation relate to any aspect of a local government, including any service provided by that local government? Yes

2. State what unit, part of division of local government this administrative regulation will affect. This administrative regulation will affect any division of local government filing a petition for hearing under KRS Chapter 146 relating to wild rivers, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers and KRS Chapter 224 relating generally to environmental protection, and the administrative regulations promulgated pursuant thereto. This administrative regulation will also affect any division of local government named as a defendant in an administrative complaint filed under those chapters and the administrative regulations promulgated pursuant thereto. This administrative regulation also applies to administrative hearings relating to mining conducted under KRS Chapter 350 and the regulations promulgated pursuant thereto, but it is not expected to affect divisions of local government.

3. State the aspect or service of local government to which this administrative regulation relates. This administrative regulation relates to administrative hearings to which divisions of local government are parties.

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a local government for the first full year the regulation is to be in effect. If specific dollars estimate cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): None

Expenditures (+/-): None

Other Explanation: No effect on expenditures and revenues of divisions of local government that are parties to administrative hearings authorized under KRS Chapters 146, 151, 223 and 224 and the administrative regulations promulgated pursuant thereto is expected, since this administrative regulation is consistent with existing statutory requirements, current administrative practice, the Kentucky Rules of Civil Procedure, and 405 KAR 7:091 and 7:092 governing administrative hearings authorized by KRS Chapter 350.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. 30 USC 1253, 1255, 30 CFR Parts 730, 731, 732, 733, 735, 724, 917. The cabinet's Department for Environmental Protection administers under state statutes some programs that have federal counterparts administered by the U.S. Environmental Protection Agency (EPA). The federal statutes authorize EPA to approve state programs which are consistent with and no less stringent than the federal programs. However, none of the programs EPA has delegated to the cabinet require adjudicatory administrative hearings to have certain procedural requirements.

2. State compliance standards. This administrative regulation amends existing procedures for conducting adjudicatory administrative hearings authorized by KRS Chapter 146 relating to wild rivers, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers, KRS Chapter 224 relating generally to environmental protection, and KRS Chapter 350 relating to mining. The procedures affect petitions for hearing on orders or final determinations of the cabinet under those statutes, as well as administrative complaints filed by the cabinet under those statutes. This administrative regulation governs service of process, computation of time, and filing of documents.

3. Minimum or uniform standards contained in the federal mandate. The federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 USC 1201 et seq. establishes the basis whereby state and federal authorities regulate surface mining. Title 5 of SMCRA contains the provisions whereby persons aggrieved by an action of the regulatory authority may challenge that action through an adjudicative process. Kentucky's implementation of these federal provisions will be achieved in part under this regulation . The controlling standard is that the state enforcement program must be as effective as the federal surface mining program, 30 USC 1253, 1255. This federal mandate, however, does not prescribe specific procedural standards other than it requires that a process be in place by which persons having an interest that may be adversely affected may be heard at any significant part of the administrative and judicial process, as well as the proper administration of such cases. There is no federal mandate for procedural standards for administrative hearings under KRS Chapter 146, 151, 223, and 224.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Waste Management
(Proposed Amendment)

401 KAR 48:050. Siting requirements for solid waste landfills.

RELATES TO: KRS 224.01, 224.10, 224.40, 224.43, 224.99

STATUTORY AUTHORITY: KRS 224.10-100, 224.40-305

NECESSITY AND FUNCTION: KRS Chapter 224 requires the cabinet to promulgate administrative ~~[adopt rules and]~~ regulations for the management, processing or disposal of wastes. KRS 224.40-305 requires that persons engaging in the storage, treatment, recycling and disposal of waste obtain a permit. This chapter establishes the minimum technical standards for solid waste sites or facilities. This administrative regulation sets forth the siting requirements for construction/demolition debris, contained, and residual landfills.

Section 1. Buffer Zones. Wastes shall not be placed:

(1) Within 250 feet of an intermittent or perennial stream unless a 401 water quality certification has been issued pursuant to 401 KAR 5:029 through 401 KAR 5:031.

(2) Within the zone of collapse of deep-mine workings or within the critical angle of draw of such workings;

(3) Within 250 feet of a feature of karst terrain;

(4) Within 250 feet of the property line;
(5) Within 250 feet of a residence;
(6) Within fifty (50) feet of a gas, sewer or water line; and
(7) Within 250 feet of a unplugged well except monitoring wells.

Section 2. Seasonal High Groundwater Table. (1) The lowest component of the bottom liner of new units of a landfill shall be at least four (4) feet above the seasonal high groundwater table.

(2) Wastes that leach heavy metals in concentrations exceeding the primary drinking water standards when analyzed using the toxicity characteristic leaching procedure test shall be placed no closer than five (5) feet above the seasonal high groundwater level.

Section 3. Flood Plains. (1) No person shall be issued a permit to construct a new contained landfill in the 100-year flood plain.

(2) Waste disposed in residual or construction/demolition debris landfills shall not be placed within the 100 year flood plain of the waters of the Commonwealth unless the applicant complies with Section 2 of 401 KAR 47:030 of the Environmental Performance Standards concerning base flow restriction, temporary water storage capacity reduction, and waste washout. Where available, empirical data shall be used to determine the frequency of flood exposure. Where data are not available, the frequency of flood exposure shall be established by the unit hydrograph technique.

Section 4. Airport Location Criteria. (1) No new contained landfill shall be located within 10,000 feet of any airport runway used by turbojet aircraft or within 5,000 feet of any airport runway used by only piston-type aircraft and no landfill shall pose a bird hazard to aircraft.

(2) An owner or operator proposing to site a new contained landfill or proposing to horizontally expand within a five (5)-mile radius of any airport runway end used by turbojet or piston-type aircraft shall notify the affected airport and the Federal Aviation Administration.

Section 5. Fault Areas. Waste cells of a solid waste landfill shall not be located within 200 feet of a fault that has had displacement in holocene time.

Section 6. Site Suitability. Landfills shall not be permitted in any area unless the applicant can demonstrate to the satisfaction of the cabinet that:

(1) The uppermost aquifer is capable of being monitored in a manner that detects the presence of any constituent listed in Section 10 of 401 KAR 48:300; and

(2) Corrective action of the uppermost aquifer is capable of being performed in accordance with 401 KAR 48:300.

PHILLIP J. SHEPHERD, Secretary
E. DOUGLAS STEPHAN, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 14, 1994 at 8 a.m.

PUBLIC HEARING: A public hearing to receive comments on this proposed administrative regulation has been scheduled for Thursday, August 25, 1994, at 10 a.m. eastern time in the auditorium of the Capital Plaza Tower, Frankfort, Kentucky. Individuals interested in being heard at this hearing must notify James Hale in writing at the address noted below, by August 20, 1994 of their intent to attend the hearing. If no notification of intent to attend the hearing is received by that date, the hearing will be cancelled. This hearing is open to the public. Any person wishing to be heard will be given an opportunity to comment on the proposed administrative regulation. Persons testifying at the hearing are requested to provide a written copy of their testimony, if available. A transcript of the hearing will not be made unless a written request for a transcript is filed with Mr. Hale by August 20, 1994. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments must be received by Mr. Hale no later than 4:30 p.m. eastern time on August 25, 1994. The Department for Environmental Protection does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities. Requests for reasonable accommodation for this public hearing, such as an interpreter or alternate formats for printed materials, must be submitted to Mr. Hale at the address below by August 20, 1994.

CONTACT: James Hale, Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502)564-6716.

REGULATORY IMPACT ANALYSIS

Agency contact: James Hale

(1) Type and number of entities affected: This proposed amendment would require that the owner or operator of a new or horizontally expanded contained landfill notify affected airports and the Federal Aviation Administration if the landfill is or will be located within five miles of any airport runway end used by turbojet or piston-type aircraft. There are currently 24 permit applications pending for contained landfills. This notice is required to maintain consistency with the federal solid waste program. A similar notification provision exists in the federal regulations at 40 CFR 258.10. This amendment is being proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

(a) Direct and indirect costs or savings to those affected:

1. First year: This proposed amendment would require that a minor percentage of future landfills notify airports and the FAA. These notices typically would take the form of certified letters. Affected landfill owners would incur the cost of mailing these letters.

2. Continuing costs or savings: After the initial notification, no subsequent notification is required, and hence there is no additional cost or savings.

3. Additional factors increasing or decreasing costs (note any effects upon competition): There are no additional factors.

(b) Reporting and paperwork requirements: The notification requirements referenced above would constitute additional reporting or paperwork requirements.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: This proposed amendment would have no financial impact on the cabinet.

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: There are no additional factors.

(b) Reporting and paperwork requirements: This amendment would not impose reporting or paperwork requirements on the cabinet.

(3) Assessment of anticipated effect on state and local revenues: This amendment will not impact state or local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: This amendment is required pursuant to an EPA deficiency in Kentucky's solid waste program as cited at 58 FR 35454 et seq. (July 1, 1993). The amendment comports with federal provisions at 40 CFR 258.10.

(5) Identify any statute, administrative regulation or government policy which may conflict, overlap or duplicate: There are no statutes, administrative regulations, or policies that conflict with, overlap, or duplicate the provisions of this amendment.

(a) Necessity of proposed regulation if in conflict: There is no conflict.

(b) If in conflict, was an effort made to harmonize the proposed regulation with conflicting provisions: There is no conflict.

(6) Any additional information or comments: None

Tiering: Was tiering applied? Yes. This amendment imposes the notification requirement on contained landfills, which is consistent with

what is required under the federal regulations.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate: This proposed amendment is equivalent to 40 CFR 258.10. The Resource Conservation and Recovery Act mandates that authorized state programs be consistent with and no less stringent than the federal program. This amendment is proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

2. State compliance standards: This amendment complies with KRS 224.43-340 which requires the cabinet to promulgate administrative regulations for the reduction and management of solid waste.

3. Minimum or uniform standards contained in the federal mandate: This proposed amendment is consistent with the provisions of 40 CFR 258.10.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Waste Management
(Proposed Amendment)

401 KAR 48:090. Operating requirements for contained landfills.

RELATES TO: KRS 224.01, 224.10, 224.40, 224.43, 224.99
STATUTORY AUTHORITY: KRS 224.10-100, 224.40-305
NECESSITY AND FUNCTION: KRS Chapter 224 requires the cabinet to promulgate administrative ~~[adopt rules and]~~ regulations for the management, processing, or disposal of solid wastes. KRS 224.40-305 requires that persons engaging in the management, processing, and disposal of solid waste obtain a permit. This chapter establishes the minimum technical standards for solid waste sites or facilities. This administrative regulation sets forth the requirements for contained landfills.

Section 1. General. The owner or operator of a contained landfill shall operate the facility in accordance with the requirements of KRS Chapter 224 and the administrative regulations promulgated pursuant thereto, the conditions of the solid waste permit issued by the cabinet, and the approved application filed with the cabinet.

Section 2. Procedures for Excluding the Receipt of Hazardous Waste. (1) The owner or operator of a solid waste contained landfill shall implement a program at the facility for detecting and preventing the disposal of regulated hazardous wastes as defined in 401 KAR Chapter 31 and polychlorinated biphenyls (PCB) wastes as defined in 40 CFR Part 761. This program shall include, at a minimum:

(a) Random inspections of incoming loads;

(b) Inspection of suspicious loads;

(c) Records of any inspections;

(d) Training of facility personnel to recognize regulated hazardous waste; and

(e) Procedures for notifying the proper authorities if a regulated hazardous waste is discovered at the facility; and

(f) Employee safety, health, training and equipment to be used in inspection.

(2) The owner or operator shall implement the following additional inspection standards to meet the requirements of subsection (1) of this section:

(a) The owner or operator shall have a program, approved by the cabinet, to inspect all waste entering a contained landfill. The program to exclude hazardous wastes shall include:

1. Random inspections in time, but uniformly distributed to all waste sources based on volume; and

2. Identification data concerning the hauler on the operating inspection record including name of the driver, name of the hauler, address, source, volume, and waste characteristics. The owner or operator shall maintain a record of the inspections in accordance with the approved recordkeeping requirements.

(b) Upon discovery of hazardous waste, the owner or operator of a contained landfill shall isolate the load and notify the cabinet immediately.

Section 3. Cover Material and Disease Vector Control Requirements. (1) Daily cover.

(a) The owner or operator shall place a minimum of six (6) inches of cover over all exposed solid waste at the end of each working day or, for continuously operating landfills, once every twenty-four (24) hours. The purpose of this cover shall be to control disease, fires, blowing litter and disease vectors. The owner or operator shall only use soil or properly weathered or crushed shales, siltstones or other materials as approved by the cabinet. Soils and other weathered, earthened material that have been contaminated with petroleum may be used as daily cover if the maximum benzene concentration of the material is less than or equal to one (1.0) ppm and if the material is not placed as daily cover during a precipitation event nor when the ambient air temperature is below fifty (50) degrees Fahrenheit;

(b) The daily cover shall not have any protruding waste, except for the occasional litter embedded into the surface, which shall not exceed ten (10) percent of the cover area;

(c) Daily cover shall be compacted upon application and provide positive drainage. The owner or operator shall place daily cover to allow for proper drainage and shall immediately compact and grade the soil;

(d) The owner or operator may remove daily cover to facilitate the vertical passage of methane gas and leachate and shall recover the exposed areas within eight (8) hours of exposure; and

(e) The owner or operator shall dispose of any daily cover removed under subsection (1)(d) of this section as solid waste.

(2) Interim cover period. The owner or operator shall:

(a) Place an additional six (6) inches of interim cover over any area that shall not receive additional solid waste within thirty (30) calendar days of the last waste placement. With the daily cover applied in accordance with subsection (1) of the section, the additional interim cover shall increase the total cover depth to twelve (12) inches;

(b) On the day waste is to be placed over an area that is covered with daily and interim cover, an owner or operator may remove a maximum depth of six (6) inches of interim cover over the area of the cell for that day's operation;

(c) Place, compact and grade the interim cover to effect proper drainage; and

(d) Apply temporary erosion controls at the time of placing interim cover.

(3) Long term cover. The owner or operator:

(a) Shall apply an additional eighteen (18) inches of long-term cover over all areas that shall not receive additional waste within four (4) months by September 15 of each year. With the daily and interim cover, the total thickness of the cover in these areas shall be thirty (30) inches;

(b) May remove a maximum of eighteen (18) inches of the thirty (30) inches of cover in this subsection within the seven (7) calendar days prior to additional waste placement. The owner or operator may remove remaining soil leaving no less than six (6) inches of daily cover from the daily cell area on the day additional waste is to be placed;

(c) Shall place, compact and grade the long term cover to effect proper drainage; and

(d) Shall complete erosion controls and proper seeding of interim and long-term cover during the fall seeding season.

(4) Final cover. The owner shall initiate the application of final cover:

(a) Within thirty (30) days of filling a completed phase of the landfill to final design grade; and

(b) Annually such that the final cap is in place by September 15 in all areas of the landfill that have reached final grade by August 15 of each year.

(c) An alternate schedule may be approved by the cabinet when construction techniques shall preclude construction by the above referenced dates.

(5) Cover report. The owner or operator shall record, on a form approved by the cabinet, the daily cell locations, and dates of cover applications at the landfill including: daily usage area, daily, interim, long term and final cap installation dates and certification reports.

Section 4. Explosive Gases Control. (1) The owner or operator of a contained solid waste landfill shall ensure that:

(a) The concentration of methane gas generated by the facility does not exceed twenty-five (25) percent of the lower explosive limits (LEL) for methane in facility structures (excluding gas control or recovery system components); and

(b) The concentration of methane gas does not exceed the lower explosive limit for methane at the facility property boundary.

(2) The owner or operator of a contained landfill shall quarterly monitor for explosive gas at the following locations:

(a) Underneath or in the low area of each on-site building;

(b) At locations along the boundary as shown in the permit;

(c) At each gas passive vent installed under the final closure cap;

(d) At any potential gas problem areas, as revealed by dead vegetation or other indicators; and

(e) At any other points required by the permit.

(3) The owner or operator shall record the date, time, location, percent lower explosive limit and other pertinent information on the recordkeeping form approved by the cabinet.

(4) The owner or operator shall install, operate and maintain a gas detector with an alarm set at twenty-five (25) percent of the lower explosive limit in each on-site building.

(5) If methane gas levels exceeding the limits specified in subsection (1) of this section are detected, the owner or operator shall:

(a) Take all necessary steps to ensure immediate protection of human health;

(b) Immediately notify the cabinet of the methane gas levels detected and the immediate steps taken to protect human health; and

(c) Within fourteen (14) days, submit to the cabinet for approval a remediation plan for the methane gas releases. The plan shall describe the nature and extent of the problem and the proposed remedy. The plan shall be implemented upon approval by the cabinet.

Section 5. Air Criteria. (1) The owner or operators of contained landfills shall not permit or engage in open burning of waste. Any open burning shall be immediately extinguished. Wastes that are burning or smoldering shall not be deposited in the fill. Such materials shall be deposited in a hot load area designated in the permit. The cabinet may grant emergency permission to burn in accordance with 401 KAR 47:150. The owner or operator shall follow the plan approved for such purposes.

(2) The owner or operator shall properly control dust on haul roads and other areas to prevent a nuisance to surrounding areas.

Section 6. Access Requirements. (1) The owner or operator of a contained solid waste landfill shall control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes to protect human health and the environment. The owner or operator shall use artificial barriers, natural barriers, or both, as appropriate. Each access point shall be controlled by lockable entrance ways.

(2) The owner or operator shall construct and maintain:

(a) Lockable entrance ways at all access points;

(b) The major access road from a publicly maintained highway to the landfill;

(c) The perimeter road; and

(d) An all-weather road to within 200 feet of the working face.

(3) The owner or operator of a contained landfill shall remove debris, mud, and waste from vehicles before leaving the site. The owner or operator shall be responsible for removing landfill debris, mud, and waste from off-site roadways.

Section 7. Water Controls. The owner or operator of a contained solid waste landfill shall:

(1) Maintain the site as necessary to prevent erosion or washing of the fill, and grade as necessary to drain rainwater from the fill area and to prevent standing water.

(2) Maintain all run-on and run-off control systems as necessary to maintain original design capacity as required by Section 2 of 401 KAR 48:070. This includes, but shall not be limited to:

(a) Removal of sediment from run-off control structures. The site design shall specify the method to be used to determine when clean-out shall occur;

(b) Removal of debris, wastes and soil from diversion and run-off ditches to maintain the design capacity;

(c) Construction and maintenance of temporary diversion ditches around the current working face. The owner or operator shall specify the location of the temporary ditches in the operational plan required by 401 KAR 47:190 and the ditches shall be approved by a professional engineer registered in the Commonwealth of Kentucky.

Section 8. Waste Restrictions. (1) The owner or operator of a contained landfill shall only dispose of wastes that:

(a) Are not hazardous wastes regulated pursuant to 401 KAR Chapters 30 through 40, except for limited quantity hazardous wastes and exempt spill residues;

(b) Do not contain free liquids as determined by the cabinet; and

(c) Are specified in the approved permit application.

(2) The owner or operator shall comply with the recordkeeping and reporting requirement of Section 11 of this administrative regulation pertaining to the location of disposed limited quantity hazardous waste and exempt spill residues.

Section 9. Working Face Requirements. (1) Within two (2) hours of receipt, the owner or operator shall spread wastes in loose layers not exceeding twenty-four (24) inches in depth and compact it to the maximum practicable density. The owner or operator shall use the equipment specified in the permit for compaction. The operator shall pass the equipment over 100 percent of the waste surface at least four (4) times. Each loose layer shall be fully compacted before any additional waste is placed.

(2) The owner or operator shall not exceed the lift height specified in the permit.

(3) The owner or operator shall not place an initial lift containing any object that may damage the bottom liner. The owner or operator shall protect the liner system with a layer of dirt, waste or similar blanket placed between operating equipment and the liner.

(4) The daily working face shall be restricted to the smallest area practical for working face operation.

(5) The completed cell shall consist of the solid waste compacted during one (1) working day.

(6) The owner or operator shall prohibit scavenging within 100 feet of the working face. All salvage and recycling shall occur at areas so designated in the permit.

(7) The owner or operator shall only allow access to the landfill

when operating personnel are on the site.

(8) The owner or operator shall not accept solid waste at a rate that exceeds the rated capability of the operational compaction and cover equipment available on site.

(9) The owner or operator shall not accept solid waste without landfill personnel present to supervise the unloading.

(10) The grounds in and about a landfill shall not be allowed to become a nuisance. When necessary, interior fences may be required to prevent litter from blowing from the landfill. The permitted area shall be policed on a routine basis to collect all scattered material.

(11) All litter attributable to the site's operation shall be picked up within forty-eight (48) hours.

(12) Unless excluded from the site, large bulky items and other nonresidential wastes shall be deposited in a manner approved by the cabinet.

(13) The owner or operator shall conform to the posted operating hours for receiving waste and shall notify the cabinet of the operating hours before changing them. The entrance sign shall meet the requirements of Section 14(2) of this regulation.

Section 10. Employee Facilities. The owner or operator of a contained landfill shall provide buildings meeting Section 9 of 401 KAR 48:070, for site personnel. The buildings shall be maintained in a safe and sanitary manner. One (1) building shall have a safe drinking water supply.

Section 11. Reports and Recordkeeping. Records and reports shall be maintained and submitted in accordance with Section 8 of 401 KAR 47:190.

Section 12. Groundwater Monitoring. The owner or operator of a contained solid waste landfill shall implement the groundwater monitoring program in the approved application.

Section 13. Closure and Closure Care Requirements. (1) The owner or operator shall comply with the following closure requirements:

(a) The owner/operator of a contained landfill shall prepare a written closure plan that describes the closure activities for each unit including the following:

1. The methods to be employed to maintain the integrity and effectiveness of any final cap, including making repairs to the cap as necessary to correct the effects of settling, subsidence, erosion, or other events, and preventing run-on and run-off from eroding or otherwise damaging the final cap. The layer addressed in Section 8(4) of 401 KAR 48:080 shall have a maximum permeability less than or equal to the permeability of any bottom liner system or natural subsoils present;

2. Maintenance and operation of the leachate collection system in accordance with the requirements, if applicable, until leachate no longer is generated;

3. Groundwater monitoring in accordance with the requirements of 401 KAR 48:300 and maintaining the groundwater monitoring system; and

4. Maintenance and operation of the explosive gas monitoring system in accordance with the requirements of Section 4 of this administrative regulation.

(b) The closure period shall be at least two (2) years following the cabinet's acceptance of the owners certification of closure.

(2) The owner or operator of a contained landfill shall prepare and implement a written closure care plan that describes monitoring and routine maintenance activities that shall be carried out during the closure care period of at least thirty (30) years. The closure care plan shall include, at a minimum, the following information:

(a) A description of the monitoring and maintenance activities for each unit and the frequency at which these activities shall be performed;

(b) Name, address and telephone number of the person or office to contact about the facility during the closure care period; and

(c) A description of the planned uses of the property during the closure care period. Closure care use of the property shall not be allowed to disturb the integrity of the final cap, liner(s), or any other components of the containment system, or the function of the monitoring systems, unless upon demonstration by the owner or operator, the cabinet determines that the activities shall not increase the potential threat to human health or the environment or the disturbance is necessary to reduce a threat to human health or the environment. The owner or operator shall obtain approval from the cabinet in order to remove any wastes or waste residues, the liner, or contaminated soils from the land.

(3) The closure care plan shall be submitted with the permit application and shall be approved by the cabinet. Any subsequent modification to the closure care plan also shall be proved by the cabinet. A copy of the most recently approved closure care plan shall be kept at the facility until completion of the closure care period has been certified in accordance with subsection (5) of this section.

(4) The owner or operator shall record a notice in the deed that shall in perpetuity notify any potential purchaser of the property of the location and time of operation of the facility, the nature of the waste placed in the site and a caution against future disturbance of the area. Such notice shall be recorded in accordance with KRS Chapter 382 and proof of recording shall be submitted to the cabinet prior to the cabinet's acceptance of certification of closure.

(5) Following completion of all closure and closure care periods for each unit, the owner or operator of a contained landfill shall submit to the cabinet certification by a professional engineer, verifying that all phases of closure and closure care have been completed in accordance with the approved plans and the requirements of KRS Chapter 224.

Section 14. Signs. (1) Warning signs shall be visible at all landfill access points. The warning signs shall be readable at a distance of 100 feet. The signs shall give warnings of all site hazards, including but not limited to: explosive gases, heavy equipment movement and heavy truck movements.

(2) Entrance signs shall be visible, located at the public entrances and all entrances used by waste hauling vehicles. The signs shall be readable from 100 feet. They shall indicate landfill name, name of the owner, name of the operator, the hours of receiving wastes, the permit number and an emergency telephone number.

Section 15. Alternative Specifications. Alternative specifications may be used only after approval by the cabinet upon a demonstration by a qualified registered professional engineer that they shall result in performance, with regard to safety, stability and environmental protection, equal to or better than that resulting from designs complying with the specifications of this administrative regulation.

PHILLIP J. SHEPHERD, Secretary
E. DOUGLAS STEPHAN, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 14, 1994 at 8 a.m.

PUBLIC HEARING: A public hearing to receive comments on this proposed administrative regulation has been scheduled for Thursday, August 25, 1994, at 10 a.m. eastern time in the auditorium of the Capital Plaza Tower, Frankfort, Kentucky. Individuals interested in being heard at this hearing must notify James Hale in writing at the address noted below, by August 20, 1994 of their intent to attend the hearing. If no notification of intent to attend the hearing is received by that date, the hearing will be cancelled. This hearing is open to the public. Any person wishing to be heard will be given an opportunity to comment on the proposed administrative regulation. Persons testifying at the hearing are requested to provide a written copy of their testimony, if available. A transcript of the hearing will not be

made unless a written request for a transcript is filed with Mr. Hale by August 20, 1994. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments must be received by Mr. Hale no later than 4:30 p.m. eastern time on August 25, 1994. The Department for Environmental Protection does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities. Requests for reasonable accommodation for this public hearing, such as an interpreter or alternate formats for printed materials, must be submitted to Mr. Hale at the address below by August 20, 1994.

CONTACT: James Hale, Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502)564-6716.

REGULATORY IMPACT ANALYSIS

Agency contact: James Hale

(1) Type and number of entities affected: This proposed amendment would allow petroleum contaminated soils to be used for daily cover at landfills under certain conditions. Also, the proposed amendment would require the final cap to have a maximum permeability less than or equal to the permeability of the bottom liner. There are currently 24 permit applications pending for contained landfills. This notice is required to maintain consistency with the federal solid waste program. A similar provision exists in the federal regulations at 40 CFR 258.60. This amendment is being proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

(a) Direct and indirect costs or savings to those affected:

1. First year: This proposed amendment would allow petroleum contaminated soils to be used for daily cover at landfills which would result in savings to landfill owners and to petroleum storage tanks owners. This proposed amendment would require a synthetic cap in landfills that contain synthetic liners which would result in increased costs to the landfill owner.

2. Continuing costs or savings: Even though there could be an increase in the cost of the final cap, the savings in using petroleum contaminated soils for daily cover will continue.

3. Additional factors increasing or decreasing costs (note any effects upon competition): There are no additional factors.

(b) Reporting and paperwork requirements:

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: This proposed amendment would have no financial impact on the cabinet.

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: There are no additional factors.

(b) Reporting and paperwork requirements: This amendment would not impose reporting or paperwork requirements on the cabinet.

(3) Assessment of anticipated effect on state and local revenues: This amendment will not impact state or local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: This amendment is required pursuant to an EPA deficiency in Kentucky's solid waste program as cited at 58 FR 35454 et seq. (July 1, 1993). The amendment comports with federal provisions at 40 CFR 258.60.

(5) Identify any statute, administrative regulation or government policy which may conflict, overlap or duplicate: There are no statutes, administrative regulations, or policies that conflict with, overlap, or duplicate the provisions of this amendment.

(a) Necessity of proposed regulation if in conflict: There is no conflict.

(b) If in conflict, was an effort made to harmonize the proposed regulation with conflicting provisions: There is no conflict.

(6) Any additional information or comments: None

Tiering: Was tiering applied? Yes. This amendment imposes requirements on contained landfills only, which is consistent with requirements of state and federal regulations.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate: This proposed amendment is equivalent to 40 CFR 258.60. The Resource Conservation and Recovery Act mandates that authorized state programs must be consistent with and no less stringent than the federal program.

2. State compliance standards: This amendment complies with KRS 224.43-340 which requires the cabinet to promulgate administrative regulations for the reduction and management of solid waste.

3. Minimum or uniform standards contained in the federal mandate: This proposed amendment is equivalent to the closure requirements in 40 CFR 258.60 effective October 9, 1991.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? The provisions for allowing the use of petroleum contaminated soils for daily cover are not included in Subtitle D.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: The ability to use petroleum contaminated soils for daily cover are different than Subtitle D but not stricter. The cost savings to petroleum storage tank owners as well as landfill owners should be sufficient justification.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Waste Management
(Proposed Amendment)

401 KAR 48:300. Surface and groundwater monitoring and corrective action.

RELATES TO: KRS 224.01, 224.10, 224.40, 224.43, 224.70, 40 CFR Parts 257, 258, 302.4 Appendix A

STATUTORY AUTHORITY: KRS 224.10-100, 224.40-305, 224.43-340

NECESSITY AND FUNCTION: KRS Chapter 224 requires the cabinet to promulgate administrative [~~adopt rules and~~] regulations for the treatment, management, processing or disposal of wastes. KRS 224.40-305 requires that persons engaging in the management, processing or disposal of waste obtain a permit. This chapter establishes the minimum technical standards for solid waste sites or facilities. This administrative regulation sets forth the standards for groundwater monitoring and corrective action.

Section 1. Applicability. The requirements of this administrative regulation apply to owners and operators of contained, construction/demolition, and residual landfills, Class II and Class III landfarming facilities, other solid waste sites or facilities at which the cabinet determines groundwater monitoring shall be required and solid waste sites or facilities required to accomplish corrective action as a result of documented groundwater contamination. Sections 1 through 7 of this administrative regulation do not apply to landfarming facilities permitted pursuant to 401 KAR 48:200. Landfarming facilities required to accomplish corrective action shall comply with Section 8 of this administrative regulation. The owner or operator shall satisfy the requirements of this administrative regulation for all wastes (or constituents thereof) contained in waste management units at the facility regardless of the time at which waste was placed in such unit.

Section 2. Surface Water Monitoring Plan. A surface water monitoring plan as required in Section 5 of 401 KAR 47:190 shall include:

(1) Documentation that the applicant currently holds or has applied for a KPDES permit for all structures that shall be used to control storm water run-off and all point source discharges.

(2) The location of surface water monitoring points identified on the engineering plans. The surface water monitoring points shall be located such that the sampling shall characterize the quality of water unaffected by the landfills and shall be located such that the sampling shall determine if water leaving the landfill in surface drainage is contaminated with leachate. Sampling protocol shall measure surface water under base flow conditions that continues to drain after storm-induced surface run-off has ceased.

(3) A schedule and list of analytical parameters for the quarterly surface water sampling program. The parameters to be analyzed for the water samples shall include at a minimum: chlorides, sulfate, iron, sodium, total organic carbon or biochemical oxygen demand, chemical oxygen demand, specific conductance, total suspended solids, total dissolved solids, total solids and pH.

(4) A form to record the results of the surface water sample analyses.

(5) Prior to the disturbance of any areas proposed for development in a landfill permit application, the owner shall analyze samples of the surface water points and submit the results to the cabinet. The sampling shall include a minimum of two (2) samples collected at no less than thirty (30) day intervals and shall be sufficient to characterize the existing surface water quality.

Section 3. Groundwater Quality Characterization. A groundwater characterization as required in 401 KAR 47:180 shall contain the chemical characteristics of the upper most aquifer down to and including the lowest aquifer that may be affected by the site or facility. This description shall include results of analysis of at least two (2) samples of groundwater from the site before waste placement for the parameters listed in Section 10 of this administrative regulation. The number of samples collected for the groundwater quality characterization shall be consistent with the statistical method for groundwater analysis to be performed in Section 9 of this administrative regulation.

(1) For facilities permitted before the effective date of this administrative regulation, the data required by this section shall be taken beginning with the first anniversary date of the issuance of the permit after the effective date of this administrative regulation and shall be for the parameters listed in Section 11 of this administrative regulation.

(2) Monitoring wells under this section shall be designed, constructed and maintained according to Section 6 of this administrative regulation. Sampling and analysis shall be conducted in accordance with a plan approved by the cabinet in accordance with the requirements of Section 7 of this administrative regulation.

Section 4. Groundwater Monitoring Plan. A groundwater monitoring plan as required in 401 KAR 47:190 or 401 KAR 48:200 shall include:

(1) The number, location and depth of proposed monitoring points;

(2) Preoperational data showing existing groundwater quality, as required in the groundwater quality characterization in Section 3 of this administrative regulation;

(3) A groundwater sampling and analysis plan. The procedures, methods and techniques shall be approved by the cabinet. The plan shall include:

(a) Procedures and techniques designed to accurately measure groundwater quality upgradient, and downgradient of the proposed waste disposal area;

(b) Cabinet approved sampling methods including procedures and techniques for sample collection, sample preservation and sample shipment;

(c) Cabinet approved analytical procedures; and

(d) Chain of custody control, field and laboratory quality assurance and quality control. The procedures and methods shall be approved by the cabinet.

(4) For solid waste sites or facilities located in karst regions the following additional hydrogeologic information shall be required:

(a) The nature and extent of karst drainage beneath the solid waste site or facility; and

(b) A description of a proposed groundwater monitoring system capable of completely and accurately monitoring groundwater contamination.

Section 5. Design Requirements for Groundwater Monitoring Systems. The groundwater quality monitoring system to be utilized in the groundwater monitoring plan shall accurately analyze groundwater quality and characterize local groundwater flow and flow systems. The system shall consist, at a minimum, of the following:

(1) At least one (1) reference or background well at a point hydraulically upgradient from the disposal area in the direction of increasing static head that is capable of providing data representative of groundwater not affected by the solid waste site or facility. When the solid waste site or facility occupies the most upgradient position in the flow system, sufficient downgradient or side gradient monitoring wells shall be placed to accurately characterize the groundwater quality and regional and local groundwater flow and flow systems. Reference wells shall be located so that they shall not be affected by groundwater contamination from the disposal area; and

(2) At least three (3) monitoring wells at points hydraulically connected in the direction of decreasing static head from the area in which solid waste has been or shall be disposed. In addition to three (3) downgradient wells, the cabinet may allow one (1) or more springs for monitoring points if the springs are hydraulically downgradient from the area in which solid waste has been or shall be disposed, if the springs are sampled in a manner approved by the cabinet, and if the springs otherwise meet the requirements of the cabinet. Downgradient monitoring wells shall be located so that they shall provide early detection of groundwater contamination and progressive monitoring of the phases and units of the site or facility.

Section 6. Requirements for Monitoring Well Construction. (1) Precautions shall be taken during drilling and construction of monitoring wells to avoid introducing contaminants into a borehole. Only potable water shall be used in drilling monitoring wells unless otherwise approved by the cabinet. Drilling muds shall not be used except with prior approval of the cabinet. Air systems and drilling lubricants shall not introduce contaminants into the boreholes.

(2) Decontamination of all equipment to be placed into the boring shall be performed before use at the site and between boreholes. Where possible, upgradient wells shall be drilled first.

(3) Monitoring wells shall be cased as follows:

(a) To maintain the integrity of the monitoring well borehole by isolating water bearing units which are sampled by each well;

(b) With a minimum casing diameter of four (4) inches unless otherwise approved by the cabinet in writing;

(c) With screens and appropriate gravel or sand packing where necessary, to enable collection of samples at depts where appropriate aquifer flow zones exist;

(d) To allow the casing to protrude at least one (1) foot above ground;

(e) To provide a drill hole diameter that is a minimum of four (4) inches larger than the outside diameter of the well casing;

(f) To produce an annular space above the sampling depth that is sealed to prevent contamination of samples and the groundwater; and

(g) If plastic casing is used, it shall be threaded and gasket sealed to preclude potential sample contamination from solvent

welded joints, unless otherwise provided by the cabinet in the permit.

(4) Monitoring well casings shall be enclosed in a protective cover that shall:

(a) Be sufficient to reliably protect the well from damage. This shall include a protective barrier around the well;

(b) Be installed into firm rock unless otherwise approved by the cabinet in writing;

(c) Be grouted and placed with a cement collar below the frost line to hold it firmly in position unless otherwise approved by the cabinet;

(d) Be numbered and painted in a highly visible color;

(e) Protrude at least one (1) inch higher above grade than the monitoring well casing;

(f) Have a locked cap; and

(g) Be made of steel or any other material of equivalent strength.

(5) Each monitoring well shall have a concrete pad extending two (2) feet around the well and sloped away from the well.

Section 7. Sampling and Analysis. (1) Parameters Listing. Owners or operators of solid waste sites or facilities that require groundwater monitoring shall conduct sampling and analysis from each monitoring well for the parameters listed in Section 11 of this administrative regulation.

(2) Reporting of analysis results. Analyses of data required by this section shall be submitted to the cabinet on a form provided by the cabinet within sixty (60) days of sampling or fifteen (15) days after receipt of analyses, whichever is sooner, unless the cabinet approves another time period in the permit. Frequency of sampling shall be as indicated in Section 11 of this administrative regulation.

(3) If analysis of the sample results indicates contamination, the owner or operator shall notify the cabinet within forty-eight (48) hours of receiving the analysis results and shall arrange for the cabinet to split a sample no later than ten (10) days from the receipt of the results.

Section 8. Groundwater Contamination Assessment and Corrective Action. (1) The operator of a solid waste site or facility shall be required to prepare and submit a groundwater assessment plan if laboratory analyses of one (1) or more monitoring wells at the site or facility shows the presence of one (1) or more parameters listed in 40 CFR 302.4, Appendix A as of October 1988, above the maximum containment level (MCL) as specified in 401 KAR 47:030 or significant increase over naturally occurring background levels for parameters that have no MCL. For parameters that have no maximum contaminant levels a significant increase over background shall be determined using a statistical test as specified in Section 9 of this administrative regulation.

(2) Confirmation sampling. The owner or operator of a solid waste site or facility shall not be required to submit an assessment plan if the following conditions are met:

(a) Within ten (10) days after receipt of sample results showing groundwater contamination the owner or operator resamples the affected wells; and

(b) Analysis from resampling shows to the cabinet's satisfaction that groundwater contamination has not occurred.

(3) The owner or operator of a solid waste site or facility shall be required to provide alternate water supplies to affected parties within twenty-four (24) hours of notification of the cabinet that sample results indicate contamination of a drinking water supply if it has been determined that the landfill is the probable source of contamination.

(4) The assessment plan shall be submitted to the cabinet within thirty (30) days of the occurrence of the conditions described in subsection (1) of this section.

(a) The assessment plan shall specify the manner in which the owner or operator shall determine the existence, quality, quantity, areal extent and depth of groundwater degradation, and the rate and direction of migration of contaminants in the groundwater. The assessment plan shall be prepared by a qualified professional and shall be implemented upon approval by the cabinet in accordance with the approved implementation schedule. The assessment plan shall be implemented within sixty (60) days after approval by the cabinet. The plan shall contain, at a minimum all of the following information:

1. The number, location, size, casing type and depth of wells, lysimeters, borings, pits, piezometers and other assessment structures or devices to be used;

2. Sampling and analytical methods for the parameters to be evaluated;

3. Analyses of all parameters listed in Section 10(3) of this administrative regulation and any other parameter determined by the cabinet; and

4. Evaluation procedures, including the use of previously gathered groundwater quality information, to determine the concentration, rate and extent of groundwater degradation or pollution from the facility.

(5) For public or private water supplies which may be adversely affected by the facility, the owner or operator shall submit a detailed hydrogeologic study addressing the potential effect of the site or facility on said water supply.

(6) If the cabinet determines that the assessment plan is inadequate, it may modify the plan and approve the plan as modified.

(7) Within ninety (90) days after the implementation of the groundwater assessment plan, the operator shall submit a groundwater assessment report containing the new data collected, analysis of the data and recommendations on the necessity for abatement.

(8) The cabinet may require abatement measures prior to approval of the groundwater assessment plan in the event that a determination has been made that there is an immediate threat to human health or the environment.

(9) Within ninety (90) days of the cabinet approval of the groundwater assessment report, but in no event later than one (1) year from the event specified in subsection (1) of this section, the owner or operator shall submit a remedial action plan to include the following:

(a) The specific methods or techniques to be used to abate groundwater contamination from the facility;

(b) The specific methods or techniques to be used to prevent further groundwater contamination from the facility; and

(c) A description of the means used to restore or replace public or private water supplies affected by contamination from the solid waste facility.

(10) Within fifteen (15) days of approval of the groundwater assessment report, the cabinet shall prepare and the owner or operator shall publish a public notice in accordance with 401 KAR 47:140, Section 7(1)(a) through (f), (3), and (4). The public notice shall contain a brief statement summarizing the contents of the groundwater assessment report, shall provide for a thirty (30) day public comment period, and shall set forth a proposed public hearing date. If no request for a public hearing is received during the thirty (30) day comment period, the public hearing may be cancelled.

(11) The owner or operator shall, within 120 days of approval of the groundwater corrective action plan under subsection (9) of this section, post the financial assurance required under 401 KAR 48:310.

(12) [~~(10)~~] The owner or operator of a solid waste site or facility shall take any other steps deemed necessary by the cabinet to ensure protection of human health and the environment.

(13) [~~(11)~~] Corrective action measures under this administrative regulation shall be initiated and completed within a period of time as specified by the cabinet considering the extent of contamination.

(14) [~~(12)~~] Corrective action measures under this administrative regulation may be terminated upon approval of the cabinet when the owner or operator demonstrates that concentrations have been reduced to levels below the maximum contaminant level or naturally occurring background.

Section 9. Statistical Methods for Groundwater Analysis. (1) The owner or operator shall specify in the permit application one (1) of the following statistical methods to be used in evaluating groundwater monitoring data for each parameter in Section 11 of this administrative regulation. The statistical test chosen shall be conducted separately for each parameter in Section 11 of this administrative regulation in each well for each monitoring event, and the results shall be maintained as part of the facility record throughout the operating and postclosure life of the facility.

(a) A parametric analysis of variance (ANOVA) followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The method shall include estimation and testing of the contrasts between each compliance well's mean and the background mean levels for each constituent.

(b) An anlysis of variance (ANOVA) based on ranks followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The method shall include estimation and testing of the contrasts between each compliance well's median and the background median levels for each constituent.

(c) A tolerance or prediction interval procedure in which an interval for each constituent is established from the distribution of the background data, and the level of each constituent in each compliance well is compared to the upper tolerance or prediction limit.

(d) A control chart approach that gives control limits for each constituent.

(e) Another statistical method approved by the cabinet based on justification included in the permit application that the method meets the requirements of subsection (2) of this section.

(2) Any statistical method chosen under subsection (1) of this section shall comply with the following performance standards, as appropriate:

(a) The statistical method used to evaluate groundwater monitoring data shall be appropriate for the distribution of chemical parameters or hazardous constituents. If the distribution of the chemical parameters or hazardous constituents is shown by the owner or operator to be inappropriate for a normal theory test, then the data shall be transformed or a distribution-free theory test shall be used. If the distributions for the constituents differ, more than one (1) statistical method may be needed.

(b) If an individual well comparison procedure is used to compare an individual compliance well constituent concentration with background constituent concentrations or a groundwater protection standard, the test shall be done at a Type I error level of no less than 0.01 for each testing period. If a multiple comparisons procedure is used, the Type I experiment-wise error rate for each testing period shall be no less than 0.05; however, the Type I error of no less than 0.01 for individual well comparisons shall be maintained. This performance standard shall not apply to tolerance intervals, prediction intervals, or control charts.

(c) If a control chart approach is used to evaluate groundwater monitoring data, the specific type of control chart and its associated parameter values shall be protective of human health and the environment. The parameters shall be determined after considering the number of samples in the background database, the data distribution, and the range of the concentration values for each constituent of concern.

(d) If a tolerance interval or a predictional interval is used to evaluate groundwater monitoring data, the levels of confidence and, for tolerance intervals, the percentage of the population that the interval must contain, shall be protective of human health and the environment. These parameters shall be determined after considering the number of samples in the background database, the data distribution, and the range of the concentration values for each constituent of concern.

(e) The statistical method shall acocunt for data below the limit of detection with one (1) or more statistical procedures that are protective of human health and the environment. Any practical quantitation limit that is used in the statistical method shall be the lowest concentration level that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions that are available to the facility.

(f) If necessary, the statistical method shall include procedures to control or correct for seasonal and spatial variability as well as temporal correlation in the data.

(3) The owner or operator shall determine whether or not there is a statistically significant increase over background values for each parameter or constituent required in the particular groundwater monitoring program that applies to the solid waste site or facility.

(a) In determining whether a statistically significant increase has occurred, the owner or operator shall compare the groundwater quality of each parameter or constituent at each monitoring well to the background value of that constituent, according to the statistical procedures and performance standards specified under subsections (1) and (2) of this section.

(b) Within thirty (30) days after completing sampling and analysis, the owner or operator shall determine whether there has been a statistically significant increase over background at each monitoring well.

[~~(1) The owner or operator of a solid waste site or facility shall use statistical procedures approved by the cabinet in determining whether background values have been significantly exceeded.~~

~~(2) The owner or operator shall demonstrate that the procedure is appropriate for conditions at that facility and shall demonstrate that the procedure:~~

~~(a) Is protective of human health and the environment;~~

~~(b) Includes statistical distributions of each parameter or constituent listed;~~

~~(c) Has a low probability of indicating contamination when it is not present and of failing to detect contamination that is actually there;~~

~~(d) Is appropriate for the hydrogeologic setting and the physical layout of the monitoring system;~~

~~(e) Describes how observations below the quantifiable limit shall be handled; and~~

~~(f) Considers or controls for seasonal and spatial variability and temporal correlation.~~]

Section 10. Groundwater Quality Characterization Parameters. For solid waste sites or facilities that require groundwater monitoring, the following parameters are to be analyzed for groundwater quality characterization as required in Section 2 of this administrative regulation:

(1) For all Class II and III landfarming facilities required to monitor groundwater, the characterization shall be based on the following parameters:

(a) Specific conductance, chemical oxygen demand, total organic carbon, chloride, iron, manganese, sodium, total nitrogen, nitrate nitrogen, chromium, cadmium, coliform bacteria, pH, calcium, magnesium, potassium, sulfate, bicarbonate, carbonate.

(b) Groundwater elevation in monitoring wells recorded as a distance from the elevation at the wellhead referenced to mean sea level based on a United States Geological Survey (USGS) datum.

(2) For residual and construction/demolition debris landfills, the characterization shall be based on the following parameters:

(a) Chloride, chemical oxygen demand, total dissolved solids, specific conductance, pH, iron, sodium, arsenic, barium, cadmium, lead, mercury, nitrate, selenium, silver, pH, calcium, magnesium, potassium, sulfate, bicarbonate, carbonate.

(b) Groundwater elevations recorded as a distance from the elevation at the wellhead referenced to mean sea level based on a United States Geological Survey (USGS) datum.

(3) For contained landfills, the characterization shall be based on the following parameters:

(a) Indicators: Specific conductance, chemical oxygen demand, total dissolved solids, total organic carbon, pH, chloride, iron,

manganese, sodium, bicarbonate, calcium, sulfate, magnesium, potassium, carbonate.

(b) Hazardous Constituents.

Systematic Name	CAS RN	Common Name
Acenaphthylene	208-96-8 [~~206-96-8~~]	Acenaphthylene [~~Acenaphthalene~~]
Acenaphthylene, 1,2-dihydro-	83-32-9	Acenaphthene
Acetamide, N-(4-ethoxyphenyl)-H	62-44-2	Phenacetin
Acetamide, N-9H-fluoren-2-yl	53-96-3	2-Acetylamino-fluorene; 2-AAF
Acetic acid ethenyl ester	108-05-4 [~~106-05-4~~]	Vinyl acetate
Acetic acid (2,4-5-trichlorophenoxy)	93-76-5	2,4,5-T; 2,4,5-Trichlorophenoxyacetic acid
Acetic acid (2,4-dichlorophenoxy)-	94-75-7	2,4-Dichlorophenoxy-acetic acid
Acetonitrile	75-05-8	Acetonitrile; Methyl cyanide
Aluminum	7429-90-5	Aluminum (total)
Anthracene	120-12-7	Anthracene
Antimony	7440-36-0	Antimony (total)
Aroclor 1016	12674-11-2	Aroclor 1016
Aroclor 1221	11104-28-2	Aroclor 1221
Aroclor 1232	11141-16-5	Aroclor 1232
Aroclor 1242	53469-21-9	Aroclor 1242
Aroclor 1248	12672-29-6	Aroclor 1248
Aroclor 1254	11097-69-1	Aroclor 1254
Aroclor 1260	11096-82-5	Aroclor 1260
Arsenic	7440-38-2	Arsenic (total)
Barium	7440-39-3	Barium (total)
Benz(a)anthracene,7,12,-dimethyl	57-97-6	7,12-Dimethyl-benz(a)-anthracene
Benz(j)aceanthrylene, 1,2-dihydro-3-methyl	56-49-5	3-Methylcholanthrene
Benz(e)acephenanthrylene	205-99-2	Benzo(b)fluoranthene
Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-	23950-58-5	Pronamide
Benz(a)anthracene	56-55-3	Benzo(a)anthracene; Benzanthracene
[~~Benzenamine~~	~~62-53-3~~	~~Aniline~~]
Benzenamine, 2 methyl-	95-53-4	o-Toluidine
Benzenamine, 2-methyl-5-nitro	99-55-8	5-Nitro-o-toluidine
Benzenamine, 2-nitro	88-74-4	2-Nitroaniline; o-Nitroaniline
Benzenamine, 3-nitro	99-09-2	3-Nitroaniline; m-Nitroaniline
Benzenamine, 4-chloro	106-47-8	p-Chloroaniline
Benzenamine, 4-nitro-	100-01-6	4-Nitroaniline; p-nitroaniline
[~~Benzenamine,4,4' methylenebis (2-chloro~~	~~101-14-4~~	~~4,4' Methylene-bis (2-chloro-aniline)~~]
Benzenamine, N-nitroso-N-phenyl	86-30-6	N-Nitrosodiphenylmamine
Benzenamine, N-phenyl-	122-39-4	Diphenylamine
Benzenamine, N,N-dimethyl-4-(phenylazo)-	60-11-7	p-Dimethylamino-azobenzene
Benzene	71-43-2	Benzene
Benzene, 1-bromo-4-phenoxy-	101-55-3	4-Bromophenyl phenyl ether
Benzene, 1-chloro-4-phenoxy-	7005-72-3	4-Chlorophenyl phenyl ether
Benzene, 1-methyl-2, 4-dinitro	121-14-2	2,4-Dinitroto-luene
Benzene, 1,1'-(2,2,2-trichloroethylidene)bis(4-chloro-	50-29-3	DDT; 4,4'-DDT
Benzene, 1,1'-(2,2,2-trichloroethylidene)bis(4-methoxy-	72-43-5	Methoxychlor
Benzene 1,1'-(2,2-dichloroethylidene)bis(4-chloro-	72-54-8	DDD; 4,4'-DDD
Benzene 1,1'-(2,2-dichloroethenylidene)bis(4-chloro-	72-55-9	DDE; 4-4'-DDE
Benzene 1,2-dichloro	95-50-1	o-Dichloroben-zene
Benzene 1,2,4-trichloro	120-82-1	1,2,4-trichloro-benzene
Benzene 1,2,4,5-tetrachloro	95-94-3	1,2,4,5-Tetra-chlorobenzene
Benzene 1,3-dichloro-	541-73-1	M-Dichloroben-zene
Benzene, 1, 3-dintro	99-65-0	m-Dinitrobenzene
Benzene, 1,3,5-trinitro-	99-35-4	sym-Trinitrobenze
Benzene 1,4-dichloro-	106-46-7	p-Dichloroben-zene
[~~Benzene 1,4 dinitro~~	~~100-25-4~~	~~meta-Dinitroben-zene~~]
Benzene, 2-methyl-1,3-dinitro	606-20-2	2,6-Dinitroto-luene
Benzene, chloro-	108-90-7	Chlorobenzene
Benzene, dimethyl-	*[~~1330-20-7~~]	Xylene (total)
Benzene, ethenyl-	100-42-5	Styrene
Benzene, ethyl-	100-41-4	Ethyl benzene
Benzene, hexachloro	118-74-1	Hexachloroben-zene
Benzene, methyl	108-88-3 [~~106-88-3~~]	Toluene
Benzene, nitro	98-95-3 [~~96-95-3~~]	Nitrobenzene
Benzene, pentachloro-	606-93-5 [~~608-93-5~~]	Pentachloroben-zene
Benzene, pentachloronitro-	82-68-8	Pentachloroni-trobenzene
Benzeneacetic acid, 4-chloro-a-(4-chlorophenyl)-a-hydroxy-, ethyl ester	510-15-6	Chlorobenzilate
1,4-Benzenediamine	106-50-3	p-Phenylene-dianine
1,2-Benzenedicarboxylic acid, bis-(2-ethylhexyl)ester	117-81-7	Bis(2-ethylhexyl) phthalate
1,2-Benzenedicarboxylic acid, butyl phenylmethyl ester	85-68-7	Butyl benzyl phthalate; Benzyl butyl phthalate
1,2-Benzenedicarboxylic acid, dibutyl ester	84-74-2	Di-n-butyl phthalate
1,2-Benzenedicarboxylic acid, diethyl ester	84-66-2	Diethyl phthalate
1,2-Benzenedicarboxylic acid, dimethyl ester	131-11-3	Dimethyl phthalate
1,2-Benzenedicarboxylic acid, dioctyl ester	117-84-0	Di-n-octyl phthalate
[~~1,3-Benzenediol~~	~~106-46-3~~	~~Resorcinol~~
~~Benzeneethanamine, a, a-dimethyl~~	~~122-09-8~~	~~alpha, alpha-dimethylphenethylamine~~]
Benzenemethanol	100-51-6 [~~100-51-8~~]	Benzyl alcohol
[~~Benzenethiol~~	~~106-98-5~~	~~Benzenethiol~~]
1,3-Benodioxole, 5-(1-propenyl)-	120-58-1	Isosafrole
1,3-Benzodioxole, 5-(2-propenyl)-	94-59-7	Safrole

Benzo(k)fluoranthene	207-08-9	Benzo(k)fluoranthene
~~[Benzoic acid~~	~~65-85-0~~	~~Benzoic acid~~
~~Benzo(rst)pentaphene~~	~~189-55-9~~	~~Dibenzo(a,i)pyrene]~~
Benzo(ghi)perylene	191-24-2	Benzo(ghi)perylene
Benzo(a)pyrene	50-32-8	Benzo(a)pyrene
Beryllium	7440-41-7	Beryllium (total)
1,1-Biphenyl-[(yi)]4,4'-diamine, 3,3'- dichloro-	91-94-1	3,3'-Dichlorobenzidine
~~[1,1 Biphen(yi) 4,4' diamine, 3,3' dimethoxy~~	~~119-90-4~~	~~3,3' Dimethoxybenzidine]~~
1,1'-Biphenyl[(yi)]-4,4'-diamine, 3,3' dimethyl-	119-93-7	3,3'-Dimethylbenzidine
(1,1'-Biphenyl)-4-amine	92-67-1	4-Aminobiphenyl
~~[1,1' Biphenyl(4 4 amine~~	~~92-87-5~~	~~Benzidine]~~
1,3-Butadiene, 1,1,2,3,4,4-hexachloro-	87-68-3	Hexachlorobutadiene
1,3-Butadiene, 2-chloro-	126-99-8	2-Chloro-1,3-butadiene; Chloroprene
1-Butanamine, N-butyl-N-nitroso-	924-16-3	N-Nitrosodi-n-butylamine
2-Butanone	78-93-3	Methyl ethyl ketone; MEK; 2-Butanone
2-Butene, 1,4-di-chloro-, (E)-	110-57-6	trans-1,4-Dichloro-2-butene
Cadmium (total)	7440-43-9	Cadmium
~~[Calcium~~	~~7440-70-2~~	~~Calcium (total)~~]
Carbamothioic acid, bis (1-methylethyl)-, S-(2,3-dichloro-2-propenyl ester	2303-16-4	Diallate
Carbon disulfide	75-15-0	Carbon disulfide
Chromium	7440-47-3	Chromium (total)
Chrysene	218-01-9	Chrysene
Cobalt	7440-48-4	Cobalt (total)
Copper	7440-50-8	Copper (total)
Cyanide	57-12-5	Cyanide
~~[2,5 Cyclohexadiene 1,4 dione~~	~~106-51-4~~	~~p-Benzoquinone]~~
Cyclohexane, 1,2,3,4, 5,6-hexachloro- (1a,2a,3B,4a,5B,6B)-	319-84-6	alpha-BHC
Cyclohexane, 1,2,3,4, 5,6-hexachloro-2B,3a,4B,5a,6B)-	319-85-7	beta-BHC
Cyclohexane, 1,2,3,4,5,6-hexachloro- (1a,2a,3a,4B,5a,6B)-	319-86-8	delta-BHC
Cyclohexane, 1,2,3,4,5,6-hexachloro- (1a,2a,3B,4a,5a,6B)-	58-89-9	gamma-BHC; Lindane
2-Cyclohexene-1-one,3,5,5-trimethyl	78-59-1	Isophorone
1,3-Cyclopentadiene,1,2,3,4,5, 5-hexachloro-	77-47-4	Hexachlorocyclopentadiene
Dibenz(a,h)anthracene	53-70-3	Dibenz(a,h)anthracene
~~[Dibenzo(b,e)(1,4)dioxin, 2,3,7,8 tetrachloro~~	~~1746-01-06~~	~~2,3,7,8 Tetrachlorodibenzo p dioxin; Hexachlorodibenzo p dioxin; Pentachlorodibenzo p dioxins; Tetra chlorodibenzo p dioxins~~
~~Dibenzo(b,def)chrysene~~	~~189-64-0~~	~~Dibenzo(a,h)pyrene]~~
Dibenzofuran	132-64-9	Dibenzofuran, Hexachlorodibenzofurans; Penta-chlorodibenzo-furans; Tetrachlorodibenzofurans.
2,7:3,6-Dimethanon-aphth (2,3-b)oxirene,3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a, 7,7a-octahydro,1aa,2B,2aa, 3B,6B,6aa,7B,7aa)-	60-57-1	Dieldrin
2,7:3,6-Dimethanon-aphth (2,3-b)oxirene,3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a, 7,7a-octahydro,1aa,2B,2aB,3a, 6a,6aB,7B,7aa)-	72-20-8	Endrin
1,4:5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexa-hydro-,1aa, 4a,4aB,5a,8a,8aB)-	309-00-2	Aldrin
1,4:5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexa-hydro-,1aa, 4a,4aB,5B,8B,8aB)-	465-73-6	Isodrin
1,4-Dioxane	123-91-1	1,4-Dioxane
Ethanamine, N-ethyl-N-nitroso	55-18-5	N-Nitrosodiethylamine
Ethanamine, N-methyl-N-nitroso	10595-95-6	N-Nitrosomethylethyl amine
Ethane, 1,1-dichloro-	75-34-3	1,1-Dichloroethane; Ethyldidene chloride
Ethane, 1,1'-(methylenebis(oxy)) bis(2-chloro-	111-91-1	Bis(2-chloroethoxy) methane
Ethane, 1,1'-oxybis (2-chloro-	111-44-4	Bis(2-chloroethyl) ether
Ethane, 1,1,1-[']trichloro-	71-55-6	1,1,1-Trichloroethane; Methyl chloroform
Ethane, 1,1,1,2-tetrachloro-	630-20-6	1,1,1,2-Tetrachloroethane
Ethane, 1,1,2-trichloro-	79-00-5	1,1,2-Trichloroethane
Ethane, 1,1,2,2-tetrachloro-	79-34-5	1,1,2,2-Tetrachloro ethane
Ethane, 1,2-dibromo	106-93-4	1,2-Dibromoethane; Ethylene dibromide; EDB
Ethane, 1,2-dichloro	107-06-2	1,2-Dichloroethane; Ethylene dichloride
Ethane, chloro-	75-00-3	Chloroethane; Ethyl chloride
Ethane, hexachloro-	67-72-1	Hexachloroethane
Ethane, pentachloro-	76-01-7	Pentachloroethane
1,2-Ethanediamine,N,N-dimethyl-N'-'2-pyridinyl-n'-(2-thienylmethyl)-	91-80-5	Methapyrilene
Ethanone, 1-phenyl-	98-86-2	Acetophenone
~~[Ethene, (2 chloro ethoxy)~~	~~110-75-8~~	~~2 Chloroethyl vinyl ether]~~
Ethene, 1,1-dichloro-	75-35-4	1,1-Dichloroethylene; Vinylidene chloride; 1,1-Dichloroethene
Ethene, 1,2-dichloro-(e)-	156-60-5	trans-1,2-Dichloroethylene;

		trans-1,2-Dichloro-ethene
Ethene, 1,2-dichloro(z)-	156-59-2	cis-1,2-Dichloro-ethylene; cis-1,2-Dichloro-ethene
Ethene, chloro-	75-01-4	Vinyl chloride; Chloroethene
Ethene, tetrachloro-	127-18-4	Tetrachloro-ethene; Tetrachloro-ethylene; Perchloro-ethylene
Ethene, trichloro-	79-01-6	Trichloroethene; Trichloroethylene
Fluoranthene	206-44-0	Fluoranthene
~~[Fluoride~~	~~12984-48-8~~	~~Fluoride]~~
9H-Fluorene	86-73-7	Fluorene
2-Hexanone	591-78-6	2-Hexanone; Methyl butyl ketone
~~[Hydrazine, 1,2-diphenyl~~	~~122-66-7~~	~~1,2-Diphenylhydrazine]~~
Indeno(1,2,3-cd) pyrene	193-39-5	Indeno(1,2,3-cd) pyrene
~~[Iron~~	~~7439-89-6~~	~~Iron (total)~~]
Lead	7439-92-1	Lead (total)
Magnesium	7439-94-4	Magnesium (total)
Manganese	7439-96-5	Manganese (total)
Mercury	7439-97-6	Mercury (total)
Methanamine, N-methyl-N-nitroso	62-75-9	N-Nitrosodimeth-ylamine
Methane, bromo-	74-83-9	Bromomethane
Methane, bromochloro-	74-97-5	Bromochlorometh-ane; Chlorobromo-methane
Methane, bromodichloro-	75-27-4	Bromodichloro-methane; Dibromo-chloromethane
Methane, chloro	74-87-3	Chloromethane; Methyl chloride
Methane, dibromo-	75-09-2 [~~74-95-3~~]	Dibromometh-ane; Methylene bromide
Methane, dibromo-chloro-	124-48-1	Chlorodibromo-methane
Methane, dichloro-	75-09-2 [~~74-09-2~~]	Dichloromethane; Methylene Chloride
Methane, Dichlorodifluoro-	75-71-8	Dichlorodifluor-omethane; CFC-12
Methane, iodo	74-88-4	Iodomethane; Meth-yl iodide
Methane, tetrachloro-	56-23-5	Carbon Tetra-chloride
Methane, tribromo-	75-25-2	Tribromomethane; Bromoform
Methane, trichloro-	67-66-3	Chloroform
Methane, trichlorofluoro-	75-69-4	Trichloromono-fluoro methane; CFC-11
Methanesulfonic acid, ethyl ester	62-50-0	Ethyl methanesul-fonate
Methanesulfonic acid, methyl ester	66-27-3	Methyl methane-sulfonate
~~[Methanethiol, trichloro~~	~~75-70-7~~	~~Trichlorometh-anethiol~~]
4,7-Methano-1H-indene-1,2, 4,5,6,7,8,8-octachloro-2,3,	**[~~57-74-9~~]	Chlordane
3a,4,7,7a-hexahydro		
4,7-Methano-1H-indene-1,4,5, 6,7,8,8-heptachloro-3a, 4,7,7a-tetrahydro-	76-44-8	Heptachlor
2,5-Methano-2H-indeno(1,2-b) oxirene,2,3,4,5,6,7,7-heptachloro-1a,1b,5,5a,6, 6a-hexahydro-,(1aa,1bB,2a, 5a,5aB,6B,6aa)	1024-57-3	Heptachlor epoxide
6,9-Methano-2,4,3-benzo-dioxathiepin,6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-,3-oxide, (3a,5aB,6a,9a,9aB)	959-96-8	Endosulfan I
6,9-Methano-2,4,3-6,7,8,9, benzo-dioxathiepin, 10,10-hexachloro-1,5,5a, 6,9,9a-hexahydro-,3-oxide, (3a,5aa,6B,9B,9aa)	33213-65-9	Endosulfan II
6,9-Methano-2,4,3-benzodioxathiepin,6,7,8,9, 10,10-hexachloro-1,5,5a,6,9, 9a-hexahydro-3,3-dioxide	1031-07-8	Endosulfan sulfate
1,3,4-Methano-2H-cyclobutal (cd)pentalen-2-one,1,1a,3,3a, 4,5,5,5a,5b,6-decachloro-octahydro-	143-50-0	Kepone
1,2,4-Methanocyclopenta(cd) pentalene-5-carboxaldehyde, 2,2a,3,3,4,7-hexachloro-decahydro-,(1a,2B,2aB,4B, 4aB,5B,6aB,6aB,7R*)	7421-93-4	Endrin aldehyde
~~[Morpholine, 4-nitroso~~	~~59-89-2~~	~~N-Nitrosomor-pholine~~]
1-Naphthalenamine	134-31-7 [~~134-32-7~~]	1-Naphthylamine
2-Naphthalenamine	91-59-8	2-Naphthylamine
Naphthalene	91-20-3	Naphthalene
Naphthalene, 2-chloro-	91-58-7	2-chloronaph-thalene
Naphthalene, 2-methyl-	91-57-6	2-Methylnaph-thalene
1,4-Naphthalenedione	130-15-4	1,4-Naphthoqui-none
~~[Naphtho(1,2,3,4-def) chrysene~~	~~192-65-4~~	~~Dibenzo(a,e) pyrene~~]
Nickel	7440-02-0	Nickel (total)
~~[Osmium~~	~~7440-04-2~~	~~Osmium (total)~~
~~Oxirane~~	~~75-21-8~~	~~Ethylene oxide~~]
2-Pentanone, 4-methyl-	108-10-1	4-Methyl-2-pentanone; Methyl isobutyl ketone
Phenanthrene	85-01-8	Phenanthrene
Phenol	108-95-2	Phenol
Phenol, 2-(1-methyl-propyl)-4, 6-dinitro	88-85-7	2-sec-Butyl-4,6-dinitro-phenol; Dino-seb; DNBP
Phenol, 2-chloro-	95-57-8	2-Chlorphenol
Phenol, 2-methyl-	95-48-7	ortho-Cresol; 2-methylphenol
Phenol, 2-methyl-4,6-dinitro-	34-52-1	4,6-Dinitro-o-cresol; 4,6-Dinitro-2 methylphenol
Phenol, 2-nitro	88-75-5	2-Nitrophenol; o-Nitrophenol
~~[Phenol, 2,2'-methylenebis (3,4,6-trichloro)~~]	~~70-30-4~~	~~Hexachlorophene~~

Phenol, 2,3,4,6-tetrachloro-	58-90-2	2,3,4,6-Tetrachlorophenol
Phenol, 2,4-dichloro	120-83-2	2,4-Dichlorophenol
Phenol, 2,4-dimethyl-	105-67-9	2,4-Dimethylphenol; m-Xylenol
Phenol, 2,4-dinitro-	51-28-5	2,4-Dinitrophenol
Phenol, 2,4,5-trichloro	95-95-4	2,4,5-Trichlorophenol
Phenol, 2,4,6-trichloro-	88-06-2	2,4,6-Trichlorophenol
Phenol, 2,6-dichloro-	87-65-0	2,6-Dichlorophenol
Phenol, 3 methyl-	108-39-4	m-Cresol; 3-methylphenol
Phenol, 4-chloro-3-methyl-	59-50-7	p-Chloro-m-cresol; 4-Chloro-3-methylphenol
Phenol, 4-methyl-	106-44-5	para-Cresol; 4-methylphenol
Phenol, 4-nitro	100-02-7	4-Nitrophenol; p-Nitrophenol
Phenol, pentachloro-	87-86-5	Pentachlorophenol
Phosphorodithioic acid, 0,0-diethyl S-((ethylthio) methyl) ester	298-02-2	Phorate
Phosphorodithioic acid, 0,0-diethyl S-(2-(ethylthio) ethyl) ester	298-04-4	Disulfoton
Phosphorothioic acid, 0-(4-((dimethyl-amino)sulfonyl) phenyl)0,0-dimethyl ester	52-85-7	Famphur
Phosphorothioic acid, 0,0-diethyl 0-(4-nitrophenyl ester	56-38-2	Parathion
Phosphorothioic acid, 0,0-diethyl 0-pyrazinyl ester	297-97-2	0,0-Diethyl 0,2-pyrazinyl phosphorothioate; thionazin
Phosphorothioic acid, 0,0-dimethyl 0-(4-nitrophenyl) ester	298-00-0	Methyl parathion; Parathion methyl
Phosphorodithioic acid, 0,0-dimethyl S- (2- (methylamino) -2-oxoethyl ester	60-51-5	Dimethoate
Phosphorothioic acid, 0,0,0-triethyl ester	126-68-1	0,0,0-Triethyl phosphorothioate
Piperidine, 1-nitroso-	100-75-4	N-Nitrosopiperidine
~~[Potassium~~	~~7440-09-7~~	~~Potassium (total)]~~
1-Propanamine, N-nitroso-N-propyl-	621-64-7	Di-n-propylnitrosamine; N-nitrosodipropylamine, N-nitroso-N-dipropylamine
Propane, 1,2-dibromo-3-chloro	96-12-8	1,2-Dibromo-3-chloropropane; DBCP
Propane, 1,2-dichloro-	78-87-5	1,2-Dichloropropane; Propylene dichloride
Propane, 1,3-dichloro-	142-28-9	1,3-Dichloropropane; Trimethylene dichloride
Propane, 1,2,3-trichloro-	96-18-4	1,2,3-Trichloropropane
Propane, 2,2-dichloro-	594-20-7	2,2-Dichloropropane; Isopropylidene chloride
Propane, 2,2'-oxybis (1-chloro-	108-60-1	Bis(2-chloroisopropyl) ether; Bis-(2-chloro-1-methylethyl) ether; 2,2'-Dichlorodi-isopropyl ether; DCIP
~~[Propanedinitrile~~	~~109-77-3~~	~~Malononitrile]~~
Propanenitrile	107-12-0	Ethyl cyanide; Propionitrile
~~[Propanenitrile, 3-chloro~~	~~542-76-7~~	~~3-Chloropropionitrile]~~
Propanoic acid, 2-(2,4,5-trichloro-phenoxy)-	93-72-1	Silvex; 2,4,5-TP
~~[1-Propanol, 2,3-dibromo-phosphate (3:1)~~	~~126-72-7~~	~~Tris(2,3-dibromopropyl) phosphate]~~
1-Propanol, 2-methyl-	78-83-1	Isobutyl alcohol
2-Propanone	67-64-1	Acetone
2-Propenal	107-02-8	Acrolein
1-Propene, 1,1-dichloro-	563-58-6	1,1-Dichloropropene
1-Propene, 1,1,2,3,3, 3,-hexachloro-	1888-71-7	Hexachloropropene
1-Propene, 1,3-dichloro-, (E)-	10061-02-6	trans-1,3-Dichloropropene
1-Propene, 1,3-dichloro-, (Z)-	10061-01-5	cis-1,3-Dichloropropene
1-Propene, [~~1,~~]3-chloro-	107-05-1	3-Chloropropene; Allyl chloride
2-Propenenitrile,2-methyl	126-98-7	Methacrylontrile
2-Propenenitrile	107-13-1	Acrylonitrile
2-Propenoic acid, ~~methyl , ethyl ester~~	97-63-2	Ethyl methacry-~~late~~
2-Propenoic acid, 2-methl-, methyl ester	80-62-6	Methyl methacrylate
~~[2 Propen-1-ol~~	~~107-18-6~~	~~Allyl alcohol~~
~~2 Propyn-1-ol~~	~~107-19-7~~	~~2 Propyn-1-ol]~~
Pyrene	129-00-0	Pyrene
~~[Pyridine~~	~~110-86-1~~	~~Pyridine~~
~~Pyridine, 2 methyl~~	~~109-06-8~~	~~2 Picoline]~~
Pyrrolidine,~~[Pyridine,]~~ 1-nitroso-	930-55-2	N-nitrosopyrrolidine
Selenium	7782-49-2	Selenium (total)
Silver	7440-22-4	Silver (total)
~~[Sodium~~	~~7440-23-5~~	~~Sodium (total)]~~
Sulfide	18496-25-8	Sulfide
~~[Sulfurous acid, 2-chloroethyl 2-(4d-(1,1-dimethylethyl) phenoxy) 1-methyl ethyl ester]~~	~~140-57-8~~	~~Aramite~~
Thallium	7440-28-0	Thallium (total)
~~[Thiodiphosphoric acid ((HO)$_2$-P(S))$_2$, tetraethyl ester~~	~~3689-24-5~~	~~Tetraethylidithiopyrophosphate]~~
Tin	7440-31-5	Tin (total)
Toxaphene	8001-35-2	Toxaphene
Vanadium	7440-62-2	Vanadium (total)
Zinc	7440-66-6	Zinc (total)

*Xylene(total): This entry includes o-xylene (CAS RN 96-47-6), m-xylene (CAS RN 108-38-3), p-xylene (CAS RN 106-42-3), and unspecified xylenes (dimethylbenzenes) (CAS RN 1330-20-7).

**Chlordane: This entry includes alpha-chlordane (CAS RN 5103-71-9), beta-chlordane (CAS RN 5103-74-2), gamma chlordane (CAS RN 5566-34-7), and constituents of chlordane (CAS RN 57-74-9 and CAS RN 12789-03-06).

(c) Groundwater elevations in monitoring wells recorded as a distance from the elevation at the wellhead referenced to mean sea

level based on a United States Geological Survey datum.

(4) For residual landfills this characterization shall include parameters approved by the cabinet based upon the chemical analysis of the waste.

(5) For other sites or facilities the characterization shall be for parameters determined by the cabinet.

Section 11. Groundwater Monitoring Parameters. (1)(a) Operators of Class II and Class III landfarming facilities requiring groundwater monitoring shall monitor for the following parameters on a semiannual basis: temperature, chemical oxygen demand, total organic carbon, total nitrogen, nitrate nitrogen, lead, chromium, cadmium, coliform bacteria;

(b) Groundwater elevations in monitoring wells recorded as a distance from the elevation at the wellhead referenced to mean sea level based on a USGS datum; and

(c) Other parameters as approved by the cabinet based on the waste analysis.

(2) Operators of residual and construction/demolition debris landfills shall monitor semiannually for the following:

(a) Temperature, chloride, chemical oxygen demand, total dissolved solids, total organic carbon, specific conductance, pH, iron, sodium;

(b) Arsenic, barium, cadmium, chromium, lead, mercury, nitrate, selenium;

(c) Groundwater elevations in monitoring wells recorded as a distance from the elevation at the wellhead referenced to mean sea level based on a USGS datum;

(d) Other parameters as approved by the cabinet based on the waste analysis; and

(e) If after four (4) consecutive quarterly monitoring periods, analysis for the parameters in paragraphs (a) through (d) of this subsection indicates no exceedences above levels specified in Section 8(1) of this administrative regulation, the owner or operator may, upon request, be granted permission from the cabinet to reduce the monitoring parameters to those listed in paragraph (a) of this subsection.

(3) Operators of contained landfills shall be required to monitor quarterly for the following parameters:

(a) Temperature, chloride, chemical oxygen demand, total dissolved solids, total organic carbon, specific conductance, pH, [~~iron, sodium,~~] total organic halides, antimony, arsenic, barium, beryllium, cadmium, chromium, cobalt, copper, iron, lead, mercury, nickel, nitrate, selenium, silver, sodium, thallium, vanadium, and zinc;

(b) Acetone; acrolein; acrylonitrile; benzene; bromochloromethane; bromodichloromethane; [~~4-bromofluorobenzene;~~] bromoform (tribromomethane); bromomethane (methyl bromide); 2-butanone (methyl ethyl ketone); carbon disulfide; carbon tetrachloride; chlorobenzene; chlorodibromomethane (dibromochloromethane); chloroethane (ethyl chloride); 2-chloroethyl vinyl ether; chloroform (trichloromethane); chloromethane (methyl chloride); dibromomethane (methylene bromide); 1,2-dibromo-3-chloro-propane (DBCP); 1,2-dibromoethane (ethylene dibromide, EDB); 1,2-dichlorobenzene (o-dichlorobenzene); 1,4-dichlorobenzene (p-dichlorobenzene); trans-1,4-dichloro-2-butene [~~butane~~]; dichlorodifluoromethane; 1,1-dichloroethane (ethylidene chloride); 1,2-dichloroethane (ethylene dichloride); cis-1,3-dichloropropene; trans-1,3-dichloropropene; [~~1,4-difluorobenze;~~] ethanol; ethylbenzene; ethyl methacrylate; 2-hexanone (methyl butyl ketone); iodomethane (methyl iodide); methylene chloride (dichloromethane); 4-methyl-2-pentanone (methyl isobutyl ketone); 1,1-dichloroethene (1,1-dichloroethylene, vinylidene chloride); cis-1,2-dichloroethene (cis-1,2-dichloroethylene); trans-1,2-dichloroethene (trans-1,2-dichloroethylene); 1,2-dichloropropane (propylene dichloride); styrene; 1,1,1,2-tetrachloroethane; 1,1,2,2-tetrachloroethane; tetrachloroethylene (tetrachloroethene, perchloroethylene); toluene; 1,1,1-trichloroethane (methyl chloroform); 1,1,2-trichloroethane; trichloroethene (trichloroethylene); [~~trichloroethane;~~] trichlorofluoromethane (CFC-11); 1,2,3-trichloropropane; vinyl acetate; vinyl chloride; xylene;

(c) Groundwater elevations recorded as a distance from the elevation at the wellhead referenced to mean sea level based on a United States Geologic Survey datum;

(d) Determine the rate and direction of groundwater flow each time groundwater is sampled;

(e) [~~(d)~~] Other parameters as approved by the cabinet based on the waste analysis; and

(f) [~~(e)~~] If after four (4) consecutive quarterly monitoring periods, analysis for the parameters in paragraphs (a) and (b) of this subsection indicates no exceedences above the levels specified in Section 8(1) of this administrative regulation, the owner or operator may obtain permission from the cabinet to reduce the sampling program to annual sampling for parameters in paragraphs (a) and (b) of this subsection while sampling quarterly for the following:

1. Temperature;
2. Chloride;
3. [~~2.~~] Chemical oxygen demand;
4. [~~3.~~] Total dissolved solids;
5. [~~4.~~] Total organic carbon;
6. [~~5.~~] Specific conductance;
7. [~~6.~~] pH;
8. [~~7.~~] Iron;
9. [~~8.~~] Sodium; and
10. [~~9.~~] Total organic halides.

(4) Operators of residual landfills shall monitor quarterly for parameters to be determined by the cabinet based upon chemical analysis of the waste to be disposed.

(5) Other solid waste sites or facilities shall monitor for parameters and at a frequency determined by the cabinet.

PHILLIP J. SHEPHERD, Secretary
E. DOUGLAS STEPHAN, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 14, 1994 at 8 a.m.

PUBLIC HEARING: A public hearing to receive comments on this proposed administrative regulation has been scheduled for Thursday, August 25, 1994, at 10 a.m. eastern time in the auditorium of the Capital Plaza Tower, Frankfort, Kentucky. Individuals interested in being heard at this hearing must notify James Hale in writing at the address noted below, by August 20, 1994 of their intent to attend the hearing. If no notification of intent to attend the hearing is received by that date, the hearing will be cancelled. This hearing is open to the public. Any person wishing to be heard will be given an opportunity to comment on the proposed administrative regulation. Persons testifying at the hearing are requested to provide a written copy of their testimony, if available. A transcript of the hearing will not be made unless a written request for a transcript is filed with Mr. Hale by August 20, 1994. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments must be received by Mr. Hale no later than 4:30 p.m. eastern time on August 25, 1994. The Department for Environmental Protection does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities. Requests for reasonable accommodation for this public hearing, such as an interpreter or alternate formats for printed materials, must be submitted to Mr. Hale at the address below by August 20, 1994.

CONTACT: James Hale, Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502)564-6716.

REGULATORY IMPACT ANALYSIS

Agency contact: James Hale

(1) Type and number of entities affected: This proposed amendment would require cabinet approval of the groundwater assessment report with requirements for a public notice and hearing, financial assurance, provides standards for statistical methods for groundwater analysis, and amends the groundwater quality characterization parameters and groundwater monitoring parameters to be consistent with Subtitle D. There are currently 24 permit applications pending for contained landfills. A similar notification provision exists in the federal regulations at 40 CFR Subpart 258 E and Appendices I and II. This amendment is being proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

(a) Direct and indirect costs or savings to those affected:

1. First year: Implementation of this proposed amendment should result in a savings of approximately 60 percent per sample the first year depending on the condition of the matrix.

2. Continuing costs or savings: The amount saved per sample should continue and the number of samples required will decrease after the first year depending on the condition of the matrix.

3. Additional factors increasing or decreasing costs (note any effects upon competition); There are no additional factors.

(b) Reporting and paperwork requirements:

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: This proposed amendment would have no financial impact on the cabinet.

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: There are no additional factors.

(b) Reporting and paperwork requirements: This amendment would not impose reporting or paperwork requirements on the cabinet.

(3) Assessment of anticipated effect on state and local revenues: This amendment will not impact state or local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: This amendment is required pursuant to an EPA deficiency in Kentucky's solid waste program as cited at 58 FR 35454 et seq. (July 1, 1993). The amendment comports with federal provisions at 40 CFR 258 Subpart E and Appendices I and II.

(5) Identify any statute, administrative regulation or government policy which may conflict, overlap or duplicate: There are no statutes, administrative regulations, or policies that conflict with, overlap, or duplicate the provisions of this amendment.

(a) Necessity of proposed regulation if in conflict: There is no conflict.

(b) If in conflict, was an effort made to harmonize the proposed regulation with conflicting provisions: There is no conflict.

(6) Any additional information or comments: None

Tiering: Was tiering applied? Yes. This amendment imposes requirements on contained landfills only, which is consistent with what is required under the state and federal regulations.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate: This proposed amendment is equivalent to 40 CFR 258 Subpart E and Appendices I and II. The Resource Conservation and Recovery Act mandates that authorized state programs be consistent with and no less stringent than the federal program. This amendment is proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

2. State compliance standards: This amendment complies with KRS 224.43-340 which requires the cabinet to promulgate administrative regulations for the reduction and management of solid waste.

3. Minimum or uniform standards contained in the federal mandate: This proposed amendment is consistent with the provisions of 40 CFR 258 Subpart E and Appendices I and II.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Environmental Protection
Division of Waste Management
(Proposed Amendment)

401 KAR 48:310. Financial requirements and bonds.

RELATES TO: KRS 224.01-010 to 224.01-070 [~~224.10~~], 224.40-100 to 224.43-345, [~~224.70,~~] 224.99-010, Chapter 355

STATUTORY AUTHORITY: KRS 224.10-100, 224.40-305, 224.40-650, 40 CFR Parts 257, 258

NECESSITY AND FUNCTION: KRS 224.40-305 requires the cabinet to promulgate administrative [~~adopt rules and~~] regulations for the managing, processing, or disposal of wastes. KRS 224.40-650 requires that persons engaging in the management, processing, and disposal of waste obtain a permit. KRS 224.650 and KRS 224.40-110 require [~~requires nonpublic~~] permit applicants to post a performance bond[~~s~~] with a mechanism of financial assurance. This chapter establishes the minimum technical standards for solid waste sites or facilities. This administrative regulation sets forth the financial requirements for closure, closure care, and corrective action.

Section 1. Financial Assurance Criteria. The financial assurance criteria and bond requirements apply to each [~~the~~] owner and operator of any [~~all~~] solid waste disposal site[~~s~~] or facility [~~facilities~~]. Any owner or operator that [~~which~~] is a city, county, urban-county government, 109 district, taxing district, political subdivision of the Commonwealth, the Commonwealth, or any agency [~~agencies~~] thereof, or any entity whose debts and liabilities are the debts and liabilities of the above entities, shall [~~only~~] be required to comply with Sections 2, 3, and 15 [~~12~~] of this administrative regulation.

Section 2. Closure Cost Estimate. Except as provided by KRS 224.40-120, the owner or operator shall have a detailed written estimate, in current dollars, of the cost of hiring a third party to close the solid waste disposal site or facility in accordance with the closure plan developed to satisfy the closure requirements in Section 4(1) of 401 KAR 48:060, Section (15) of 401 KAR 48:070, Section 4 of 401 KAR 48:170, Section 5 of 401 KAR 48:200, and KRS 224.40.650.

(1) The estimate shall equal the cost of closing the solid waste disposal site or facility at the point in the active life when the extent and manner of its operation would make closure the most expensive. The cabinet shall adjust the figure for inflation and other factors each year. The owner or operator shall base the cost estimate on the following elements:

(a) Design;

(b) Site grading and drainage;

(c) Hauling and placing of each element of the approved cap;

(d) Final grading and drainage of the cap;

(e) Revegetation of the cap; and

(f) Quality control and construction certification.

(2) The owner or operator shall increase the closure cost estimate and the amount of financial assurance provided under Section 5 of this administrative regulation if changes to the closure plan or solid waste disposal site or facility conditions increase the maximum cost of closure at any time during the active life.

(3) The owner or operator may request a reduction in the closure cost estimate and the amount of financial assurance provided under Section 5 of this administrative regulation if he can demonstrate that the cost estimate exceeds the maximum cost of closure at any time

over the life of the solid waste disposal site or facility.

(4) The owner or operator shall keep a copy of the latest closure cost estimate at the solid waste disposal site or facility until the owner or operator has been notified by the cabinet that he has been released from closure financial assurance requirements under Section 5 of this administrative regulation.

Section 3. Closure Care Cost Estimate. (1) Except as provided for by KRS 224.40-120, the owner or operator of each solid waste site or facility shall have a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct each phase of closure care monitoring and maintenance [~~of the solid waste landfill~~] in accordance with the closure care plan developed to satisfy the closure care requirements of Section 3 of 401 KAR 48:060, Section 13 of 401 KAR 48:090, and Section 3 of 401 KAR 48:170. The closure care cost estimate for each phase of closure care used to demonstrate financial assurance in Section 6 of this administrative regulation shall be [~~is~~] calculated by multiplying the annual cost estimate for each phase of closure care by the number of years of closure care required. For contained landfills, the closure care estimate mandated by KRS 224.40-650 shall be a minimum of $10,000 per year, using 1990 as the baseline year.

(2) The cost estimate for each phase of closure care shall be based on the most expensive costs of closure care during that phase. The cabinet shall adjust the figure each year for inflation and other factors.

(3) The owner or operator shall increase the amount of the closure care cost estimate and the amount of financial assurance provided under Section 6 of this administrative regulation if changes in the closure care plan or facility conditions increase the maximum costs of closure care.

(4) The owner or operator may request a reduction in the closure cost estimate and the amount of financial assurance provided under Section 6 of this administrative regulation if he can demonstrate to the satisfaction of the cabinet that the cost estimate exceeds the maximum costs of closure care remaining over the closure care period.

(5) The owner or operator shall keep a copy of the latest closure care cost estimate at the facility until he has been notified by the cabinet that he has been released from closure care financial assurance requirements for the entire facility under Section 6 of this administrative regulation.

Section 4. Financial Mechanisms. The mechanisms used to demonstrate financial assurance under this administrative regulation shall ensure that the funds necessary to meet the costs of closure and closure care will [~~shall~~] be available in a timely manner whenever they are needed. The owner or operator shall execute a performance [~~use the~~] bond specified in Section 7 with one (1) or a combination of the financial mechanisms in Sections [~~7, 8,~~] 9 [~~and~~] 10, 11, 12, and 13 of this administrative regulation, that [~~which~~] satisfies the following criteria:

(1) The financial assurance mechanism shall ensure that the amount of funds is sufficient to cover the costs of closure and closure care;

(2) The financial assurance mechanism[~~s~~] shall ensure that funds shall be available in a timely fashion;

(3) The financial assurance mechanism[~~s~~] shall guarantee the availability of the required amount of coverage from the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, until the owner or operator establishes an alternative financial assurance mechanism or is released from the financial assurance requirements under Sections 5, 6, 7, and 14 [~~11~~] of this administrative regulation. The amount of financial assurance obtained from a single financial institution shall not exceed the limit of federal insurance, when such assurance is provided by a financial institution that uses federal insurance to guarantee the availability of funds.

Section 5. Closure Financial Assurance. Except as provided by KRS 224.40-120, the owner or operator of each solid waste disposal site or facility [~~landfill or landfarm~~] shall establish, in accordance with Section 4 of this administrative regulation, financial assurance for closure of the facility, in an amount equal to the most recent closure cost estimate prepared in accordance with Section 2 of this administrative regulation. The owner or operator shall provide continuous coverage for closure until released from financial assurance requirements. The owner or operator may be released from financial assurance requirements for closure after a site visit by a cabinet representative and approval by the cabinet. For contained landfills, the owner or operator shall submit the certification that closure has been completed in accordance with the approved closure plan. Following receipt of the closure certification or completion of the closure inspection, the cabinet shall:

(1) Notify the owner or operator in writing that he is no longer required to maintain financial assurance for closure; or

(2) Provide the owner or operator with a detailed written statement of any reason to believe that closure has not been conducted in accordance with the approved closure plan.

Section 6. Closure Care. Except as provided by KRS 224.40-120, the owner or operator of each solid waste site or facility [~~landfill~~] shall provide for closure care as required under Section 3 of 401 KAR 48:060, Section 13 of 401 KAR 48:090, and Section 3 of 401 KAR 48:170 for the required period following the cabinet's acceptance of closure. The owner or operator of a contained landfill may be released from closure care requirements after the cabinet has received a certification that the closure care period has been completed in accordance with the approved plan as required under Section 13 of 401 KAR 48:090. Following receipt of the closure care certification, the cabinet shall notify the owner or operator with a detailed written statement of any reason to believe that closure care has not been conducted in accordance with the approved closure care plan.

Section 7. Performance Bond. Before the cabinet shall issue a permit, the owner or operator of a solid waste disposal site or facility that is required to execute [~~post~~] a performance bond and post a financial assurance mechanism or other security pursuant to KRS 224.40-650 shall complete the performance bond and financial assurance mechanism in a manner approved by the cabinet. To satisfy the financial requirement, the owner or operator shall submit a performance bond (see Section 8 [~~and Appendix A~~] of this administrative regulation) and one (1) or more of the [~~three (3)~~] following five (5) financial mechanisms:

(1) Surety bond as specified in Section 9 of this administrative regulation [~~8 and Appendix A of this regulation~~];

(2) Letter of credit as specified in Section 10 of this administrative regulation; [~~9 and Appendix B of this regulation; or~~]

(3) Escrow agreement as specified in Section 11 of this administrative regulation; [~~10 and Appendix C of this regulation.~~]

(4) Trust agreement as specified in Section 12 of this administrative regulation; or

(5) Insurance policy as specified in Section 13 of this administrative regulation.

Section 8. Wording of the Performance Bond. A performance bond guaranteeing performance of closure and [~~or~~] closure care, or closure individually and closure care individually, shall be executed on DEP Form 6053-A, entitled "Performance Bond" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays. [~~a form~~

~~provided by the cabinet. The surety bond form is a part of the performance bond form. The surety bond portion of the performance bond shall be completed only if a surety bond is being used; otherwise the surety bond portion of the performance bond shall be left blank. The performance bond form shall be as contained in Appendix A of this regulation.~~]

Section 9. Surety Bond. To be eligible to issue a surety bond, a surety shall be listed as acceptable in the current edition of U.S. Treasury Circular 570. The penal sum of the bond shall not exceed the amount of the surety's underwriting limitation. The surety bond form is a part of DEP Form 6053-A. The surety bond portion of the performance bond shall be completed only if a surety bond is being used; otherwise the surety bond portion of the performance bond shall be left blank.

Section 10. Wording of the Instrument for a Letter of Credit. A letter of credit, as allowed by Sections 4 and 7 of this administrative regulation, shall be executed on DEP Form 6053-B, entitled "Irrevocable Letter of Credit" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays. [~~a form provided by the cabinet. The letter of credit form shall be as contained in Appendix B of this regulation.~~]

Section 11. [~~10.~~] Wording of the Escrow Agreement. An [~~solid waste facility~~] escrow agreement, as allowed in Sections 4 and 7 of this administrative regulation, shall be executed on DEP Form 6053-C, entitled "Escrow Agreement" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays. [~~a form provided by the cabinet. The escrow agreement form shall be as contained in Appendix C of this regulation.~~] If a certificate of deposit is used in conjunction with the escrow agreement, it shall be made payable to the financial institution as the escrow agent.

Section 12. Wording of Trust Fund Agreement. A trust fund, as allowed by Sections 4 and 7 of this administrative regulation, shall be executed on DEP Form 6053-K, entitled "Trust Fund Agreement" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays.

Section 13. Insurance Policies. (1) The owner or operator of a solid waste disposal site or facility may provide an insurance policy to demonstrate the financial assurance for closure or closure care of the facility. The insurance policy shall conform with the requirements of this section and shall be submitted along with DEP Form 6053-D, entitled "Certificate of Insurance for Closure or Closure Care" (July 1994), which is hereby incorporated by reference. DEP Form 6053-D may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays.

(2) The insurance policy shall guarantee that the funds will be available to close the solid waste disposal site or facility when closure occurs or to provide closure care for the solid waste site or facility when the closure care period begins, whichever is applicable. The policy shall guarantee that once closure or closure care begins, whichever is applicable, the insurer will be responsible for the paying out of funds to the owner or operator or other person authorized to conduct closure or closure care, up to an amount equal to the face amount of the policy. The insurance policy shall be issued for a face amount at least equal to the current closure cost estimate for closure or the current closure care cost estimate, whichever is applicable. The term "face value" refers to the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer shall not change the face amount, although the insurer's future liability will be lowered by the amount of payments.

(3) The owner or operator, or any other person authorized to conduct closure or closure care, may receive reimbursements for closure or closure care expenditures. Requests for reimbursement for expenditures shall be made by submitting itemized bills to the cabinet. The cabinet shall determine whether the closure or closure care expenditures are in accordance with the approved closure or closure care plan, or are otherwise justified, and if so, shall instruct the insurer to make reimbursements in such amounts as the cabinet specifies in writing. If the cabinet has reason to believe that the cost of closure or closure care will be greater than the face amount of the policy, then the cabinet may withhold reimbursement of such amounts and set forth the reasons for the withholding in writing.

(4) An insurance policy shall contain a provision allowing assignment of the policy to a successor owner or operator. This assignment may be conditional upon consent of the insurer, provided the consent is not unreasonably refused.

(5) The insurance policy shall provide that the insurer may not cancel, terminate or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may cancel the policy by sending notice of the cancellation by certified mail to the owner or operator and to the cabinet 120 days or more in advance of the cancellation. Cancellation, termination, or failure to renew shall not occur, and the policy shall remain in force, if on or before the date of expiration:

(a) Closure is ordered by the cabinet or a court of competent jurisdiction;

(b) The owner or operator is named as debtor in a voluntary or involuntary bankruptcy proceeding under Title 11 U.S. Code; or

(c) The premium is paid.

(6) If the insurer cancels the policy, the owner or operator shall obtain by the effective date of the cancellation, alternate financial assurance as specified in this administrative regulation.

(7) For insurance policies providing coverage for closure care, commencing on the date that liability to make payments pursuant to the policy accrues, the insurer shall thereafter annually increase the face amount of the policy. This increase shall be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to eighty-five (85) percent of the most recent investment rate or the equivalent coupon-issued yield announced by the U.S. Treasury for twenty-six (26)-week treasury securities.

(8) The owner or operator may cancel the insurance policy only if alternate financial insurance is substituted and approved by the cabinet, as specified in this administrative regulation, or if the owner or operator is no longer required to demonstrate financial assurance in accordance with Section 14 of this administrative regulation and 401 KAR Chapters 47 and 48.

(9) If the owner or operator chooses to purchase an insurance policy to cover the cost of closure or closure care, whichever is applicable, the chosen insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one (1) or more states of the United States of America.

(10) The owner or operator shall submit a copy of the insurance policy and an executed DEP Form 6053-D to the cabinet for approval prior to this method of financial insurance being accepted. The owner or operator shall also execute a performance bond in accordance with Section 7 of this administrative regulation.

Section 14. [~~11.~~] Release of Financial Assurance Mechanisms and Performance Bonds. (1) Bonds posted to assure proper closure

of a solid waste disposal site or facility shall be released two (2) years after the date that the cabinet determines the final cover has been constructed and revegetated with permanent vegetation and all of requirements of the approved closure plan have been accomplished. The cabinet may withhold that amount of bond necessary to correct deficiencies in the solid waste disposal site or facility [~~landfill~~] or its closure system.

(2) Bonds posted to assure performance and closure of landfarming facilities shall be released when the owner or operator [~~applicant~~] demonstrates to the cabinet's satisfaction that the site has been closed and is in compliance with 401 KAR 47:030, 401 KAR 48:300, and KRS Chapter 224.

(3) Bonds posted to assure proper closure care shall be released when the owner or operator demonstrates to the cabinet's satisfaction that the solid waste disposal site or facility has completed closure care activities in conformance with the approved closure care plan under Section 3 of 401 KAR 48:060, Section 13 of 401 KAR 48:090, or Section 3 of 401 KAR 48:170.

Section 15. [~~12.~~] Financial Assurance for Publicly-Owned Facilities. The owner or operator of a publicly-owned solid waste disposal facility shall provide a budget for the permitting, construction, operation, closure, and closure care of the facility. The budget shall be revised and submitted annually. When elements of the facility's permitting, construction, operation, closure, or closure care are to be accomplished by contract or agreement, a copy of the contract or agreement shall be submitted to the cabinet.

Section 16. Financial Assurance for Captive Facilities. (1) A solid waste disposal site or facility that is operated exclusively by a solid waste generator on property owned by the solid waste generator for the purpose of accepting industrial solid waste exclusively from the solid waste generator may meet the financial assurance requirements of this administrative regulation by completing a performance bond and submitting one (1) of the following financial assurance mechanisms: any of the five (5) mechanisms set forth in Section 7 of this administrative regulation; a corporate guarantee, in accordance with Section 17 of this administrative regulation and executed on DEP Form 6053-E; a corporate financial test, in accordance with Section 17 and executed on DEP form 6053-F; or any alternative mechanism that meets the criteria of Section 4 of this administrative regulation and is approved by the cabinet.

(2)(a) The following documents are hereby incorporated by reference:

1. DEP Form 6053-E, entitled "Corporate Guarantee for Closure or Closure Care" (July 1994); and

2. DEP form 6053-F, entitled "Letter from Chief Financial Officer on Corporate Financial Test" (July 1994).

(b) The documents referenced in paragraph (a) of this subsection may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays.

Section 17. Financial Test and Corporate Guarantee. (1) The owner of a captive facility as defined in Section 16 of this administrative regulation may satisfy the requirements of this administrative regulation by demonstrating that he passes a financial test as specified in this section. To pass this test, the owner or operator shall meet the criteria set forth in paragraph (a) and either paragraph (b) or (c) of this subsection:

(a) Less than fifty (50) percent of the parent corporations' gross revenues are derived from solid waste disposal operations.

(b) The owner or operator shall have:

1. Satisfaction of at least two (2) of the following ratios: a ratio of total liabilities to net worth less than two (2.0); a ratio of the sum of net income plus depreciation, depletion, and amortization to total liability greater than one-tenth (0.1); or a ratio of current assets to current liabilities greater than one and five-tenths (1.5);

2. Net working capital and tangible net worth each at least six (6) times the sum of the current closure and current closure care cost estimates;

3. Tangible net worth of at least ten (10) million dollars; and

4. Assets in the United States amounting to at least ninety (90) percent of total assets or at least six (6) times the sum of the current closure and current closure care cost estimates.

(c) The owner or operator shall have:

1. A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by "Standard and Poor's" or AAA, AA, A, or BAA as issued by "Moody's";

2. Tangible net worth as least six (6) times the sum of the current closure and current closure care cost estimates;

3. Tangible net worth of at least ten (10) million dollars; and

4. Assets located in the United States amounting to at least ninety (90) percent of total assets or at least six (6) times the sum of the current closure and current closure care cost estimates.

(2) The phrase "current closure and current closure care cost estimates" as used in subsection (1) of this section refers to the cost estimates required under Sections 2 and 3 of this administrative regulation and referenced in the letter from the owner or operator's chief financial officer.

(3) To demonstrate that requirements of this test are met, the owner or operator shall submit the following items to the cabinet:

(a) A letter signed by the owner or operator's chief financial officer and worded as specified on DEP Form 6053-F;

(b) A copy of a report by an independent certified public accountant examining the owner or operator's financial statements for the most recently completed fiscal year; and

(c) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

1. The auditor has compared the data that the letter from the chief financial officer specified as having been derived from the independently audited year-end financial statements for the most recent fiscal year with the amounts in such financial statements; and

2. In connection with that procedure, no matters came to his attention that caused him to believe that the specified data should be adjusted.

(4) After the initial submission of the items specified in subsection (3) of this section, the owner or operator shall send updated information to the cabinet not later than ninety (90) days after the close of each succeeding fiscal year. This information shall include all three (3) items specified in subsection (3) of this section.

(5) If the owner or operator no longer meets the requirements of subsection (1) of this section, notice shall be sent to the cabinet of the intent to establish alternate financial assurance, as specified in this administrative regulation. The notice shall be sent by certified mail no later than ninety (90) days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide that alternate financial assurance no later than 120 days after the end of that fiscal year.

(6) The cabinet may, based on a reasonable belief that the owner or operator no longer meets the requirements of subsection (1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (3) of this section. If the cabinet finds, on the basis of these reports or other information, that the owner or operator no longer meets the requirements of subsection (1) of this section, the owner or operator shall provide alternate financial assurance as specified in this administrative regulation no later than thirty (30) days after notification of this a finding.

(7) The cabinet may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified pubic accountant in his report on examination of the owner or operator's financial statements. An adverse opinion or disclaimer of

opinion shall be cause for disallowance. The cabinet shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this administrative regulation no later than thirty (30) days after notification of the disallowance.

(8) The owner or operator is no longer required to submit the items specified in subsection (3) of this section when:

(a) The owner or operator substitutes alternative financial assurance for closure or closure care specified in this administrative regulation; or

(b) The cabinet notifies the owner or operator, in accordance with Section 14 of this administrative regulation, that it is no longer required to maintain financial assurance for closure or closure care of the solid waste disposal site or facility.

(9) The owner or operator may meet the requirements of this section by obtaining a written guarantee, hereafter referred to as a "corporate guarantee". The guarantor shall be the parent corporation of the captive facility as defined in Section 16 of this administrative regulation. The guarantor shall meet the requirements for owners or operators in subsections (1) to (7) of this section and shall comply with the terms of DEP Form 6053-E. The corporate guarantee shall accompany the items sent to the director as specified in subsection (3) of this section. The terms of the corporate guarantee shall provide that:

(a) If the owner or operator fails to perform closure or closure care of a facility provided for by the corporate guarantee in accordance with the closure or closure care plan and permit requirements, the guarantor shall do so or shall establish a trust fund, in the name of the owner or operator, as specified in Section 12 of this administrative regulation;

(b) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the cabinet. Cancellation may not occur, however, during the 120-day period beginning on the first day that both the owner or operator and the cabinet have received notice of cancellation, as evidenced by the certified mail return receipts; and

(c) If the owner or operator fails to provide alternate financial assurance as specified in this administrative regulation, and fails to obtain the written approval of this alternate financial assurance from the cabinet not later than ninety (90) days after both the owner or operator and the cabinet have received notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide the alternate financial assurance in the name of the owner or operator.

Section 18. Financial Assurance for Corrective Action. (1) The owner or operator of a facility required to prepare and submit a groundwater corrective action plan under 401 KAR 48:300 shall prepare a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct the corrective action activities in accordance with the corrective action plan developed under 401 KAR 48:300. The corrective action cost estimate shall account for the total cost estimate of corrective action activities as described in the corrective action plan for the entire corrective action period. The cabinet shall annually adjust this estimate for inflation and other factors, until the corrective action program is completed in accordance with 401 KAR 48:300 and the approved plan.

(2) The owner or operator shall increase the corrective action cost estimate in the amount of financial assurance provided under subsection (1) of this section if changes in the corrective action plan or conditions at the solid waste disposal site or facility increased the maximum cost of corrective action.

(3) The owner or operator may request from the cabinet a reduction in the amount of corrective action cost estimate and the amount of financial assurance provided under subsection (1) of this section if the cost estimate exceeds the maximum remaining cost of corrective action.

(4) The owner or operator shall provide continuous coverage for corrective action until released from the financial requirements for corrective action under subsection (7) of this section.

(5) Within 120 days of approval of the corrective action plan, the owner or operator shall post a performance bond executed on DEP Form 6053-G, entitled "Performance Bond for Corrective Action" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays. The owner or operator shall also post one (1) or a combination of the following financial assurance mechanisms in the amount set forth in the corrective action cost estimate:

(a) A surety bond executed on DEP Form 6053-G;

(b) A trust fund executed on DEP Form 6053-J, entitled "Trust Agreement for Corrective Action" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays;

(c) A letter of credit executed on DEP Form 6053-H, entitled "Irrevocable Letter of Credit for Corrective Action" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays;

(d) An escrow agreement executed on DEP Form 6053-I, entitled "Escrow Agreement for Corrective Action" (July 1994), which is hereby incorporated by reference. This document may be obtained from the Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716, from 8 a.m. to 4:30 p.m., eastern time, Monday through Friday, excluding state holidays;

(e) Any other financial assurance mechanism that complies with subsections (1) to (4) of this section and is approved by the cabinet.

(6) The owner or operator may satisfy the requirements of this section by establishing one (1) or more of the financial mechanisms listed in subsection (5) of this section.

(7) The financial insurance mechanisms posted to assure performance of the corrective action required under 401 KAR 48:300 shall be released when the owner or operator demonstrates to the cabinet's satisfaction that the groundwater corrective action plan's remedial measures have been completed and that the facility is in compliance with 401 KAR 48:300 and KRS Chapter 224.

Section 19. Use of Multiple Financial Mechanisms at Single Facilities and Single Mechanisms at Multiple Facilities. (1) The owner or operator may satisfy the requirements of this administrative regulation by establishing more than one (1) financial mechanism for each facility. These mechanisms are limited to trust funds, escrow agreements, surety bonds, letter of credit, and insurance. The mechanisms shall be as specified in Sections 8 to 12 of this administrative regulation respectively, except that it is the combination of mechanisms, rather than each single mechanisms, that shall provide financial assurance for an amount at least equal to the current closure or closure care cost estimates. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he may use the trust fund as a standby trust fund for the other mechanisms.

(2) The owner or operator may use a financial assurance mechanism specified in this administrative regulation to meet the requirements of this regulation for more than one (1) facility. Evidence of financial assurance submitted to the cabinet shall include a list showing, for each facility, the name, address, and amount of funds for closure and closure care assurance by the financial mechanism. The amount of funds available through the financial mechanism shall be no less than the sum of the funds that would be available if a separate financial mechanism had been established and maintained for each facility. In directing funds available through the financial

mechanism for closure or closure care of any of the facilities provided for by the financial mechanism, the cabinet may direct only the amount of funds designated for the facility, unless the owner or operator agrees to the use of additional funds available under the financial mechanism.

[APPENDIX A TO 401 KAR 48:310
COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
DIVISION OF WASTE MANAGEMENT
18 REILLY ROAD
FRANKFORT, KY 40601
PERFORMANCE BOND

Application Number: _____
Existing Permit Number: _____
Type of Bond:
_____Cash Bond
_____Surety Bond # _____
_____Certificate of Deposit # _____
_____Letter of Credit # _____

KNOW ALL PERSONS BY THESE PRESENTS, that the undersigned, _____, as Principal, and _____, as Surety, is/are held and firmly bound unto the Natural Resources and Environmental Protection Cabinet in the penal sum of _____ dollars ($_____), _____ which sum is herewith deposited with the Natural Resources and Environmental Protection Cabinet; _____ for payment of which sum is to be well and truly made: _____ which sum is herewith deposited with the Natural Resources and Environmental Protection Cabinet, by and through its Escrow Agent, _____ as a grantee that the provisions of the permit issued pursuant to Application Number _____, all applicable laws, rules, and regulations will be observed and hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. This bond is effective upon receipt by the Division of Waste Management (hereinafter Division).

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that, whereas, the above bound Principal, pursuant to the provisions of KRS Chapter 224 and 401 KAR Chapters 47 and 48 did file with the Division, an application for a permit to construct and/or operate a solid waste site or facility in the Commonwealth of Kentucky; that in said application the Principal identified the area to be permitted as _____ acres, located in _____ County, at or near the community of _____; and whereas the above described area will be affected by the facility during the life of the permit and until the Principal has completed proper closure and closure care; and corrective action, if required, and Cabinet, or, in the case of contained landfills, a professional engineer and Cabinet, has certified the same. Furthermore, it is understood that the obligation under this bond extends to environmental degradation occurring off the permitted area but proximately resulting from the construction, operation or closure of the solid waste site or facility.

Now, if said _____, as Principal, shall faithfully perform all the requirements of the above designated application, the permit issued pursuant thereto and the applicable laws, rules, and regulations, and the terms of this bond, then this obligation shall be released; otherwise, it is agreed that said penal sum shall be paid to the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, upon receipt of an Order of the Cabinet.

PRINCIPAL: _____ BY: _____
OFFICIAL POSITION: _____ DATE: _____

Subscribed and sworn to before me by _____ this the _____ day of _____, 19___.

_____
Notary Public, State at Large

My commission expires the _____ day of _____, 19___.

COMPLETE FOR SURETY BOND:
SURETY:
ADDRESS:
LOCAL AGENCY ISSUING BOND:
ADDRESS:
BY:
OFFICIAL POSITION:
SIGNATURE:
DATE:
NOTE: The person who signs for a surety company shall file with the bond a copy of the Power of Attorney showing authority to sign. All bonds executed by an out of state bonding agent shall be countersigned by a resident Kentucky agent.
COUNTERSIGNED
BY:
AGENT FOR:
ADDRESS:

APPENDIX B TO 401 KAR 48:310
IRREVOCABLE LETTER OF CREDIT

_____
(financial institution)

COMMONWEALTH OF KENTUCKY
Natural Resources and
Environmental Protection Cabinet
Department for Environmental Protection
Division of Waste Management
18 Reilly Road
Frankfort, Kentucky 40601

Date: _____
IRREVOCABLE LETTER OF CREDIT NO: _____

Gentlemen:

We hereby open our irrevocable letter of credit in your favor for the account of _____ for a sum or sums not exceeding a total of _____ dollars ($_____) available by your draft(s) on us at sight when accompanied by a Natural Resources and Environmental Protection Cabinet Order of Forfeiture.

It is a condition of this Letter of Credit that it will be automatically extended for additional periods of up to one (1) year from the then relevant expiry date unless thirty (30) days prior to that relevant expiry date, we notify you that we elect not to extend this Letter of Credit whereupon you may elect either to obtain cash collateral by drawing your on sight draft on us for an amount not to exceed the unused balance of this Letter of Credit, or to let the Letter of Credit expire. For the purposes of this credit, our notice not to extend shall mean:

1. That we send our notification to you at the above listed address by registered mail (return receipt requested) dated not less than thirty (30) days prior to expiration; and

2. That, in the event, prior to fifteen (15) days before the then relevant expiry date, we have not received either your draft or your written notice that you do not intend to draw from your draft on us, we will hand deliver our notification to obtain a receipt from: Director, Division of Waste Management, Natural Resources and Environmental Protection Cabinet, or that official's designated representative, not less than five (5) days prior to the then relevant expiry date. In the event we shall have failed to notify you as described above, this Letter of Credit shall be automatically extended for a period of one (1) year; and

3. That, in the event you draw your draft upon us in response to our notice not to extend, such draft need not be accompanied by an Order of Forfeiture.

Drafts must be negotiated not later than _____. All drafts drawn

under this credit shall state that they are "drawn under _____, dated _____, associated with permit number.

This Letter of Credit is subject to the Uniform Commercial Code of the Commonwealth of Kentucky. Jurisdiction for any litigation concerning this Letter of Credit shall be in Franklin Circuit Court, Commonwealth of Kentucky.

In the event we become unable to fulfill our obligations under the Letter of Credit for any reason, notice shall be given within five (5) days to the Permittee and Director, Division of Waste Management, at the address indicated in this Letter of Credit.

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that such drafts will be duly honored on due presentation to the drawee.

BY: _____

Authorized Signer

_____

Title

APPENDIX C TO 401 KAR 48:310
COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
DIVISION OF WASTE MANAGEMENT
18 REILLY ROAD
FRANKFORT, KY 40601
ESCROW AGREEMENT

THIS AGREEMENT, made, executed, and delivered this the _____ day of _____, 19___, by and between _____, as Applicant, and _____, and the Kentucky Natural Resources and Environmental Protection Cabinet (hereinafter Cabinet).

WITNESSETH:

WHEREAS, Applicant desires to obtain a permit to construct and/or operate a solid waste site or facility in the Commonwealth of Kentucky; and

WHEREAS, the laws of the Commonwealth require that a bond be posted to insure proper closure, closure care of the facility and if required, corrective action to guarantee performance of the requirements in KRS Chapter 224 and the regulations promulgated pursuant thereto, and

WHEREAS, the Applicant desires to meet the bonding requirements for constructing and/or operating a solid waste site or facility in the Commonwealth of Kentucky by executing such bond and posting surety in the sum of _____ dollars ($_____) with the Cabinet to be held by Escrow Agent, which sum is hereby acknowledged by the Cabinet to be sufficient and acceptable for the permit application number _____, relating to _____ acres located at _____ in _____ County, Kentucky; and

WHEREAS, such sum shall be placed in the safe custody of the Escrow Agent and the Agent is directed to purchase certificates of deposit of the _____, which certificates of deposit are hereinafter referred to as The Certificates, and are more fully described as follows, to wit:

CERTIFICATE NO. DATE OF ISSUANCE PRINCIPAL AMT.

AND WHEREAS, this Agreement is a supplement to the bond filed by the Applicant with permit application number _____ for a permit to construct and/or operate a solid waste site or facility.

NOW, THEREFORE, in consideration of the premises set forth herein, the parties hereto mutually agree as follows:

1. The Escrow Agent hereby acknowledges receipt of The Certificates above listed, to be safely and securely kept for the stated purposes of this Agreement and subject to the terms and conditions herein, and hereby binds itself to perform completely under the terms of this Agreement and to dispose of The Certificates or the proceeds therefrom only as provided herein. The Escrow Agent further agrees to exercise due care in the safekeeping and delivery of The Certificates;

2. The parties agree The Certificates or any subsequent Certificates are and shall be made payable in favor of the Escrow Agent only and the parties further agree that until such time as the Cabinet orders that the bond for the permit application be forfeited or until such time as the bond is released, all interest accruing on The Certificates shall be disposed of in accordance with paragraphs 4 and 5 of this Agreement;

3. The parties agree that the Escrow Agent is hereby authorized and directed to insure that The Certificates remain in full force during the term of this Agreement and the Escrow Agent may, upon notice to all parties, and upon the maturity of The Certificates, issue new Certificates of face value equal to the outstanding amount of the bond. In the event of such issuance, the new Certificates shall replace The Certificates herein for all purposes and shall be subject to the conditions of this Agreement;

4. Any interest accruing on The Certificates shall be held by the Escrow Agent until such time as the bond has been released or forfeited or The Certificates have matured and been replaced by new Certificates. No interest shall be paid to the Applicant on any Certificate until such time as the Certificate matures or a full release has been obtained from the Cabinet or until the bond has been forfeited and any penalty resulting from the cashing of the Certificate has been satisfied;

5. In the event of forfeiture of the performance bond herein and upon the Cabinet's written notice of such forfeiture to the Escrow Agent, the Escrow Agent shall promptly cash The Certificates and forward to the Cabinet a Cashier's Check in the outstanding amount of the bond, pay any penalties which result from the cashing of The Certificates from the interest accrued thereon, and remit any remaining interest and principal to the Applicant;

6. The parties agree that neither the Escrow Agent nor the Cabinet shall be liable for any loss of interest which may result to the Applicant as a result of an Order of Forfeiture;

7. The Escrow Agent shall not be liable for inquiring whether there has been performance by the Applicant or to see the application of any monies paid on the instruction of the Cabinet and in such matters the Escrow Agent may rely upon the instructions of the Cabinet executed by the Secretary of the Cabinet, his designee, or his successor or the successor agency as provided by law. The Escrow Agent need not verify the apparent authority of an agent of the Cabinet in carrying out the Cabinet's instructions. Nothing herein shall prevent the Commonwealth from designating a person authorized to act for it in any other lawful manner;

8. That for value received the Applicant does hereby assign, transfer, and set over to the Commonwealth of Kentucky all right, title, and interest which the Applicant may have in The Certificates. The parties agree that The Certificates are being held solely for the benefit of the Commonwealth of Kentucky and that the Applicant has relinquished all right, title, and interest to The Certificates as provided herein. The Applicant may not pledge or encumber in any manner The Certificates or any renewal certificates, or the interest due thereon, so long as the same are subject to the conditions of the bond herein;

9. The Cabinet agrees that upon completion of proper closure and closure care, or corrective action of or for the solid waste site or facility and upon the Cabinet's inspection and certification of same and in the case of contained landfills, upon certification by a professional engineer, the Cabinet shall release the bond herein and promptly notify the Escrow Agent and the Applicant of such release.

10. It is agreed, as between the parties, that in the event the Escrow Agent closes or goes into receivership, any Federal Deposit

~~Insurance Corporation, Federal Savings and Loan Insurance Corporation, or National Credit Union Administration insurance proceeds paid on, to, or as a result of The Certificates, shall first be applied to cover The Certificates;~~

~~11. The parties agree that the Escrow Agent shall be the Cabinet's agent for holding The Certificates for the purpose of perfecting the Cabinet's security interest in these Certificates under KRS Chapter 355.~~

~~12. This agreement shall be binding upon the successors and assigns of the respective parties; and~~

~~13. Upon receipt by the Escrow Agent of written notification by the Cabinet of the forfeiture or the release of the bond herein, and disbursement pursuant to this agreement by the Escrow Agent of written notification by the Cabinet of the forfeiture or the release of the bond herein, and disbursement pursuant to this agreement by the Escrow Agent of The Certificates or the proceeds therefrom and any interest accrued thereon, the Escrow Agent shall be discharged of any and all duties and liabilities arising out of or as a result of this Agreement.~~

~~SIGNED, SEALED, AND DELIVERED, the day and date first above written by the appropriately authorized officers.~~

~~APPLICANT:~~

~~BY:~~

~~TITLE:~~

~~ESCROW AGENT:~~

~~BY:~~

~~TITLE:~~

~~NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET~~

~~BY:~~

~~TITLE:]~~

PHILLIP J. SHEPHERD, Secretary
E. DOUGLAS STEPHAN, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 14, 1994 at 8 a.m.

PUBLIC HEARING: A public hearing to receive comments on this proposed administrative regulation has been scheduled for Thursday, August 25, 1994, at 10 a.m. eastern time in the auditorium of the Capital Plaza Tower, Frankfort, Kentucky. Individuals interested in being heard at this hearing must notify James Hale in writing at the address noted below, by August 20, 1994 of their intent to attend the hearing. If no notification of intent to attend the hearing is received by that date, the hearing will be cancelled. This hearing is open to the public. Any person wishing to be heard will be given an opportunity to comment on the proposed administrative regulation. Persons testifying at the hearing are requested to provide a written copy of their testimony, if available. A transcript of the hearing will not be made unless a written request for a transcript is filed with Mr. Hale by August 20, 1994. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments must be received by Mr. Hale no later than 4:30 p.m. eastern time on August 25, 1994. The Department for Environmental Protection does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities. Requests for reasonable accommodation for this public hearing, such as an interpreter or alternate formats for printed materials, must be submitted to Mr. Hale at the address below by August 20, 1994.

CONTACT: James Hale, Division of Waste Management, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-6716.

REGULATORY IMPACT ANALYSIS

Agency contact: James Hale

(1) Type and number of entities affected: This proposed amendment would provide the forms for all of the financial assurance mechanisms allowed by KRS 224.40-110 and Subtitle D. There are currently 24 permit applications pending for contained landfills. This amendment is being proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

(a) Direct and indirect costs or savings to those affected:

1. First year: This proposed amendment includes the financial instruments allowed by KRS 224.40-110 and 224.40-650. This amendment is proposed for administrative purposes in compliance with KRS Chapter 13A.

2. Continuing costs or savings: There is no continuing costs or savings.

3. Additional factors increasing or decreasing costs (note any effects upon competition); There are no additional factors.

(b) Reporting and paperwork requirements: The additional paperwork requirements will be the result of having standardized forms to be used for the financial assurance instruments authorized by KRS 224.40-110.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: This proposed amendment would have no financial impact on the cabinet.

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: There are no additional factors.

(b) Reporting and paperwork requirements: This amendment would increase the number of forms used by the cabinet for financial assurance instruments.

(3) Assessment of anticipated effect on state and local revenues: this amendment will not impact state or local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: This amendment is required pursuant to an EPA deficiency in Kentucky's solid waste program as cited at 58 FR 35454 et seq. (July 1, 1993). The amendment comports with federal provisions at 40 CFR 258.10 and KRS Chapter 13A.

(5) Identify any statute, administrative regulation or government policy which may conflict, overlap or duplicate: There are no statutes, administrative regulations, or policies that conflict with, overlap, or duplicate the provisions of this amendment.

(a) Necessity of proposed regulation if in conflict: There is no conflict.

(b) If in conflict, was an effort made to harmonize the proposed regulation with conflicting provisions: There is no conflict.

(6) Any additional information or comments: None

Tiering: Was tiering applied? Yes. This amendment allows the use of additional financial instruments to finance the cost of contained landfills, which is consistent with what is required under the state and federal regulations.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate: This proposed amendment is equivalent to 40 CFR 258 Subpart G. The Resource Conservation and Recovery Act mandates that authorized state programs be consistent with and no less stringent than the federal program. This amendment is proposed pursuant to a deficiency in Kentucky's program cited at 58 FR 35454 et seq. (July 1, 1993).

2. State compliance standards: This amendment complies with KRS 224.43-340 which requires the Cabinet to promulgate administrative regulations for the reduction and management of solid waste and KRS 224.40-110 which allows the cabinet to accept the Subtitle D financial assurance mechanisms for closure, postclosure and corrective action.

3. Minimum or uniform standards contained in the federal

mandate: This proposed amendment is consistent with the provisions of 40 CFR 258 Subpart G.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining Reclamation and Enforcement
(Proposed Amendment)

405 KAR 7:015. Documents incorporated by reference.

RELATES TO: KRS Chapter 350

STATUTORY AUTHORITY: KRS Chapter 13A, 350.028, 350.465

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to adopt administrative regulations pertaining to surface coal mining and reclamation operations under the permanent regulatory program. This administrative regulation provides for incorporation by reference of documents referred to in these administrative regulations and other documents relied on by the cabinet in implementing the permanent regulatory program.

Section 1. Reclamation Advisory Memoranda. The following Reclamation Advisory Memoranda (RAM) issued by the cabinet are incorporated herein by reference for the purposes of 405 KAR Chapters 7 through 24. Copies may be obtained from the cabinet. If there is a conflict between these documents on a particular item, the document of later date shall prevail.

(1) RAM No. 56, "Overlapping Permits," December 1, 1982.

(2) RAM No. 73, "Delayed Filing of Performance Bonds on Technically Acceptable Applications for Transitioning Permanent Program Permits," February 6, 1984.

(3) RAM No. 75, "Permanent Program Performance Standards Take Effect March 16, 1984 on Transitioning Operations," March 12, 1984.

(4) RAM No. 76, "Revision to RAM No. 73: Maximum Period of Bond Deferral Reduced from 5 Years to 3 Years," April 2, 1984.

(5) RAM No. 77, "Reinstatement of Small Operator Assistance," April 2, 1984.

(6) RAM No. 78, "Departmental Policies: Withdrawal and Maintenance of Mining Permit Applications," April 23, 1984.

Section 2. Technical Reclamation Memorandum. The following Technical Reclamation Memorandum (TRM) issued by the cabinet is incorporated herein by reference for the purposes of 405 KAR Chapters 7 through 24. Copies may be obtained from the department: TRM No. 1, "Existing Structures," October 22, 1982.

Section 3. [~~Penalty Assessment Manual. The following document issued by the cabinet is incorporated herein by reference for the purposes of 405 KAR Chapters 7 through 24. Copies may be obtained from the cabinet. "Penalty Assessment Manual," July 1983.~~

~~Section 4.~~] Documents Referred to Within These Administrative Regulations. The following documents which are referred to within 405 KAR Chapters 7 through 24 are incorporated by reference for the purposes of 405 KAR Chapters 7 through 24.

(1) "Standard Methods for the Examination of Water and Wastewater," fourteenth edition, 1976. Prepared by American Public Health Association, American Water Works Association, and Water Pollution Control Federation. Copies may be obtained from American Public Health Association, 1015 Eighteenth Street NW, Washington, D.C. 20036.

(2) "Methods for Chemical Analysis of Water and Wastes," March 1979, U.S. Environmental Protection Agency. Copies may be obtained from U.S. Environmental Protection Agency, Environmental Monitoring and Support Laboratory, 26 W. St. Clair Street, Cincinnati, Ohio 45268.

(3) "Soil Taxonomy," Agriculture Handbook 436, 1975, U.S.D.A. - Soil Conservation Service. Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(4) "Soil Survey Manual," Agriculture Handbook No. 18, 1951, U.S. Department of Agriculture. Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(5) "ASTM STANDARD D388-77, Standard Specification for Classification of Coal by Rank," 1977, American Society for Testing and Materials. Copies may be obtained from American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19103.

(6) ANSI S1.4-1971, "Specification for Sound Level Meters," 1971, American National Standards Institute, Inc. Copies may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, NY.

(7) AASHTO T99-74, "Standard Methods of Test for the Moisture-Density Relations of Soils Using 5.5 lb. (2.5 Kg) Rammer and a twelve (12) in. (305 mm) Drop," 1974, American Association of State Highway and Transportation Officials. Copies may be obtained from American Association of State Highway and Transportation Officials, 444 N. Capitol Ave., Washington, D.C. 20001.

Section 4. [~~5.~~] Permit Application Review Procedures. The following Permit Application Review Procedures (PARP) issued by the cabinet are incorporated herein by reference for the purposes of 405 KAR Chapters 7 through 24. Copies may be obtained from the cabinet.

(1) PARP No. 2, "Lands within 100 feet, measured horizontally, of a cemetery," April 18, 1983.

(2) PARP No. 6, "Advertising Schedule Variance," July 29, 1983.

Section 5. [~~6.~~] Policy Memorandum. The following policy memorandum issued by the cabinet is incorporated herein by reference for the purposes of 405 KAR Chapters 7 through 24. Copies may be obtained from the cabinet. Departmental Policy Memorandum No. 81-003, "Conflict of Interest," June 19, 1981.

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994

FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (Eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (Eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency Contact: Jim Villines

(1) Type and number of entities affected: This regulation applies to permanent program surface coal mining and reclamation operations in Kentucky. It also indirectly affects the general public in the coal field regions. However, this amendment has little effect since it merely deletes the "Penalty Assessment Manual," July 1983 which was incorporated by reference. This document is being superseded by an amendment to the Cabinet's regulation on assessment of civil penalties at 405 KAR 7:095. See the regulatory impact analysis for 405 KAR 7:095 for a discussion of that amendment.

(a) Direct and indirect costs or savings to those affected:

1. First year: None
2. Continuing costs or savings: None
3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: None
2. Continuing costs or savings: None
3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternatives were considered.

(5) Identify any statute, rule, regulation or governmental policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed regulation with conflicting provisions: Not applicable

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining Reclamation and Enforcement
(Proposed Amendment)

405 KAR 7:095. Assessment of civil penalties.

RELATES TO: KRS 350.990(1), 30 CFR Parts 730-733, 735, 845, 917, 30 USC 1268

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.465, 350.990(1), 30 CFR Parts 730-733, 735, 845, 917, 30 USC 1268

NECESSITY AND FUNCTION: KRS 350.990(1) directs the cabinet to promulgate an administrative regulation setting forth the method for calculating monetary penalties. This regulation establishes how and when penalties will be assessed and includes a point system for calculating penalties, rules for assessing continuing violations, and a provision allowing waiver of the point system.

Section 1. How Penalty Assessments are Made. The cabinet shall review each violation, condition or practice cited in a notice of noncompliance and order for remedial measures or order of cessation and immediate compliance in accordance with the assessment procedures described in 405 KAR 7:092 and this administrative regulation to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

Section 2. When Penalty Will be Assessed. (1) The cabinet shall assess a penalty for each violation, condition or practice cited in an order of cessation and immediate compliance.

(2) The cabinet shall assess a penalty for each violation cited in a notice of noncompliance and order for remedial measures, if the violation is assigned thirty-one (31) points or more under the point system described in Section 3 of this administrative regulation.

(3) The cabinet may assess a penalty for each violation cited in a notice of noncompliance and order for remedial measures if the violation is assigned thirty (30) points or less under the point system described in Section 3 of this administrative regulation. In determining whether to assess a penalty, the cabinet shall consider the factors listed in 405 KAR 7:092, Section 3(2).

Section 3. Point System for Penalties. The cabinet shall use the point system described in this section to determine the amount of any penalty. Points shall be assigned as follows:

(1) History of previous violations. The cabinet shall assign up to thirty (30) points based on the history of previous violations.

One (1) point shall be assigned for each past violation cited in a notice of noncompliance and order for remedial measures. Five (5) points shall be assigned for each violation (but not a condition or practice) cited in an order of cessation and immediate compliance. The history of previous violations, for the purpose of assigning points, shall be determined and the points assigned with respect to a particular coal exploration or surface coal mining operation. Points shall be assigned as follows:

(a) A violation shall not be counted, if the notice or order is the subject of pending administrative or judicial review or if the time to request such review or to appeal any administrative or judicial decision has not expired, and thereafter it shall be counted for only one (1) year.

(b) No violation for which the notice or order has been vacated shall be counted; and

(c) Each violation shall be counted without regard to whether it led to a civil penalty assessment.

(2) Seriousness. The cabinet shall assign up to thirty (30) points based on the seriousness of the violation, as follows:

(a) Probability of occurrence. The cabinet shall assign up to fifteen (15) points based on the probability of the occurrence of the event which a violated standard is designed to prevent. Points shall be assessed according to the following schedule:

1. No probability of occurrence; zero points.
2. Insignificant probability of occurrence; one (1) to four (4) points.
3. Unlikely probability of occurrence; five (5) to nine (9) points.
4. Likely probability of occurrence; ten (10) to fourteen (14) points.
5. Occurred; fifteen (15) points.

(b) Extent of potential or actual damage. The cabinet shall assign up to fifteen (15) points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as follows:

1. If the damage or impact which the violated standard is designed to prevent would remain within the coal exploration or permit area, the cabinet shall assign zero to seven (7) points, depending on the duration and extent of the damage or impact.
2. If the damage or impact which the violated standard is designed to prevent would extend outside the coal exploration or

permit area, the cabinet shall assign eight (8) to fifteen (15) points, depending on the duration and extent of the damage or impact.

(c) Administrative requirements. In the case of a violation of an administrative requirement, such as a requirement to keep records, the cabinet shall, in lieu of paragraphs (a) and (b) of this subsection, assign up to fifteen (15) points for seriousness, based upon the extent to which enforcement is obstructed by the violation.

(3) Negligence. The cabinet shall assign up to twenty-five (25) points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

(a) A violation, condition or practice which occurs through no negligence shall be assigned no penalty points for negligence. No negligence means an inadvertent violation, condition or practice which was unavoidable by the exercise of reasonable care.

(b) A violation, condition or practice which is caused by negligence shall be assigned twelve (12) points or less, depending on the degree of negligence. Negligence means the failure of a permittee to prevent the occurrence of the violation, condition or practice due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation, condition or practice due to indifference, lack of diligence, or lack of reasonable care.

(c) A violation, condition or practice which occurs through a greater degree of fault than negligence shall be assigned thirteen (13) to twenty-five (25) points, depending on the degree of fault. A greater degree of fault than negligence means reckless, knowing, or intentional conduct.

(4) Good faith in attempting to achieve compliance. The cabinet shall subtract up to fifteen (15) points based on the degree of good faith of the person to whom the notice or order was issued in attempting to achieve rapid compliance after notification of the violation, condition or practice. Points shall be subtracted as follows:

(a) Rapid compliance. Six (6) to fifteen (15) points shall be subtracted from the total points if the person to whom the notice or order was issued took extraordinary measures to abate the violation, condition or practice in the shortest possible time and that abatement was achieved before the time set for abatement.

(b) Normal compliance. Zero to five (5) points shall be subtracted from the total points if the person to whom the notice or order was issued abated the violation, condition or practice by the abatement date.

Section 4. Determination of Amount of Penalty. For each violation, condition, or practice cited in a notice or order, the cabinet shall determine the amount of any civil penalty by converting the total number of points assigned under Section 3 of this administrative regulation to a dollar amount, according to the schedule in Appendix A of this administrative regulation.

Section 5. Assessment of Separate Violations for Each Day. (1) The cabinet may assess separately a civil penalty for each day from the date of issuance of the notice or order to the date of abatement of the violation. In determining whether to make such an assessment, the cabinet shall consider the factors listed in 405 KAR 7:092, Section 3(2) and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two (2) or more days and which is assigned more than seventy (70) points under Section 3 of this administrative regulation, the cabinet shall assess a civil penalty for a minimum of two (2) separate days.

(2) Whenever a violation, condition or practice contained in a notice of noncompliance and order for remedial measures or order for cessation and immediate compliance has not been abated within the abatement period set in the notice or order, a civil penalty of not less than $750 shall be assessed for each day during which such failure continues according to the provisions of 405 KAR 7:092, Section 13(2).

Section 6. Waiver of Use of Point System to Determine Civil Penalty. (1) The cabinet upon its own initiative, or upon a written request by the person to whom the notice or order was issued that is received within fifteen (15) days of mailing of the proposed penalty assessment, may waive the use of the point system contained in Section 3 of this administrative regulation to set the civil penalty, if the cabinet determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust. However, the cabinet shall not waive the use of the point system or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate the violation, condition or practice. The basis for every waiver shall be fully explained and documented in the records of the case.

(2) If the cabinet waives the use of the point system, it shall use the criteria set forth in 405 KAR 7:092, Section 3(2) to determine the appropriate penalty. When the cabinet has elected to waive the use of the point system, it shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.

Section 7. Procedures for Assessment of Civil Penalties Document. "Procedures for Assessment of Civil Penalties", Kentucky Department for Surface Mining Reclamation and Enforcement, June 15, 1994, is hereby incorporated by reference. This document may be reviewed or a copy may be obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky, 40601, Monday through Friday, 8 a.m. through 4:30 p.m.

APPENDIX A OF 405 KAR 7:095

Penalty Schedule

Point	Dollars	Points	Dollars
1	20	36	1,600
2	40	37	1,700
3	60	38	1,800
4	80	39	1,900
5	100	40	2,000
6	120	41	2,100
7	140	42	2,200
8	160	43	2,300
9	180	44	2,400
10	200	45	2,500
11	220	46	2,600
12	240	47	2,700
13	260	48	2,800
14	280	49	2,900
15	300	50	3,000
16	320	51	3,100
17	340	52	3,200
18	360	53	3,300
19	380	54	3,400
20	400	55	3,500
21	420	56	3,600
22	440	57	3,700
23	460	58	3,800
24	480	59	3,900
25	500	60	4,000
26	600	61	4,100
27	700	62	4,200
28	800	63	4,300
29	900	64	4,400
30	1,000	65	4,500
31	1,100	66	4,600
32	1,200	67	4,700

33	1,300	68	4,800
34	1,400	69	4,900
35	1,500	70 and above	5,000

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994

FILED WITH LRC: July 14, 1994 at 3 p.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (Eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (Eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency Contact: Jim Villines

(1) Type and number of entities affected: This administrative regulation establishes the method for calculating monetary penalties for violations of KRS Chapter 350. This amendment is being made to incorporate by reference a manual "Procedures for Assessment of Civil Penalties," Kentucky Department for Surface Mining Reclamation and Enforcement, June 15, 1994, which further explains the assessment process. The two major entities affected by this regulation are the coal mining industry and the general public in the coal field regions.

(a) Direct and indirect costs or savings to those affected: None. See (6) below.

1. First year: None. See (6) below.

2. Continuing costs or savings: None. See (6) below.

3. Additional factors increasing or decreasing costs: (Note any affects upon competition): None. See (6) below.

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body: None. See (6) below.

(a) Direct and indirect costs or savings:

1. First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: None

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternatives were considered.

(5) Identify any statute, rule, regulation or governmental policy which may be in conflict, overlapping, or duplication: None

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments: This amendment to 405 KAR 7:095 merely incorporates by reference a manual "Procedures for Assessment of Civil Penalties," Kentucky Department for Surface Mining Reclamation and Enforcement, June 15, 1994. The manual contains an explanation of the assessment process and the procedures used by the cabinet in assessing penalties. These procedures are those that are currently in place; thus, there will be no impact on the industry, public, or the cabinet.

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment to administrative regulation because it is an incorporation of a document by reference and under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all regulated persons under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. 30 USC 1268, 30 CFR 845

2. State compliance standards. This administrative regulation establishes procedures for the assessment of civil penalties pursuant to KRS 350.990. This proposed amendment incorporates by reference a document "Procedures for Assessment of Civil Penalties," Department for Surface Mining Reclamation and Enforcement, June 15, 1994, which further explains the penalty assessment process. The document includes: a general description of the assessment process; an explanation of the assessment factors; the assessment mechanism, including the assessor's statement and assessment worksheet; and the application of the assessment factors to specific violations.

3. Minimum or uniform standards contained in the federal mandate. The federal mandate establishes procedures for the assessment of civil penalties, including the use of a point system. This administrative regulation contains the same standards for the assessment of civil penalties as the federal mandate.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. The standards, responsibilities, and requirements are the same as the federal counterparts.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining Reclamation and Enforcement
(Proposed Amendment)

405 KAR 10:010. General requirements for performance bond and liability insurance.

RELATES TO: KRS 350.020, 350.060, 350.062, 350.064, 350.151, 350.465, 30 CFR Parts 730-733, 735, 800.11, 800.60, 917, 30 USC 1253, 1255

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.060, 350.064, 350.151, 350.465, 30 CFR Parts 730-733, 735, 800.11, 800.60, 917, 30 USC 1253, 1255

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to regulate surface coal mining and reclamation operations, including requiring bond sufficient to insure satisfactory reclamation. This administrative regulation sets forth the general requirements for performance bonds and liability insurance. This administrative regulation further sets out general minimum require-

ments for filing and maintaining bonds and insurance for surface coal mining and reclamation operations, and general requirements for various bonding methods.

Section 1. Applicability. This chapter sets forth the minimum requirements for filing and maintaining performance bonds and insurance for surface coal mining and reclamation operations under KRS Chapter 350.

Section 2. Requirement to File a Bond. (1) An applicant shall not disturb surface acreage or extend any underground shafts, tunnels, or operations prior to receipt of approval from the cabinet of a performance bond covering areas to be affected by surface operations and facilities.

(2) After an application for a new, amended, revised or renewed permit to conduct surface coal mining and reclamation operations has been approved under Title 405, Chapter 8, but before the [~~such~~] permit is issued, the applicant shall file with the cabinet, on a form prescribed and furnished by the cabinet, a performance bond payable to the cabinet. The performance bond shall be conditioned upon the faithful performance of all the requirements of KRS Chapter 350, Title 405, Chapters 7 through 24, and the provisions of the reclamation plan and permit, and shall cover all surface coal mining and reclamation operations to be conducted within the permit area or increment thereof until all reclamation requirements of Title 405, Chapters 7 through 24 have been met. The amount, duration, type, conditions and terms of the performance bond shall conform to 405 KAR 10:020 and 405 KAR 10:030.

(3) No permit shall be revised or amended to include additional area unless the liability of the current bond(s) is extended to cover the entire permit area or increment as revised or amended, and the liability of the supplemental bond(s) covers the entire permit area as revised or amended. Unless these conditions are met with respect to the bond(s), the additional area shall [~~must~~] be permitted as a separate increment of the current permit area or under a new permit.

(4) A rider to the applicable performance bond, confirming coverage of the revision, shall be submitted by the applicant if a revision to a permit does not change the acreage of the permit area or increment but:

(a) Adds a coal washer, a crush and load facility, a refuse pile, or a coal mine waste impoundment to the existing permit; or

(b) Alters the boundary of a permit area or increment.

Section 3. Bonding Methods. The method of performance bonding for a permit area shall be selected by the applicant and approved by the cabinet prior to the issuance of a permit, and shall consist of one (1) of the following methods:

(1) Method "S" - single area bonding. A single area bond is a bond which covers the entire permit area as a single undivided area, for which the applicant shall [~~must~~] file the entire bond amount required by the cabinet prior to issuance of the permit. Liability under the bond shall extend to every part of the permit area at all times. Except as provided in 405 KAR 10:020, Section 3(2) regarding extended bond liability, there shall be no release of all or part of the bond amount for completion of a particular phase of reclamation on any part of the permit area under 405 KAR 10:040 until that phase of reclamation has been successfully completed on the entire permit area.

(2) Method "I" - incremental bonding. Incremental bonding is a method of bonding in which the permit area is divided into individual increments, each of which is bonded separately and independently, and for which bond is filed as operations proceed through the permit area.

(a) The permit area shall be divided into distinct increments which shall be subject to approval by the cabinet. Each increment shall be of sufficient size and configuration to provide for efficient reclamation operations should reclamation operations by the cabinet become necessary. If [~~Where~~] the approved postmining land use is of such nature that successful implementation of the postmining land use capability depends upon an area being integrally reclaimed, then that area shall [~~must~~] be contained within a single increment. These increments shall be clearly identified on maps submitted in the permit application under Title 405, Chapter 8, and the applicant shall describe the approximate time schedule for beginning operations in each increment.

(b) Prior to issuance of a permit, the applicant shall file with the cabinet the full bond amount required by the cabinet for the first increment or increments of the permit area to be disturbed, which shall be not less than the minimum bond required for the permit area required under 405 KAR 10:020, Section 2.

(c) The permittee shall not engage in any surface coal mining and reclamation operations on any increment of the permit area unless and until the full bond amount required by the cabinet has been filed with the appropriate regional office of the department for that increment, the cabinet has verified the validity of the bond, and written authorization to conduct surface coal mining and reclamation operations on that increment is issued by the administrator of the regional office. No credit shall be given for reclamation on other increments.

(d) The boundaries of each increment shall be physically marked at the site in a manner approved by the cabinet.

(e) The bond amount for an increment shall be released or forfeited independently of any other increment of the permit area, and liability under the performance bond shall extend only to the increment expressly covered by the bond. A single bond amount may be filed to cover more than one (1) increment, in which case the increments so covered shall be treated as a single increment.

(f) Except as provided in 405 KAR 10:020, Section 3(2) regarding extended bond liability, there shall be no release of bond for completion of a phase of reclamation on any part of an increment until that phase of reclamation has been successfully completed on the entire increment.

(g) When the bond for an increment is completely released under 405 KAR 10:040, the increment shall be deleted from the permit area.

Section 4. Requirement to File a Certificate of Liability Insurance. Each applicant for a permit shall submit to the cabinet, as part of the permit application, a certificate issued by an insurance company authorized to do business in Kentucky. The amount, duration, form, conditions and terms of this insurance shall conform to 405 KAR 10:030.

Section 5. Documents Incorporated by Reference. (1) The following forms are hereby incorporated by reference:

(a) Performance Bond, SME-42, February, 1991.

(b) Irrevocable Standby Letter of Credit, SME-72, July, 1994.

(c) Confirmation of Irrevocable Standby Letter of Credit, SME-72-A, April, 1991.

(d) Certificate of Liability Insurance, SME-29.

(e) Notice of Cancellation, Nonrenewal or Change of Liability Insurance, SME-30.

(f) Escrow Agreement, SME-64, May, 1991.

(g) These forms may be reviewed or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994

FILED WITH LRC: July 14, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (Eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow

Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (Eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to:

CONTACT PERSON: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency Contact: Jim Villines

(1) Type and number of entities affected: This amendment is the result of the Reclamation Bonding Study conducted by a committee made up of industry, environmental, surety, and governmental representatives. The committee studied the issue of adequacy of performance bonds in Kentucky and determined that this amendment, coupled with the amendments proposed for 405 KAR 16:020, would decrease the chances that forfeited bonds would be inadequate to reclaim a minesite. Under these amendments a permittee will have to submit a rider to his performance bond, confirming coverage of the revision, if a revision to a permit adds a coal washer, a crush and load facility, a refuse pile, or a coal mine waste impoundment to the existing permit; or alters the boundary of a permit area or increment. This amendment affects the coal mining industry and the general public living in the coal field regions of the state which can be adversely affected by inadequately reclaimed surface coal mines. There are approximately 1300 active coal mining operations in the state; however only a small portion of these operations will be affected by these amendments.

(a) Direct and indirect costs or savings to those affected:

1. First year: There will be no cost to those affected. The requirement for bond coverage has always been there, this amendment simply establishes a procedure to ensure that the regulations are followed.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: This proposed amendment does impose an additional paperwork requirement to file a rider to the performance bond.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: There will be no cost to the cabinet.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: This proposed amendment does impose an additional paperwork requirement to receive and maintain the rider to the performance bond.

(3) Assessment of anticipated effect on state and local revenues: Their will be no effect on state and local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternatives were considered because this proposed amendment is based on recommendations of the committee described above that spent a great deal of time and effort to analyze the existing situation and generate solutions to the bonding problems.

(5) Identify any statute, administrative regulation, or governmental policy which may be in conflict, overlapping or duplication: There are no statutes, administrative regulations, or governmental policies known to be in conflict, overlapping or duplication.

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. 30 USC 1259 and 30 CFR 800.11

2. State compliance standards. Under this amendment a permittee will have to submit a rider to his performance bond, confirming coverage of the revision, if a revision to a permit adds a coal washer, a crush and load facility, a refuse pile, or a coal mine waste impoundment to the existing permit; or alters the boundary of a permit area or increment.

3. Minimum or uniform standards contained in the federal mandate. The federal mandate sets forth in general language the requirement to file performance bonds.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No. The federal mandate sets forth in general language the requirement to file performance bonds, but does not get to the level of detail of this amendment. It is left to the individual states to flesh out the details of their bonding programs. This proposed amendment is a minor procedural and paperwork requirement.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining
Reclamation and Enforcement
(Proposed Amendment)

405 KAR 16:010. General provisions.

RELATES TO: KRS 350.020, 350.090, 350.093, 350.151, 350.405, 350.410, 350.440, 350.445, 350.450, 350.465, 30 CFR Parts 730-733, 735, 816.59, 816.79, 816.99, 816.131-.132, 917, 30 USC 1253, 1255

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.465, 30 CFR Parts 730-733, 735, 816.59, 816.79, 816.99, 816.131-.132, 917, 30 USC 1253, 1255

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to promulgate rules and administrative regulations establishing performance standards for protection of people and property, land, water and other natural resources, and aesthetic values, during surface mining activities and for restoration and reclamation of surface areas affected by mining activities. This administrative regulation contains general performance standards for maximizing coal recovery, protection of underground mining, prevention and correction of landslides, temporary cessation of operations,

[~~and~~] permanent abandonment of operations, and protection of outcrop barrier pillars.

Section 1. Applicability. The provisions of this chapter are applicable to all surface mining activities conducted under 405 KAR Chapters 7 through 24. The provisions of this chapter also apply to those special categories of surface mining activities for which performance standards are set forth under 405 KAR 20:030 through 405 KAR 20:080 except to the extent that a provision of those administrative regulations specifically exempts a particular category from a particular requirement of this chapter.

Section 2. Coal Recovery. Surface mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

Section 3. Protection of Underground Mining. No surface mining activity shall be conducted within 500 feet of any point of either an active or abandoned underground mine, unless:

(1) If any of the workings of the underground mine are active, the nature, timing, and sequence of the surface mining activity are jointly approved by the cabinet, the MSHA, and the Kentucky Department of Mines and Minerals; and

(2) For both active and abandoned underground mines, the surface mining activity results in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public.

Section 4. Slide and Erosion Barriers. An undisturbed natural barrier shall be provided beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for a minimum distance of fifteen (15) feet or greater distance as the cabinet may determine is necessary to assure stability. The barrier shall be retained in place to prevent slides and erosion.

Section 5. Slides. At any time a slide occurs which may have a potential adverse effect on property, health, safety, or the environment, the person who conducts the surface mining activities shall notify the cabinet by the fastest available means and comply with any remedial measures required by the cabinet.

Section 6. Permanent Abandonment of Operations. (1) Notice required. On or before the date of permanent abandonment of operations, the permittee shall provide written notice to the cabinet that permanent [~~such~~] abandonment is intended.

(2) Prior to permanent abandonment, and prior to removal of necessary equipment from the site, all affected areas shall be closed, backfilled, and otherwise permanently reclaimed in accordance with the requirements of KRS Chapter 350, the administrative regulations of this Title, and the permit.

(3) All equipment, underground openings, structures, or other facilities not required for monitoring shall be removed and the affected areas reclaimed unless the cabinet approves the retention of the [~~such~~] equipment, openings, structures, or other facilities as compatible with the postmining land use or as beneficial to environmental monitoring.

Section 7. Temporary Cessation of Operations. (1) Notice required. Prior to a temporary cessation of operations which the permittee intends to last for thirty (30) days or more, or as soon as it is known to the permittee that an existing temporary cessation will last beyond thirty (30) days, the permittee shall provide written notice to the cabinet that [~~such~~] temporary cessation is anticipated. The notice shall state to what extent equipment will be removed from the site during the temporary cessation, and shall state the approximate date on which the permittee intends that operations will be resumed.

(2) Temporary cessation shall not relieve a permittee of the obligation to comply with 405 KAR 16:070, Section 1(1)(g) and the surface and groundwater monitoring requirements of 405 KAR 16:110, and the obligation to comply with all applicable conditions of the permit during the cessation.

(3) During temporary cessations, equipment and facilities necessary to environmental monitoring or to compliance with performance standards shall be made secure to the extent practicable.

Section 8. Protection of Outcrop Barrier Pillars. (1) Coal shall not be removed by auger mining, contour mining, or other surface mining activities, from an outcrop barrier pillar left by an underground mine, unless the cabinet approves the proposed coal removal.

(2) The cabinet may approve the proposed coal removal if it determines that:

(a) The removal will completely eliminate existing underground workings;

(b) The removal will eliminate or significantly reduce an existing or potential threat to the health or safety of the public resulting from the existing underground workings; or

(c) The removal will eliminate or significantly reduce existing or potential adverse impacts to the quantity or quality of groundwater or surface water resulting from the existing underground workings.

GLENNA J. CURRY, Deputy Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: June 20, 1994
FILED WITH LRC: June 21, 1994 at 11 a.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to:

CONTACT PERSON: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency contact: Jim Villines

(1) Type and number of entities affected: This proposed amendment requires that where the coal seam approaches the land surface, the underground mine must leave an unmined section of coal to create an outcrop barrier pillar that is of sufficient width to support the overburden and prevent failure and sudden release of water due to water pressure against the outcrop barrier pillar. It

provides that the cabinet may determine on a case-by-case basis the width of the outcrop barrier pillar that is necessary; but if the coal seam dips toward the land surface the width must not be less than the width given by the formula: W = 50 + H, where W is the minimum width in feet and H is the maximum hydrostatic head in feet that can build up on the outcrop barrier pillar. This amendment is intended to reduce occurrences of a "blowout," a rapid release to the land surface of a large volume of water impounded in underground mine workings. Blowouts usually result from simply mining too close to the land surface, leaving an outcrop barrier pillar that is too weak to withstand the buildup of water pressure against it. This amendment will require adequate outcrop barrier pillars, and will thereby reduce damages to property and the environment and reduce hazards to people as required by KRS 350.020. Blowouts have caused considerable damage to property and the environment and represent a hazard to persons in the area where they occur. Additionally, an underground mine can become a source of acid mine drainage after a blowout. Thus this amendment affects underground coal operations and the general public living in the coal field regions. There are approximately 800 active underground mines in Kentucky, but not all of these have mining conditions that would be affected by this amendment.

(a) Direct and indirect costs or savings to those affected:

1. First year: This amendment will sometimes result in a wider coal outcrop barrier pillar than an underground mine would have provided in absence of this new requirement. In these cases, some coal that would have been mined will now be left in place, rather than being mined and sold.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: Applicants will need to include engineering information and drawings detailing the coal outcrop barrier pillars in the permit application. This is a small addition to the permit application.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: Some additional effort will be necessary in technical review of the permit application.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: No effect is anticipated. In some cases, small amounts of coal in specific areas that might have been mined and sold will instead be left in place as wider outcrop barrier pillars than would have been left in the absence of this amendment. However, since total annual severance tax revenues depend upon total annual production, which is market driven, and since the small amounts of coal discussed above will be replaced by other production, no effect on annual revenues is anticipated.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternatives were considered.

(5) Identify any statute, administrative regulation, or governmental policy which may be in conflict, overlapping or duplication: None

(a) Necessity of proposed regulation if in conflict: Not in conflict.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: Not in conflict.

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. There is no federal mandate for this proposed amendment. This proposed amendment adds a requirement for which there is no federal counterpart. There are federal counterparts to the current requirements of this administrative regulation, but this proposed amendment does not alter those requirements.

2. State compliance standards. This proposed amendment requires that where the coal seam approaches the land surface, the underground mine must leave an unmined section of coal to create an outcrop barrier pillar that is of sufficient width to support the overburden and prevent failure and sudden release of water due to water pressure against the outcrop barrier pillar. It provides that the cabinet may determine on a case-by-case basis the width of the outcrop barrier pillar that is necessary; but if the coal seam dips toward the land surface the width must not be less than the width given by the formula: W = 50 + H, where W is the minimum width in feet and H is the maximum hydrostatic head in feet that can build up on the outcrop barrier pillar.

3. Minimum or uniform standards contained in the federal mandate. There is no federal counterpart to this proposed amendment.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? There is no federal counterpart to this proposed amendment.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This amendment is necessary to reduce occurrences of a "blowout," a rapid release to the land surface of a large volume of water impounded in underground mine workings. Blowouts usually result from simply mining too close to the land surface, leaving an outcrop barrier pillar that is too weak to withstand the buildup of water pressure against it. This amendment will require adequate outcrop barrier pillars, and will thereby reduce damages to property and the environment and reduce hazards to people as required by KRS 350.020.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining Reclamation and Enforcement
(Proposed Amendment)

405 KAR 16:020. Contemporaneous reclamation.

RELATES TO: KRS 350.062, 350.093, 350.100, 350.110, 350.405, 350.410, 350.435, 350.450, 350.465, 30 CFR Parts 730-733, 735, 816.100, 917, 30 USC 1253, 1255

STATUTORY AUTHORITY: KRS Chapter 13A, 350.028, 350.093, 350.100, 350.465, 30 CFR Parts 730-733, 735, 816.100, 917, 30 USC 1253, 1255

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to promulgate rules and administrative regulations establishing performance standards for protection of people and property, land, water and other natural resources, and aesthetic values, during surface mining activities and for restoration and reclamation of surface areas affected by mining activities. This administrative regulation sets forth requirements for keeping reclamation operations, including backfilling, grading, soil preparation and revegetation, contemporaneous with mining operations.

Section 1. General. Reclamation operations, including but not limited to, backfilling, grading, topsoil redistribution, liming, fertilizing, other soil preparation, seeding, planting, mulching and revegetation of all land that is disturbed by surface mining activities, shall occur as contemporaneously as practicable with mining operations and in accordance with this administrative regulation.

Section 2. Backfilling and Grading. Backfilling and grading

operations shall proceed as concurrently with mining operations as possible and in accordance with the requirements of this section, except that specific time and distance criteria set forth in the approved plan for backfilling and grading shall take precedence over corresponding criteria in this administrative regulation. The approved backfilling and grading plan may specify time and distance criteria less restrictive than those set forth in this administrative regulation, and may allow more than one (1) pit per permit area, if [when] the permittee has demonstrated through detailed written analysis in the permit application that [such] other criteria or additional pits are essential to the proposed mining and reclamation operations, and the cabinet has determined that use of the requested [such] criteria or additional pits will not likely cause adverse environmental impacts. If alternative distance limits are approved or additional pits allowed, then the applicant shall provide supplemental assurance in accordance with Section 6 of this administrative regulation. [As used in this section, "initial surface disturbance" means the initial excavation for the purpose of removal of topsoil or overburden.]

(1) Area mining. Backfilling and grading to approximate original contour on a disturbed area shall be completed within 180 calendar days following the removal of coal from that area, and shall not be more than four (4) spoil ridges behind the pit being mined, with the spoil from the pit being mined being considered the first spoil ridge. There shall be only one (1) pit allowed per permit area.

(2) Auger mining. Coal removal in a given location shall be completed within sixty (60) calendar days after the initial excavation for the purpose of removal of topsoil or overburden [surface disturbance] at that location. Auger holes shall be sealed as required by 405 KAR 20:030. Backfilling and grading to approximate original contour shall follow coal removal by not more than sixty (60) days and by not more than 1500 linear feet. There shall be only one (1) auger mining operation allowed per permit area.

(3) Contour mining. Coal removal in a given location shall be completed within sixty (60) calendar days after the initial excavation for the purpose of removal of topsoil or overburden [surface disturbance] at that location. Backfilling and grading to approximate original contour shall follow coal removal by not more than sixty (60) calendar days and by not more than 1500 linear feet. There shall be only one (1) pit allowed per permit area.

(4) Multiple-seam contour mining. If [When] overlapping multiple cuts producing a benched highwall are made to remove more than one (1) coal seam at a given location, backfilling and grading at that location shall be completed within sixty (60) calendar days after removal of the last coal seam at that location and shall follow the advancing cut of the last coal seam by not more than 1500 feet. Removal of all coal seams shall proceed as concurrently as possible and in a timely manner, in order to minimize the time period in which disturbed areas are exposed prior to reclamation. There shall be only one (1) multiple seam operation allowed per permit area.

(5) Combined contour mining and auger mining. Coal removal by contour mining at a given location shall be completed within the time frame specified in subsection (3) or (4) of this section as appropriate. Auger mining at a given location shall be completed within thirty (30) calendar days after coal removal by contour mining at that location. Sealing of auger holes and backfilling and grading shall then be completed as required in subsection (2) of this section. There shall be only one (1) contour mining pit and one (1) auger mining operation allowed per permit area.

(6) Mountaintop removal. Backfilling and grading on a disturbed area shall be completed within 180 calendar days following the removal of coal from that area. If the mountaintop removal operation begins by mining a contour cut around all or a part of the mountaintop, the time and distance limits for contour mining shall apply to that cut unless alternative limits are approved under Sections 2 and 6 of this administrative regulation.

(7) All final backfilling and grading shall be completed before equipment necessary for backfilling and grading is removed from the site.

Section 3. Soil Preparation and Revegetation. (1) When backfilling and grading have been completed on an area, the required topsoil redistribution, liming, fertilizing, other soil preparation, seeding, planting, and mulching of that area shall be completed as soon as possible in a manner consistent with the approved plans for topsoil handling and revegetation and in accordance with 405 KAR 16:200, Section 3.

(2) The time allowed for soil preparation and revegetation pursuant to subsection (1) may exceed thirty (30) calendar days only when specifically authorized in the approved plans for topsoil handling and revegetation or when authorized pursuant to Sections 4 or 5 of this administrative regulation.

Section 4. Deferments. (1) The cabinet may allow a permittee to defer the time criteria for coal removal and contemporaneous reclamation requirements on specified areas if the permittee can demonstrate that the [said] deferment is necessary to address at least one (1) of the following:

(a) Adverse condition including weather, labor, and other conditions clearly beyond the permittee's control.

(b) Combined surface and underground mining activities subject to the provisions of 405 KAR 8:050, Section 7 and 405 KAR 20:020.

(c) Coal marketing problems.

(2) Application for a deferment pursuant to this section shall be in the form prescribed by the cabinet. Approval of the deferment request shall be made in writing. The approval shall state that the deferment is justified and that no environmental damage will occur during the period of deferment.

(a) Application for a deferment pursuant to subsection (1)(a) of this section for adverse conditions shall be made in writing and shall include documentation of the adverse conditions beyond the operator's control and demonstration of impossibility of conducting coal removal and contemporaneous reclamation in a timely manner due to those conditions. The application shall be filed at the appropriate regional office of the department. Upon a successful demonstration that the adverse [such] conditions exist, the regional administrator may grant a reclamation deferment for a maximum of thirty (30) days, on a form provided by the department. At least seven (7) days prior to the expiration of the deferment, the permittee may request, in writing, an additional extension, again stating the reason for the request and providing any appropriate additional documentation. The regional administrator may renew the original extension once upon [such] request, however the [such] renewal shall not [to] exceed thirty (30) days. Any need for additional time shall [must] be demonstrated to the Division of Field Services in Frankfort by written request. The [Such] request shall [must] initially be submitted to the regional office at least two (2) weeks prior to the expiration of the renewed deferment. Upon recommendation of the regional administrator, the director of the Division of Field Services shall issue his decision on or before expiration of the deferment.

(b) Application for a deferment pursuant to subsection (1)(b) of this section for combined surface and underground mining shall be made according to 405 KAR 8:050, Section 7.

(c) Application for a deferment pursuant to subsection (1)(a) of this section for coal marketing problems shall be made according to Section 5 of this administrative regulation.

(3) The applicant has the burden of establishing the need for a deferment. The applicant shall [must] demonstrate that reclamation on the site is contemporaneous as of the date of the request for deferment and that distance requirements for contemporaneous reclamation will be met during the period of deferment. The permittee shall continue to comply with the time limits of the coal removal and contemporaneous reclamation requirements until the deferment is issued.

(4) Reclamation deferments may be approved for a period

reasonably related to the specified conditions justifying the deferment. The deferral shall not extend beyond the expiration date of the permit and in no event shall the aggregate deferral period exceed thirty (30) months, except where approved combined mining is being carried out under subsection (1)(b) of this section.

(5) The cabinet shall periodically reexamine and update the amount of the bond on the permit area so that the amount of the bond is sufficient to assure completion of reclamation if the work had to be performed by the cabinet in the event of forfeiture.

Section 5. Additional Requirements for Deferments for Coal Marketing Problems. Upon written application conforming to the requirements of the statutes and administrative regulations, the cabinet may grant a deferment of coal removal and contemporaneous reclamation for a period not to exceed thirty (30) months pursuant to KRS 350.093.

(1) Application requirements.

(a) An applicant for a deferment of coal removal and contemporaneous reclamation shall submit an application on a form specified by the cabinet. An application shall contain at least the following:

1. A demonstration of the need for the deferment, including documentation of the coal marketing problem.

2. A plan consisting of a detailed narrative description of the method by which the applicant shall conform to each of the performance standards specified in subsection (2) of this section [~~(hereinafter "plan")~~].

3. A detailed schedule for implementation of each of the performance standards of subsection (2) of this section [~~(hereinafter "schedule")~~], which may not extend beyond thirty (30) days from the issuance by the cabinet of a deferment from coal removal and contemporaneous reclamation.

4. An itemized estimate of the total cost of reclamation of the area proposed for deferment. The estimate shall, at a minimum, include calculations and supporting data demonstrating the volume of spoil necessary for backfilling and grading all open pits and highwalls, the cost of backfilling those pits and highwalls, the cost of final grading and revegetation of the entire disturbed area, and the cost of moving necessary reclamation equipment to the job site.

5. Written consent of the surety for the deferment if [~~where~~] the permit area or increment is covered by a surety bond.

(b) The applicant shall place an advertisement in the newspaper of largest bona fide circulation in each county in which the permit is located. The advertisement shall be published within ten (10) days after the date the application is submitted to the cabinet and shall contain, at a minimum, the location of the area for which coal removal and contemporaneous reclamation are proposed to be deferred, the reason for which the deferment is sought, and the duration of the requested deferment. The advertisement shall also indicate that the deferment shall not exceed six (6) months initially, but may be renewed for additional six (6) months periods up to a maximum of thirty (30) months. The applicant shall submit proof of the advertisement to the cabinet within fifteen (15) days after application for the deferment. The application shall not be deemed complete until the [~~such~~] proof is submitted.

(c) The applicant shall also notify, in writing, the owners of the surface of the permit area and adjacent areas as listed on the permit application. The applicant shall provide proof of this [~~such~~] notice to the cabinet. The application shall not be deemed complete until the [~~such~~] proof is submitted. Within five (5) days after receipt of a complete application, the cabinet shall notify those other persons, if any, who it determines to have an interest which is or may be adversely affected by the proposed deferment.

(d) Any person with an interest which is or may be adversely affected may file written comments and objections to the application for a deferment within ten (10) days after receipt of the written notice or publication of the newspaper notice, whichever is later.

(e) Upon receipt of the application, the cabinet shall examine the data and calculations submitted pursuant to subsection (1)(a)4 of this section and shall cause an inspection of the area subject to the proposed deferment to be made by an authorized agent of the cabinet. Based upon the data supplied and the inspection, the Division of Permits of the cabinet shall determine whether the existing bond for the entire permit or increment is sufficient for the cabinet to completely reclaim the entire disturbed area of the permit or increment at the expiration of the deferment. If the existing bond is insufficient, then the cabinet shall require, prior to approving the deferment, that the applicant file such additional bond as is determined by the cabinet to be sufficient for the cabinet to completely reclaim the disturbed area.

(f) The cabinet shall consider the application, any other submittals from the applicant and any comments received from the public, and shall render a final decision on the application within thirty (30) days of receipt of the complete application. If the cabinet determines that the applicant has satisfied the requirements for a deferment from coal removal and contemporaneous reclamation contained in KRS 350.093(2) and in this administrative regulation, then the cabinet shall grant a deferment to the applicant for a period not to exceed six (6) months. Upon approval by the cabinet, the plan and schedule proposed by the applicant and any conditions imposed on the approval by the cabinet shall become conditions of the permit.

(2) Performance standards. Each permittee subject to a deferment shall, at a minimum:

(a) Complete final reclamation including backfilling, grading, topsoiling and revegetation on all disturbed areas; except [~~provided, however,~~] that those areas of the pit, work area, excess spoil disposal areas, topsoil storage areas, and access road necessary to allow resumption of coal extraction without redisturbance of finally reclaimed areas may be exempted from this requirement for the duration of the deferment. In order to meet this requirement, the permittee may be required to reclaim closer to the pit than the distance limits specified in the contemporaneous reclamation administrative regulation.

(b) Mulch or establish quick growing temporary vegetation, or both, on all areas exempted under paragraph (a) of this subsection (except for haul road surfaces) such as excess spoil disposal areas, work areas, topsoil storage areas, and all other areas which have been cleared of vegetation, to the extent technically practicable to achieve erosion control or stability as determined by the cabinet. The permittee shall maintain the cover on all these [~~such~~] areas to minimize erosion throughout the deferment period.

(c) Acid- or toxic-producing spoil shall not be left exposed but shall be covered or treated in accordance with Section 3 of 405 KAR 16:190 and 405 KAR 18:190.

(d) Supplemental sediment control measures such as straw dikes and fabric filter fences may be required by the cabinet on a case-by-case basis to minimize additional contributions of sediment to the stream flow or run-off.

(e) Where accumulation of water in the pit may adversely impact the hydrologic balance, public health and safety or the environment, the cabinet shall require such measures as are necessary to minimize adverse impacts. These may include but are not limited to such measures as:

1. Providing drainage from the pit to prevent breaching of the undisturbed berm.

2. Pumping the water to a treatment facility when accumulation of acid or toxic water in the pit may result in contamination of the ground water.

(3) Deferment implementation.

(a) The permittee shall implement the terms of the approved plan within the time schedule approved by the cabinet and consistent with this administrative regulation.

(b) Except as expressly modified by the approved plan, schedule, and conditions in the deferment approval, the permittee shall comply with all of the requirements of the administrative regulations and the

permit conditions which would apply to the operation had the deferment not been granted. These requirements include but are not limited to the following:

1. All discharges of water from the permitted area shall be continually treated to meet the applicable effluent limitations.

2. All water quality monitoring and reporting otherwise required shall continue.

3. All diversion ditches, sedimentation ponds, haul road drainage ditches and culverts, etc., shall be rehabilitated as necessary and continually maintained to comply with the applicable performance standards and with the designs approved in the permit. Sediment shall be removed from the sedimentation ponds when the design sediment storage volume has filled with sediment.

4. Haul road maintenance, such as grading, replacement of durable surface material, and cleaning out of ditches and culverts, shall be continually performed as necessary to comply with the performance standards and the approved permit and to minimize erosion.

(4) Expiration and renewal.

(a) A deferment from coal removal and contemporaneous reclamation shall expire six (6) months after the date of issuance of the deferment by the cabinet. A deferment from coal removal and contemporaneous reclamation may be renewed upon written application for a period of no more than six (6) months upon a showing of need for additional time, and upon a showing that the area subject to deferment is in compliance with the requirements of the administrative regulations, the permit, and the terms of the deferment. The cabinet shall inspect the area subject to deferment prior to approval of any renewal.

(b) Regardless of the reasons for the deferment, no deferments or subsequent renewals shall be granted beyond the maximum aggregate period of thirty (30) months for any permit area, including any deferment periods issued for adverse conditions. At the expiration of the thirty (30) month aggregate period, a permittee shall not be granted any additional deferments or renewals unless the permittee can demonstrate that it has conducted twelve (12) months of continuous active coal removal from the permit area after the expiration of the thirty (30) month aggregate period, it has completed reclamation of all previously deferred areas in the permit area, and it otherwise meets all requirements for a deferment. For the purpose of this paragraph, "completed reclamation" means completion of reclamation phase I as defined by 405 KAR 10:040, Section 2(4)(a).

(c) The deferment shall terminate upon resumption of coal extraction activities on the permit area subject to deferment.

(5) Enforcement and revocation.

(a) The cabinet shall inspect the area subject to deferment at least once each month on the average, during the routine partial and complete inspections made of the permit area. Upon each inspection, the inspector shall note under the "comments" section of the Mine Inspection Report form whether the area subject to deferment meets the conditions of the deferment approval, including the plan and schedule.

(b) If [~~In the event that~~] the inspection shows that a violation of the conditions of the deferment or of the administrative regulations or of the conditions of the permit is occurring on the area subject to deferment, or is causally related to the area subject to deferment, then the cabinet shall issue a notice of noncompliance and order for remedial measures or order for cessation and immediate compliance in accordance with Title 405, Chapter 12. If the permittee fails to abate the violation within the time for abatement, or any extension thereof, established by the cabinet, then the cabinet shall revoke the deferment in addition to other enforcement actions required by Title 405, Chapters 7 through 24.

Section 6. Supplemental Assurance. (1) If alternative distance limits or additional pits are approved under Section 2 of this administrative regulation, the applicant shall submit to the cabinet supplemental assurance in the amount set forth in this section. This supplemental assurance shall be for the purpose of assuring the reclamation of the additional unreclaimed disturbed area and shall be in addition to the performance bond required under 405 KAR Chapter 10.

(a) The supplemental assurance shall not be subject to the bond release requirements of 405 KAR 10:040, but shall be returned in accordance with the requirements of this section.

(b) However, the requirements of 405 KAR 10:030, 405 KAR 10:035, and 405 KAR 10:050 shall apply to supplemental assurance.

(2) Contour mining (single seam). The amount required shall be $50,000 per 1500 feet, or any portion thereof, of additional distance approved for the first pit under Section 2 of this administrative regulation. If an additional pit or pits are approved, the amount shall be $50,000 per 1500 feet, or any portion thereof, including the first 1500 feet of each additional pit.

(3) Contour mining (multiple seam). For multiple seam contour mining operations subject to Section 2(4) of this administrative regulation, the amount required shall be $50,000 per 1500 feet, or any portion thereof, of additional distance approved for the first multiple seam operation under Section 2 of this administrative regulation. If any additional multiple seam operations are approved, the amount shall be $50,000 per 1500 feet, or any portion thereof, including the first 1500 feet of each additional multiple seam operation.

(4) Mountaintop removal. If a mountaintop removal operation begins by mining a contour cut around all or a portion of the mountaintop, that contour portion shall require the same supplemental assurance set forth in subsection (2) of this section.

(5) Area mining. The amount required shall be $50,000 for any four (4) spoil ridges, or any portion thereof, of additional distance approved for the first pit under Section 2 of this administrative regulation. If an additional pit or pits are approved, the amount shall be $50,000 for any four (4) spoil ridges, or any portion thereof, including the first four (4) spoil ridges of each additional pit.

(6) Return of supplemental assurance. Supplemental assurance shall be returned to the person that submitted it upon:

(a) Application to the cabinet for the return; and

(b) Inspection and written documentation (including photographs) by the cabinet verifying that the area for which the supplemental assurance was submitted has been backfilled and graded (or in the case of mountaintop removal, the associated highwall has been eliminated by mining operations).

(7) The provisions of this section and the requirements of Section 2 of this administrative regulation requiring approval for more than one (1) pit per permit area shall apply:

(a) Upon the effective date of this administrative regulation for all permit applications submitted on or after that date; and

(b) 180 days after the effective date of this administrative regulation for all other surface coal mining and reclamation operations.

Section 7. Documents Incorporated by Reference. (1) The following forms are hereby incorporated by reference:

(a) Supplemental Assurance, SME-42 (SA), July, 1994.

(b) Escrow Agreement (for use with Supplemental Assurance form only), SME-64 (SA), July, 1994.

(c) These forms may be reviewed or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994

FILED WITH LRC: July 14, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (Eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow

Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (Eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to:

CONTACT PERSON: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency Contact: Jim Villines

(1) Type and number of entities affected: This amendment is the result of the Reclamation Bonding Study conducted by a committee made up of industry, environmental, surety, and governmental representatives. The committee studied the issue of adequacy of performance bonds in Kentucky and determined that these amendments to the requirements for contemporaneous reclamation would decrease the chances that forfeited bonds would be inadequate to reclaim a minesite. Under these amendments a permittee will have to post supplemental assurance (Cd's, letter of credit, surety guarantee, etc.) in addition to the normal performance bond whenever he obtains approval of alternate distance limits under the contemporaneous reclamation regulation. This will also be required if he wishes to open up more than one pit on the permit area. This was recommended by the Bonding Study Committee as a mechanism for assuring that the cabinet would have sufficient funds to reclaim these types of operations should bond forfeiture ever become necessary. This amendment affects the coal mining industry and the general public living in the coal field regions of the state which can be adversely affected by inadequately reclaimed surface coal mines. There are approximately 500 active strip mining operations in the state; however only a portion of these operations will be affected by these amendments.

(a) Direct and indirect costs or savings to those affected:

1. First year: The costs are directly related to how much additional area the permittee seeks to disturb or how many pits he seeks to open on one permit area. If the site is reclaimed properly, then the supplemental assurance is returned to the permittee of course. The cost is due to the interest or surety charges involved while the supplemental assurance is posted. This will be highly variable from site to site.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): Failure to implement this scheme may result in the cabinet having to increase the amount of performance bond posted for all coal mines, which would have a much more negative impact on the industry.

(b) Reporting and paperwork requirements: There will be some additional paperwork involved related to the posting of the supplemental assurance and the subsequent return of those funds after successful reclamation.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: Their will be some increased workload for the cabinet due to the need to process an unknown number of permit revisions and submittals of supplemental assurance during the first year, but it should not substantially impact the cost of operation of the cabinet.

2. Continuing costs or savings: After the first year, the increase in workload should be less since revisions of existing permits will have already been accomplished and only the normal number of requests for alternate distance limits will be involved. There will be a small amount of work involved in inspecting sites for the return of supplemental assurance.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: There will be some additional paperwork involved related to the posting of the supplemental assurance and the subsequent return of those funds after successful reclamation.

(3) Assessment of anticipated effect on state and local revenues: Their will be no effect on state and local revenues.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternatives were considered because these proposed amendments are based on recommendations of the committee described above that spent a great deal of time and effort to analyze the existing situation and generate solutions to the bonding problems.

(5) Identify any statute, administrative regulation, or governmental policy which may be in conflict, overlapping or duplication: There are no statutes, administrative regulations, or governmental policies known to be in conflict, overlapping or duplication.

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. There is no federal mandate for these proposed amendments. There are no federal statutes or regulations related to the proposed amendments concerning time and distance limits. 30 CFR 816.101 which used to contain some time and distance limits for contemporaneous reclamation has been suspended pending future federal rulemaking. There are no federal counterparts to the proposed amendments related to supplemental assurance.

2. State compliance standards. These amendments modify the existing time and distance limits for contemporaneous reclamation and require the filing of supplemental assurance for situations where alternate distance limits are approved.

3. Minimum or uniform standards contained in the federal mandate. There are no federal counterparts to these amendments.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? There are no federal counterparts to these amendments.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining

Reclamation and Enforcement
(Proposed Amendment)

405 KAR 16:200. Revegetation.

RELATES TO: KRS 350.093, 350.095, 350.100, 350.405, 350.410, 350.420, 350.435, 350.465, 30 CFR Parts 730-733, 735, 816.111-.116, 917, 30 USC 1253, 1255, 1265

STATUTORY AUTHORITY: KRS Chapter 13A, 350.028, 350.100, 350.465, 30 CFR Parts 730-733, 735, 816.111-.116, 917, 30 USC 1253, 1255, 1265

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to promulgate rules and administrative regulations establishing performance standards for protection of people and property, land, water and other natural resources, and aesthetic values, during surface mining activities and for restoration and reclamation of surface areas affected by mining activities. This administrative regulation sets forth requirements for revegetation of areas affected by surface mining activities, including requirements for temporary and permanent vegetative cover, use of introduced species, timing of revegetation, mulching and other soil stabilizing practices, standards for measuring revegetation success, and reporting requirements.

Section 1. General Requirements. (1)(a) Each permittee shall establish on all affected land a diverse, effective, and permanent vegetative cover that meets the requirements of this administrative regulation and the revegetation provisions of 405 KAR 16:180, and that supports the approved postmining land use.

(b) For prime farmland areas, the requirements of 405 KAR 20:040 shall apply in lieu of the productivity standards of this administrative regulation unless those areas are exempted by 405 KAR 8:050, Section 3, in which case the productivity standards of this administrative regulation shall apply.

(2) All revegetation shall be in compliance with the plans submitted under 405 KAR 8:030, Sections 24(4) and 37, as approved by the cabinet, and shall be carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with the approved postmining land use.

(3) If the approved postmining land use is not cropland or pastureland, all disturbed land except water areas, rock areas such as those used for drainage control and wildlife enhancement, and surface areas of roads that are approved as a part of the postmining land use or uses shall be seeded or planted to achieve a permanent vegetative cover of the same seasonal variety native to the region that is capable of soil stabilization, self-regeneration, and plant succession. The vegetative cover shall be considered of the same seasonal variety if it consists of a mixture of species of equal or superior utility for the approved postmining land use when compared with the utility of naturally occurring vegetation during each season of the year.

(4) If the postmining land use is cropland or pastureland, establishment of crops or pasture species normally grown in the mine vicinity and normal husbandry practices, and compliance with 405 KAR 16:180, Section 3(2) for cropland, will meet the requirements of subsection (1)(a) of this section.

(5)(a) Plant species used for revegetation shall be compatible with the plant and animal species of the area, and shall meet the requirements of applicable state and federal laws or regulations for seeds, poisonous and noxious plants, and introduced species.

(b) Except for cropland, selection of species, distribution patterns, seeding rates, and planting arrangements shall be approved case-by-case by the cabinet based upon this administrative regulation and TRM #21, "Plant Species, Distribution Patterns, Seeding Rates, and Planting Arrangements for Revegetation of Mined Lands", Kentucky Department of Fish and Wildlife Resources, Kentucky Department of Natural Resources, Division of Forestry, and Kentucky Department for Surface Mining Reclamation and Enforcement (July 12, 1994). [~~TRM #20, "Methodologies for the Evaluation, Protection, and Enhancement of Fish and Wildlife Resources for Coal Mining and Reclamation Operations", Kentucky Department for Fish and Wildlife Resources and Kentucky Department for Surface Mining Reclamation and Enforcement (December 6, 1991).~~] This document is incorporated by reference. It may be reviewed, copied, or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. through 4:30 p.m. Two (2) or more permanent legume species and two (2) or more permanent grasses shall be established on pastureland unless fewer species are approved by the cabinet based on a pasture management plan specifically tailored to the species mix.

(6) Subject to the approval of the cabinet, small incidental areas related to the fulfillment of the postmining land use may be exempted from the revegetation standards if no adverse environmental impact will occur if the exemption is granted.

(7) The extended liability period under the performance bond requirements of 405 KAR Chapter 10 shall begin after the last time of augmented seeding, fertilizing, irrigating, or other related work, and shall continue for not less than five (5) years; except:

(a) Discrete areas of 0.25 acre or less needing reseeding due to circumstances specified in subparagraphs 1 through 5 of this paragraph may be reseeded (including reliming, refertilizing, and remulching) without restarting the five (5) year liability period. The total acreage of these areas reseeded during the liability period shall not exceed three (3) percent of the permit area acreage. This paragraph shall only apply to:

1. Reseeding associated with repair of rills and gullies;

2. Reseeding areas where vegetation was disturbed by vehicular traffic not under the control of the permittee;

3. Reseeding areas where vegetation was disturbed by the installation or removal of oil and gas wells or utility lines;

4. Reseeding areas where there was poor seed germination of the initial seeding; and

5. Reseeding areas where vegetation was unavoidably disturbed in the course of conducting some other necessary reclamation activity.

(b) Liming, fertilizing, mulching, seeding, or stocking of haul roads, locations where sedimentation ponds and off-site temporary diversions that divert water to or away from sedimentation ponds have been removed, and locations where collected sediment and embankment material from sedimentation pond removal have been disposed shall not restart the five (5) year liability period. Vegetation established in these areas shall be in place for at least two (2) years before Phase III bond release;

(c) For cropland, the five (5) year liability period shall commence at the date of initial planting for the long-term intensive agricultural postmining land use;

(d) Irrigating, reliming, and refertilizing cropland and pastureland; reseeding cropland; and renovating pastureland by overseeding with legumes after Phase II bond release and after three (3) years from the initial seeding shall be considered normal husbandry practices and shall not restart the liability period if the amount and frequency of these practices do not exceed normal agricultural practices used on unmined land within the region; and

(e) Other normal husbandry practices that may be conducted without restarting the liability period are disease, pest, and vermin control; pruning; and transplanting and replanting of trees and shrubs in accordance with Section 6 of this administrative regulation.

(8) For pastureland, and for cropland except prime farmland subject to 405 KAR 20:040, ground cover and productivity success standards shall be met during the growing seasons of any two (2) years of the liability period except the first year; and areas approved for other uses shall equal or exceed the applicable success standards during the growing season of the last year of the liability period.

Section 2. Use of Introduced Species. Introduced species may be substituted for native species only if approved by the cabinet under the following conditions:

(1) The species shall meet the applicable requirements of Section 1(2), (3), (4), and (5) of this administrative regulation.

(2)(a) Appropriate field trials or other studies shall be conducted or published literature shall be submitted to demonstrate to the satisfaction of the cabinet that proposed, unproven, introduced species are desirable and are necessary for achieving the postmining land use; or

(b) The species are necessary to achieve a quick, temporary, and stabilizing cover that aids in controlling erosion; and measures to establish permanent vegetation are included in the approved plan submitted under 405 KAR 8:030, Sections 24(4)(e) and 37.

Section 3. Timing. Seeding and planting of disturbed areas with permanent species shall be conducted no later than during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally, or as approved by the cabinet in the permit, for the type of plant materials selected. In accordance with Section 4 of this administrative regulation and 405 KAR 16:020, a disturbed area shall be seeded and mulched, as contemporaneously as practicable with the completion of backfilling and grading, to establish a temporary cover of small grains, grasses, or legumes until a permanent cover is established.

Section 4. Soil Amendments and Stabilization. (1) Nutrients and soil amendments shall be applied to regraded areas in accordance with 405 KAR 16:050, Section 5.

(2) Suitable mulch or other soil stabilizing practices shall be used in addition to temporary cover on all regraded and topsoiled areas to control erosion, to promote germination of seeds, and increase the moisture retention capacity of the soil. The cabinet may, on a case-by-case basis, waive the requirement for mulch if the cabinet finds, based on seasonal, soil, and slope factors, that the temporary vegetative cover will achieve proper erosion control until a permanent cover is established, except that no waiver shall be granted for any area having a slope greater than ten (10) percent.

(3) For areas within the permit boundary to be used as cropland, the area shall be seeded or planted in order to maintain a vegetative cover effective in controlling erosion until the permittee chooses to grow crops.

Section 5. Success Standards for Ground Cover and Productivity. (1) Determination of success of ground cover and productivity may be made on the basis of reference areas from unmined lands in the vicinity of the operation, where applicable, or by application of the specific ground cover and productivity standards of this section (tree and shrub stocking standards are set forth in Section 6 of this administrative regulation).

(2)(a) For an approved postmining land use of pastureland or cropland used for the production of hay (except prime farmland subject to 405 KAR 20:040);

1. Ground cover (percent) and productivity (tons of forage per acre) shall be at least ninety (90) percent of that of an approved reference area with a statistical confidence of ninety (90) percent; or

2. Ground cover shall be at least ninety (90) percent, and productivity shall be at least ninety (90) percent of the average yield for that hay in the county in the three (3) years prior to the year of measurement, as determined from "Kentucky Agricultural Statistics 1989-1990", [and] "Kentucky Agricultural Statistics 1990-1991", "Kentucky Agricultural Statistics 1991-1992", and "Kentucky Agricultural Statistics 1992-1993", with a statistical confidence of ninety (90) percent.

3. "Kentucky Agricultural Statistics 1989-1990" [and] "Kentucky Agricultural Statistics 1990-1991", "Kentucky Agricultural Statistics 1991-1992", and "Kentucky Agricultural Statistics 1992-1993", Kentucky Agricultural Statistics Service, Kentucky Department of Agriculture, and National Agricultural Statistics Service, U.S Department of Agriculture, are incorporated by reference. These documents may be reviewed, copied, or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

(b) For areas within the permit boundary where row crops will be planted (except prime farmland subject to 405 KAR 20:040);

1. Ground cover on any area not planted in row crops shall be at least ninety (90) percent with a statistical confidence of ninety (90) percent; and

2. Crop production shall be at least ninety (90) percent of that of an approved reference area or at least ninety (90) percent of the average yield for the crop in the county in the three (3) years prior to the year of measurement, as determined from "Kentucky Agricultural Statistics 1989-1990", "Kentucky Agricultural Statistics 1990-1991", "Kentucky Agricultural Statistics 1991-1992", and "Kentucky Agricultural Statistics 1992-1993", [yield data available from the Kentucky Department of Agriculture,] with a statistical confidence of ninety (90) percent.

(c) Forest land, or other areas within the permit boundary where woody plants are stocked, shall have at least eighty (80) percent ground cover with a statistical confidence of ninety (90) percent, with no sign of significant erosion as set forth in 405 KAR 16:190, Section 6.

(d) For all other land uses, ground cover shall be at least eighty (80) percent with a statistical confidence of ninety (90) percent, with no sign of significant erosion as set forth in 405 KAR 16:190, Section 6.

(e) For all land uses other than cropland planted in row crops, at Phase III bond release there shall be no discrete bare area or sparsely covered (less than fifty (50) percent ground cover) area greater than 0.25 acre in size.

(3) For previously mined areas that were not reclaimed to the requirements of 405 KAR Chapters 16 through 20, the ground cover of living plants shall not be less than the ground cover existing before the redisturbance and shall be at least eighty (80) percent with a statistical confidence of ninety (90) percent, with no sign of significant erosion as set forth in 405 KAR 16:190, Section 6.

Section 6. Tree and Shrub Stocking. This section sets forth stocking standards and criteria for counting woody plants for measuring stocking success, and shall apply [applies] in addition to Section 5 of this administrative regulation, where the approved postmining land use or the approved fish and wildlife protection and enhancement plan requires the planting of trees or shrubs.

(1) If forest land is the [an] approved postmining land use, [:

(a) The forested area shall have] a minimum stocking density of 300 [450] trees or trees and shrubs per acre determined with a statistical confidence of ninety (90) percent, with tree (not shrub) species comprising at least seventy-five (75) [fifty (50)] percent of the total stock, shall be achieved on at least seventy (70) percent of the area stocked. [woody plant species;]

(a) For noncommercial (unmanaged) forest land, [(b)] at least four (4) species of trees or trees and shrubs shall be planted in a mixed distribution pattern [for noncommercial (unmanaged) forest land] with each of the four (4) species comprising at least ten (10) percent of the total stock; however, none of the species shall comprise more than fifty (50) percent of the total stock.

(b) [; and

(c)] For [areas to be used as] commercial (managed) forest land, at least seventy-five (75) percent of the total stock [woody plant stocking] shall be [with] tree (not shrub) species providing good to excellent commercial value. The species shall be selected from those listed in TRM #21 [20], except the cabinet may approve other species on a case-by-case basis.

(2) For other postmining land uses:

(a) If fish and wildlife is the postmining land use, at least thirty (30) percent of the area shall be planted in [~~comprised of~~] multiple rows or plots of trees or shrubs [~~if fish and wildlife is the postmining land use~~].

(b) For subareas within the permit boundary where trees or shrubs will be planted for the purpose of creating wildlife habitat (either for a fish and wildlife postmining land use or for fish and wildlife enhancement of other postmining land uses):

1. The minimum stocking density [~~rate~~] shall be 300 [~~450~~] woody plants per acre, except the cabinet may approve a lesser stocking density if the specific stocking density and species are recommended by the Kentucky Department of Fish and Wildlife Resources for the permit area based upon site-specific considerations and consist of at least 150 trees or shrubs per acre of recommended species, determined with a statistical confidence of ninety (90) percent;

2. At least six (6) [~~four (4)~~] species of trees or shrubs listed in Appendix A of TRM #21 shall be planted, including at least three (3) hard mast species, one (1) conifer species, and two (2) soft mast or shrub species, with each of the six (6) [~~four (4)~~] species comprising at least ten (10) percent of the total stock; however, none of the species shall comprise more than thirty (30) [~~fifty (50)~~] percent of the total stock; and

3. Tree and shrub species shall be selected, grouped, and distributed in a manner which optimizes edge effect, cover, and food for wildlife.

(c) For subareas within the permit boundary where trees and shrubs will be planted for the purposes of creating recreation areas, green belts, fence rows, woodlots, or shelter belts for wildlife, or otherwise facilitating the postmining land use, the minimum stocking density [~~rate~~] shall be 300 [~~450~~] woody plants per acre, unless a lesser density is approved by the cabinet based on site-specific considerations.

(3) For determining tree or shrub stocking success for areas within the permit boundary to be stocked with woody plants, the following criteria shall apply:

(a) At Phase II bond release, each tree or shrub counted shall be alive and healthy and shall have been in place for not less than one (1) growing season. At Phase III bond release, each tree or shrub counted shall be alive and healthy and shall have been in place for not less than two (2) growing seasons:

(b) At Phase III bond release each tree or shrub counted shall have at least one-third (1/3) of its height in live crown;

(c) At Phase III bond release, only woody plants over one (1) foot in height shall be counted, and if multiple stems occur on the same plant, only the tallest stem shall be counted;

(d) Up to a cumulative twenty (20) percent of the woody plants needed to meet the approved stocking [~~standard of 450 per acre~~] may be replanted during the liability period without restarting the liability period;

(e) At Phase III bond release, at least eighty (80) percent of the trees and shrubs used to determine success shall have been in place for three (3) years or more; [~~and~~]

(f) Volunteer plants that meet all applicable requirements of this administrative regulation may be counted; and

(g) [~~(f)~~] Portions of the site occupied by approved rock areas, brush piles, permanent impoundments, permanent roads, and surface drainageways shall be excluded from the stocking success determinations.

Section 7. Use of Reference Areas. (1) Access.

(a) If the reference area is not under the control of the permittee, there shall be a written agreement between the permittee and the landowner specifying that the area may be used for the purposes of a reference area;

(b) The agreement shall also specify that representatives of the cabinet and OSM have right of entry for the purpose of observing and measuring vegetation; and

(c) The agreement shall be effective until final bond release on the permit area, and a copy of the agreement shall be submitted in the permit application.

(2) Selection and management.

(a) Reference areas shall be:

1. Located in unmined areas;

2. Of sufficient area to allow meaningful vegetation measurements and comparisons with the permit area;

3. As close to the permit area as practicable;

4. Representative of the geology, soil, and slope of the permit area, and have the same vegetative type or crops proposed for the postmining land use; and

5. Delineated on the vegetation map pursuant to 405 KAR 8:030, Section 19 or on another appropriate map.

(b) Management of the reference area shall be comparable to that which is required for the approved land use of the permit area.

Section 8. Planting Report. (1) Prior to or simultaneously with the submittal of an application for Phase I bond release on an area, the permittee shall file a certified planting report with the cabinet, on a form prescribed and furnished by the cabinet, giving the following information:

(a) Identification of the operation;

(b) The type of planting or seeding, including mixtures and amounts;

(c) The date of planting or seeding;

(d) The area of land planted or seeded; and

(e) Any other relevant information that the cabinet requires.

(2) A planting report as described in subsection (1) of this section shall also be submitted to the cabinet if any augmentive reseeding or replanting, or other augmentive work, is performed within the permit area.

Section 9. Measurement of Vegetation Success. (1) "TRM #19, Field Sampling Techniques for Determining Ground Cover, Productivity, and Stocking Success of Reclaimed Surface Mined Lands", Department for Surface Mining Reclamation and Enforcement, June 28, 1991, is hereby incorporated by reference. This document may be reviewed or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky, 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

(2) Ground cover and tree and shrub stocking shall be measured using the techniques outlined in TRM #19.

(3) Productivity for pastureland and cropland shall be measured by either:

(a) The techniques established in TRM #19 or alternatives approved under subsection (4) of this section; or

(b) Harvesting and weighing the entire crop or forage by the permittee to determine total yield from the entire permit area or the entire portion designated as cropland (including prime farmland) or pastureland. Representative samples shall be taken to determine moisture content. Procedures for determining total yields under this option shall be approved in advance by the cabinet[~~; or~~

~~(c) For cropland where hay is grown that is not prime farmland and for pastureland, harvesting and weighing by the permittee of the forage from a productivity test area that is an approved representative subarea of the area designated as pastureland or cropland, under subsection (6) of this section~~].

(4) The cabinet may approve alternative sampling and measurement techniques for productivity determinations in addition to those established by TRM #19 if:

(a) A complete description and justification of the methodology is submitted to the cabinet;

(b) The cabinet determines that use of the methodology would provide substantial benefit to the user in terms of cost, efficiency, or accuracy of measuring productivity;

(c) The methodology is determined by the cabinet to be procedurally and statistically valid and in compliance with this administrative regulation;

(d) Methodologies used for prime farmland shall be approved in consultation with SCS; and

(e) Alternative methodologies shall not be used unless they are approved by OSM.

(5) Measurements of ground cover, tree and shrub stocking, and productivity for Phase II and Phase III bond release shall be made by the cabinet, except the permittee may measure productivity.

(a) If the permittee intends to measure productivity, he shall notify the department's appropriate regional office of the measurement dates in order to provide the opportunity for cabinet personnel to observe the measurements. This notification shall be provided in writing at least thirty (30) days prior to the anticipated measurement dates and shall be provided by telephone or in person within two (2) days prior to the measurement dates.

(b) If the permittee measures productivity, he shall ensure that the measurements are made by qualified persons.

(c) The cabinet may make measurements or take other appropriate action as deemed necessary to verify measurements made by the permittee.

(6) [~~Productivity test area for cropland where hay is grown that is not prime farmland and for pastureland. If approved by the cabinet a permittee may determine productivity by mowing, baling and weighing the forage on a test area that is a representative subarea of the area designated as pastureland or cropland.~~

~~(a) The test area shall be one (1) contiguous subarea of the larger area to be represented; shall include ten (10) percent or more of the larger area but shall not be less than one (1) acre; shall be representative of the soil types, slopes and aspect of the larger area; and at the time of harvesting shall be representative of the vegetative species, ground cover, and extent of vegetative growth on the larger area.~~

~~(b) Prior to submitting an application for Phase II bond release the permittee shall submit a copy of the MRP map marked to show the proposed test area. The cabinet shall evaluate the proposed test area and shall notify the permittee in writing whether the proposed test area is approved. The approval shall be conditioned that fertilization and other management of the test area shall be the same as that of the larger area, and that at the time of harvesting the test area shall be representative of the vegetative species, ground cover, and extent of vegetative growth on the larger area. If the cabinet approves the test area the permittee shall physically mark the location of the test area with appropriate markers. The cabinet in its approval may specify the type of markers required.~~

~~(c) Within ten (10) working days of receipt of the written notice of anticipated measurement dates under subsection (5)(a) of this section, the cabinet shall inspect the area to determine if species composition, ground cover, and extent of vegetative growth on the test area are representative of the larger area. If the cabinet determines that the test area does not meet the applicable criteria, it shall promptly notify the permittee in writing and set forth the reasons for its determination. If the cabinet determines that the test area meets the applicable criteria, it shall promptly notify the permittee in writing that the test area may be harvested to determine productivity.~~

~~(d) The permittee shall mow, bale and weigh the yield from the test area, and shall ensure that the yield from the test area is kept separate from the yield from surrounding areas. Representative samples shall be taken to determine moisture content. Personnel of the cabinet may observe the mowing, baling and weighing and may take any reasonable actions necessary to verify the validity of these activities.~~

~~(e) The permittee shall submit the results of the yield measurements to the cabinet. The cabinet shall have the right to reject the results, in whole or in part, for good cause. The cabinet shall evaluate the results and shall notify the permittee in writing of the extent to which the results fulfill the requirement to demonstrate productivity for the larger area.~~

~~(7)~~] All crop and forage yields shall be adjusted to standard moisture content: fifteen (15) percent for pasture and hay, fifteen and five-tenths (15.5) percent for corn, and twelve and five-tenths (12.5) percent for soybeans and wheat.

(7) [~~(8)~~] Whether measured by the cabinet or the permittee, vegetation success shall be measured prior to the submittal of an application for a Phase II or Phase III bond release.

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994

FILED WITH LRC: July 14, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (Eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (Eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency Contact: Jim Villines

(1) Type and number of entities affected: This administrative regulation for surface mining operations and its counterpart 405 KAR 18:200 for underground mining operations establish revegetation requirements. There are about 3600 permanent program permits in effect, under which about 800 mining operations are currently active. This regulation will primarily affect operations where tree and shrub plantings are necessary but have not been completed. This regulation will affect surface owners by affecting the reclamation of the land, and will indirectly affect the general public in the coal field regions. These amendments are being made: to correct deficiencies noted by the federal Office of Surface Mining; to revise the stocking success standards for trees and shrubs based upon consultation with the Kentucky Department of Fish and Wildlife Resources and the Kentucky Department for Natural Resources, Division of Forestry; to delete a document currently incorporated by reference (TRM #20) that contains material not related to this administrative regulation and to incorporate by reference a new document (TRM #21) that relates only to certain revegetation requirements; and to incorporate by reference recent editions of "Kentucky Agricultural Statistics." A few nonsubstantive editorial changes are also being made.

(a) Direct and indirect costs or savings to those affected:

1. First year: On balance, these amendments will likely allow some reductions in the cost of reclamation to the industry, primarily

due to reductions in the required stocking densities for trees and shrubs and the opportunity for further reductions in some circumstances. The magnitude of these effects will be site specific, depending upon the postmining land use and the mix of revegetation measures chosen by the permittee.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings: None

1. First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: No effect.

(4) Assessment of alternative methods; reasons why alternatives were rejected: Although the provisions regarding tree and shrub stocking densities and species were developed jointly with other agencies, no significant alternatives were considered.

(5) Identify any statute, administrative regulation, or governmental policy which may be in conflict, overlapping or duplication: None

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. 30 CFR Parts 730-733, 735, 816.111-.116, 917; 30 USC 1253, 1255, 1265

2. State compliance standards. These amendments are being made: to correct deficiencies noted by the federal Office of Surface Mining; to revise the stocking success standards for trees and shrubs based upon consultation with the Kentucky Department of Fish and Wildlife Resources and the Kentucky Department for Natural Resources, Division of Forestry; to delete a document currently incorporated by reference (TRM #20) that contains material not related to this administrative regulation and to incorporate by reference a new document (TRM #21) that relates only to certain revegetation requirements; and to incorporate by reference recent editions of "Kentucky Agricultural Statistics." A few nonsubstantive editorial changes are also being made. The amendments made to correct deficiencies noted by OSM include:

1) New language at Section 1(4) to ensure it does not inadvertently negate the 405 KAR 16:180 Section 3(2) requirement that "where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the permittee shall intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals." This new language will assure the Kentucky regulations are consistent with 30 CFR 816.97(h).

2) New language in Section 5(2)(b)2 to specifically identify the "Kentucky Agricultural Statistics" documents being relied on (except on prime farmland) for average county yields of row crops, in the same manner as already provided at Section 5(2)(a)2 for pastureland and hay cropland.

3) Deletion of Section 9(3)(c) and 9(6) regarding use of productivity test areas rather than statistical evaluation of productivity. The amendments made through consultation with the Kentucky Department of Fish and Wildlife Resources and the Division of Forestry in the cabinet's Department for Natural Resources include:

a) Revisions throughout Section 6, the success standards for stocking of trees and shrubs.

b) Development of new TRM #21, "Plant Species, Distribution Patterns, Seeding Rates, and Planting Arrangements for Revegetation of Mined Lands." The other substantive amendment is the incorporation by reference of 1991-1992 and 1992-1993 editions of "Kentucky Agricultural Statistics."

3. Minimum or uniform standards contained in the federal mandate. The federal regulation for revegetation is different in character than many of the other federal performance standards. Although it contains certain minimum requirements, it charges each state with establishing much of the detail of the revegetation standards so local and regional conditions can be taken into account. Minimum provisions are included for establishing vegetation, introduced species, timing, mulching, success standards, statistically valid sampling techniques, husbandry practices, and others.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No. Although the state administrative regulation contains more detail than the corresponding federal regulation, as explained above, the states are charged with establishing the detailed requirements.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. Not applicable.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining Reclamation and Enforcement
(Proposed Amendment)

405 KAR 18:010. General provisions.

RELATES TO: KRS 350.020, 350.090, 350.093, 350.151, 350.410, 350.440, 350.465, 30 CFR Parts 730-733, 735, 817.59, 817.99, 817.131-.132, 917, 30 USC 1253, 1255, 1266

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.151, 350.465, 30 CFR Parts 730-733, 735, 817.59, 817.99, 817.131-.132, 917, 30 USC 1253, 1255, 1266

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to promulgate rules and administrative regulations establishing performance standards for protection of people and property, land, water and other natural resources, and aesthetic values, during underground mining activities and for restoration and reclamation of surface areas affected by underground mining activities. This administrative regulation contains general performance standards for maximizing coal recovery, prevention and correction of landslides, temporary cessation of operations, [~~and~~] permanent abandonment of operations, and outcrop barrier pillars.

Section 1. Applicability. The provisions of this chapter are applicable to all underground mining activities including coal processing plants, conducted under Title 405, Chapters 7 through 24. The provisions of this chapter also apply to those special categories of underground mining activities for which performance standards are set forth under 405 KAR 20:020 through 405 KAR 20:080, except to the extent that a provision of those administrative regulations specifically exempts a particular category from a particular requirement of this chapter.

Section 2. Coal Recovery. Underground mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the

future through surface coal operations is minimized.

Section 3. Slides. At any time a slide occurs which may have a potential adverse effect on property, health, safety, or the environment, the permittee shall notify the cabinet by the fastest available means and comply with any remedial measures required by the cabinet.

Section 4. Permanent Abandonment of Operations. (1) Notice required. On or before the date of permanent abandonment of operations, the permittee shall provide written notice to the cabinet that permanent [~~such~~] abandonment is intended.

(2) Prior to permanent abandonment, and prior to removal of necessary equipment from the site, all affected areas shall be closed, backfilled, and otherwise permanently reclaimed in accordance with the requirements of KRS Chapter 350, the administrative regulations of this Title, and the permit.

(3) All equipment, underground openings, structures, or other facilities not required for monitoring shall be removed and the affected areas reclaimed unless the cabinet approves the retention of the [~~such~~] equipment, openings, structures, or other facilities as compatible with the postmining land use or as beneficial to environmental monitoring.

Section 5. Temporary Cessation of Operations. (1) Notice required. Prior to a temporary cessation of operations which the permittee intends to last for thirty (30) days or more, or as soon as it is known to the permittee that an existing temporary cessation will last beyond thirty (30) days, the permittee shall provide written notice to the cabinet that [~~such~~] temporary cessation is anticipated. The notice shall state to what extent equipment will be removed from the site during the temporary cessation, and shall state the approximate date on which the permittee intends that operations will be resumed.

(2) Temporary cessation shall not relieve a permittee of the obligation to comply with 405 KAR 18:070, Section 1(1)(g) and the surface and groundwater monitoring requirements of 405 KAR 18:110, and the obligation to comply with all applicable conditions of the permit during the cessation.

(3) During temporary cessations, equipment and facilities necessary to environmental monitoring or to compliance with performance standards shall be made secure to the extent practicable.

Section 6. Outcrop Barrier Pillars. (1) Except where entries and ventilation shafts are approved, an unmined section of coal shall be left at each area where the coal seam approaches the land surface, to create an outcrop barrier pillar.

(2) The outcrop barrier pillar shall be of sufficient width to support the overburden and to prevent failure and sudden release of water due to water pressure against the unmined coal. The cabinet may determine on a case-by-case basis the width of outcrop barrier pillar that shall be required to comply with this subsection; except if the coal seam dips toward the land surface, the width of the outcrop barrier pillar shall not be less than the width given by the following formula: W = 50 + H, where W is the minimum width in feet and H is the maximum hydrostatic head in feet that can build up on the outcrop barrier.

GLENNA J. CURRY, Deputy Commissioner
PHILLIP J. SHEPHERD, Secretary
APPROVED BY AGENCY: June 20, 1994
FILED WITH LRC: June 21, 1994 at 11 a.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to: CONTACT PERSON: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency contact: Jim Villines

(1) Type and number of entities affected: This proposed amendment requires that where the coal seam approaches the land surface, the underground mine must leave an unmined section of coal to create an outcrop barrier pillar that is of sufficient width to support the overburden and prevent failure and sudden release of water due to water pressure against the outcrop barrier pillar. It provides that the cabinet may determine on a case-by-case basis the width of the outcrop barrier pillar that is necessary; but if the coal seam dips toward the land surface the width must not be less than the width given by the formula: W = 50 + H, where W is the minimum width in feet and H is the maximum hydrostatic head in feet that can build up on the outcrop barrier pillar. This amendment is intended to reduce occurrences of a "blowout," a rapid release to the land surface of a large volume of water impounded in underground mine workings. Blowouts usually result from simply mining too close to the land surface, leaving an outcrop barrier pillar that is too weak to withstand the buildup of water pressure against it. This amendment will require adequate outcrop barrier pillars, and will thereby reduce damages to property and the environment and reduce hazards to people as required by KRS 350.020. Blowouts have caused considerable damage to property and the environment and represent a hazard to persons in the area where they occur. Additionally, an underground mine can become a source of acid mine drainage after a blowout. Thus this amendment affects underground coal operations and the general public living in the coal field regions. There are approximately 800 active underground mines in Kentucky, but not all of these have mining conditions that would be affected by this amendment.

(a) Direct and indirect costs or savings to those affected:

1. First year: This amendment will sometimes result in a wider coal outcrop barrier pillar than an underground mine would have provided in absence of this new requirement. In these cases, some coal that would have been mined will now be left in place, rather than being mined and sold.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: Applicants will need to include engineering information and drawings detailing the coal outcrop barrier pillars in the permit application. This is a small addition to the permit application.

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year: Some additional effort will be necessary in technical review of the permit application.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: No effect is anticipated. In some cases, small amounts of coal in specific areas that might have been mined and sold will instead be left in place as wider outcrop barrier pillars than would have been left in the absence of this amendment. However, since total annual severance tax revenues depend upon total annual production, which is market driven, and since the small amounts of coal discussed above will be replaced by other production, no effect on annual revenues is anticipated.

(4) Assessment of alternative methods; reasons why alternatives were rejected: No alternatives were considered.

(5) Identify any statute, administrative regulation, or governmental policy which may be in conflict, overlapping or duplication: None

(a) Necessity of proposed regulation if in conflict: Not in conflict.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: Not in conflict.

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. There is no federal mandate for this proposed amendment. This proposed amendment adds a requirement for which there is no federal counterpart. There are federal counterparts to the current requirements of this administrative regulation, but this proposed amendment does not alter those requirements.

2. State compliance standards. This proposed amendment requires that where the coal seam approaches the land surface, the underground mine must leave an unmined section of coal to create an outcrop barrier pillar that is of sufficient width to support the overburden and prevent failure and sudden release of water due to water pressure against the outcrop barrier pillar. It provides that the cabinet may determine on a case-by-case basis the width of the outcrop barrier pillar that is necessary; but if the coal seam dips toward the land surface the width must not be less than the width given by the formula: W = 50 + H, where W is the minimum width in feet and H is the maximum hydrostatic head in feet that can build up on the outcrop barrier pillar.

3. Minimum or uniform standards contained in the federal mandate. There is no federal counterpart to this proposed amendment.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? There is no federal counterpart to this proposed amendment.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This amendment is necessary to reduce occurrences of a "blowout," a rapid release to the land surface of a large volume of water impounded in underground mine workings. Blowouts usually result from simply mining too close to the land surface, leaving an outcrop barrier pillar that is too weak to withstand the buildup of water pressure against it. This amendment will require adequate outcrop barrier pillars, and will thereby reduce damages to property and the environment and reduce hazards to people as required by KRS 350.020.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
Department for Surface Mining Reclamation and Enforcement
(Proposed Amendment)

405 KAR 18:200. Revegetation.

RELATES TO: KRS 350.093, 350.095, 350.100, 350.151, 350.405, 350.410, 350.420, 350.435, 350.465, 30 CFR Parts 730-733, 735, 817.111-.116, 917, 30 USC 1253, 1255, 1266

STATUTORY AUTHORITY: KRS Chapter 13A, 350.028, 350.100, 350.151, 350.465, 30 CFR Parts 730-733, 735, 817.111-.116, 917, 30 USC 1253, 1255, 1266

NECESSITY AND FUNCTION: KRS Chapter 350 in pertinent part requires the cabinet to promulgate rules and administrative regulations establishing performance standards for protection of people and property, land, water and other natural resources, and aesthetic values, during underground mining activities and for restoration and reclamation of surface areas affected by underground mining activities. This administrative regulation sets forth requirements for revegetation of areas affected by surface operations and facilities of underground mining activities, including requirements for temporary and permanent vegetative cover, use of introduced species, timing of revegetation, mulching and other soil stabilizing practices, standards for measuring revegetation success, and reporting requirements.

Section 1. General Requirements. (1)(a) Each permittee shall establish on all areas affected by surface operations and facilities a diverse, effective, and permanent vegetative cover that meets the requirements of this administrative regulation and the revegetation provisions of 405 KAR 18:180, and that supports the approved postmining land use.

(b) For prime farmland areas, the requirements of 405 KAR 20:040 shall apply in lieu of the productivity standards of this administrative regulation unless those areas are exempted by 405 KAR 8:050, Section 3, in which case the productivity standards of this administrative regulation shall apply.

(2) All revegetation shall be in compliance with the plan submitted under 405 KAR 8:040, Sections 24(4) and 37, as approved by the cabinet, and shall be carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with the approved postmining land use.

(3) If the approved postmining land use is not cropland or pastureland, all disturbed land except water areas, rock areas such as those used for drainage control and wildlife enhancement, and surface areas of roads that are approved as a part of the postmining land use or uses shall be seeded or planted to achieve a permanent vegetative cover of the same seasonal variety native to the region that is capable of soil stabilization, self-regeneration, and plant succession. The vegetative cover shall be considered of the same seasonal variety if it consists of a mixture of species of equal or superior utility for the approved postmining land use, when compared with the utility of naturally occurring vegetation during each season of the year.

(4) If the postmining land use is cropland or pastureland, establishment of crops or pasture species normally grown in the mine vicinity and normal husbandry practices, and compliance with 405 KAR 18:180, Section 3(2) for cropland, will meet the requirements of subsection (1)(a) of this section.

(5)(a) Plant species used for revegetation shall be compatible with the plant and animal species of the area, and shall meet the requirements of applicable state and federal laws or regulations for seeds, poisonous and noxious plants, and introduced species.

(b) Except for cropland, selection of species, distribution patterns, seeding rates, and planting arrangements shall be approved case-by-case by the cabinet based upon this administrative regulation and

TRM #21, "Plant Species, Distribution Patterns, Seeding Rates, and Planting Arrangements for Revegetation of Mined Lands", Kentucky Department of Fish and Wildlife Resources, Kentucky Department of Natural Resources, Division of Forestry, and Kentucky Department for Surface Mining Reclamation and Enforcement (July 12, 1994). ~~[TRM #20, "Methodologies for the Evaluation, Protection, and Enhancement of Fish and Wildlife Resources for Coal Mining and Reclamation Operations", Kentucky Department for Fish and Wildlife Resources and Kentucky Department for Surface Mining Reclamation and Enforcement (December 6, 1991).]~~ This document is incorporated by reference. It may be reviewed, copied, or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. Two (2) or more permanent legume species and two (2) or more permanent grasses shall be established on pastureland unless fewer species are approved by the cabinet based on a pasture management plan specifically tailored to the species mix.

(6) Subject to the approval of the cabinet, small incidental areas related to the fulfillment of the postmining land use may be exempted from the revegetation standards if no adverse environmental impact will occur if the exemption is granted.

(7) The extended liability period under the performance bond requirements of 405 KAR Chapter 10 shall begin after the last time of augmented seeding, fertilizing, irrigating, or other related work, and shall continue for not less than five (5) years; except:

(a) Discrete areas of 0.25 acre or less needing reseeding due to circumstances specified in subparagraphs 1 through 5 of this paragraph may be reseeded (including reliming, refertilizing, and remulching) without restarting the five (5) year liability period. The total acreage of these areas reseeded during the liability period shall not exceed three (3) percent of the acreage affected by surface operations and facilities. This paragraph shall only apply to:

1. Reseeding associated with repair of rills and gullies;

2. Reseeding areas where vegetation was disturbed by vehicular traffic not under the control of the permittee;

3. Reseeding areas where vegetation was disturbed by the installation or removal of oil and gas wells or utility lines;

4. Reseeding areas where there was poor seed germination of the initial seeding; and

5. Reseeding areas where vegetation was unavoidably disturbed in the course of conducting some other necessary reclamation activity.

(b) Liming, fertilizing, mulching, seeding, or stocking of haul roads, locations where sedimentation ponds and off-site temporary diversions that divert water to or away from sedimentation ponds have been removed, and locations where collected sediment and embankment material from sedimentation pond removal have been disposed shall not restart the five (5) year liability period. Vegetation established in these areas shall be in place for at least two (2) years before Phase III bond release;

(c) For cropland, the five (5) year liability period shall commence at the date of initial planting for the long-term intensive agricultural postmining land use;

(d) Irrigating, reliming, and refertilizing cropland and pastureland; reseeding cropland; and renovating pastureland by overseeding with legumes after Phase II bond release and after three (3) years from the initial seeding shall be considered normal husbandry practices and shall not restart the liability period, if the amount and frequency of these practices do not exceed normal agricultural practices used on unmined land within the region; and

(e) Other normal husbandry practices that may be conducted without restarting the liability period are disease, pest, and vermin control; pruning; and transplanting and replanting of trees and shrubs in accordance with Section 6 of this administrative regulation.

(8) For pastureland, and for cropland except prime farmland subject to 405 KAR 20:040, ground cover and productivity success standards shall be met during the growing seasons of any two (2) years of the liability period except the first year; and areas approved for other uses shall equal or exceed the applicable success standards during the growing season of the last year of the liability period.

Section 2. Use of Introduced Species. Introduced species may be substituted for native species only if approved by the cabinet under the following conditions:

(1) The species shall meet the applicable requirements of Section 1(2), (3), (4), and (5) of this administrative regulation.

(2)(a) Appropriate field trials or other studies shall be conducted or published literature shall be submitted to demonstrate to the satisfaction of the cabinet that proposed, unproven, introduced species are desirable and are necessary for achieving the postmining land use; or

(b) The species are necessary to achieve a quick, temporary, and stabilizing cover that aids in controlling erosion; and measures to establish permanent vegetation are included in the approved plans submitted under 405 KAR 8:040, Sections 24(4)(e) and 37.

Section 3. Timing. Seeding and planting of disturbed areas with permanent species shall be conducted no later than during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally, or as approved by the cabinet in the permit, for the type of plant materials selected. In accordance with Section 4 of this administrative regulation and 405 KAR 18:020, a disturbed area shall be seeded and mulched, as contemporaneously as practicable with the completion of backfilling and grading, to establish a temporary cover of small grains, grasses, or legumes until a permanent cover is established.

Section 4. Soil Amendments and Stabilization. (1) Nutrients and soil amendments shall be applied to regraded areas in accordance with 405 KAR 18:050, Section 5.

(2) Suitable mulch or other soil stabilizing practices shall be used in addition to temporary cover on all regraded and topsoiled areas to control erosion, promote germination of seeds, and increase the moisture retention capacity of the soil. The cabinet may, on a case-by-case basis, waive the requirement for mulch if the cabinet finds, based on seasonal, soil, and slope factors, that the temporary vegetative cover will achieve proper erosion control until a permanent cover is established, except that no waiver shall be granted for any area having a slope greater than ten (10) percent.

(3) For areas within the area affected by surface operations and facilities to be used as cropland, the area shall be seeded or planted in order to maintain a vegetative cover effective in controlling erosion until the permittee chooses to grow crops.

Section 5. Success Standards for Ground Cover and Productivity. (1) Determination of success of ground cover and productivity may be made on the basis of reference areas from unmined lands in the vicinity of the operation, where applicable, or by application of the specific ground cover and productivity standards of this section (tree and shrub stocking standards are set forth in Section 6 of this administrative regulation).

(2)(a) For an approved postmining land use of pastureland or cropland used for the production of hay (except prime farmland subject to 405 KAR 20:040);

1. Ground cover (percent) and productivity (tons of forage per acre) shall be at least ninety (90) percent of that of an approved reference area with a statistical confidence of ninety (90) percent; or

2. Ground cover shall be at least ninety (90) percent, and productivity shall be at least ninety (90) percent of the average yield for that hay in the county in the three (3) years prior to the year of measurement, as determined from "Kentucky Agricultural Statistics 1989-1990", "Kentucky Agricultural Statistics 1990-1991", "Kentucky Agricultural Statistics 1991-1992", and "Kentucky Agricultural

Statistics 1992-1993", [~~yield data available from the Kentucky Department of Agriculture,~~] with a statistical confidence of ninety (90) percent.

3. "Kentucky Agricultural Statistics 1989-1990", "Kentucky Agricultural Statistics 1990-1991", "Kentucky Agricultural Statistics 1991-1992", and "Kentucky Agricultural Statistics 1992-1993", Kentucky Agricultural Statistics Service, Kentucky Department of Agriculture, and National Agricultural Statistics Service, United States Department of Agriculture, are incorporated by reference. These documents may be reviewed, copied, or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. through 4:30 p.m.

(b) For areas within the area affected by surface operations and facilities where row crops will be planted (except prime farmland subject to 405 KAR 20:040):

1. Ground cover on any area not planted in row crops shall be at least ninety (90) percent with a statistical confidence of ninety (90) percent; and

2. Crop production shall be at least ninety (90) percent of that of an approved reference area or at least ninety (90) percent of the average yield for the crop in the county in the three (3) years prior to the year of measurement, as determined from "Kentucky Agricultural Statistics 1989-1990", "Kentucky Agricultural Statistics 1990-1991", "Kentucky Agricultural Statistics 1991-1992", and "Kentucky Agricultural Statistics 1992-1993", [~~yield data available from the Kentucky Department of Agriculture,~~] with a statistical confidence of ninety (90) percent.

(c) Forest land, or other areas within the area affected by surface operations and facilities where woody plants are stocked, shall have at least eighty (80) percent ground cover with a statistical confidence of ninety (90) percent, with no sign of significant erosion as set forth in 405 KAR 18:190, Section 4.

(d) For all other land uses, ground cover shall be at least eighty (80) percent with a statistical confidence of ninety (90) percent, with no sign of significant erosion as set forth in 405 KAR 18:190, Section 4.

(e) For all land uses other than cropland planted in row crops, at Phase III bond release there shall be no discrete bare area or sparsely covered (less than fifty (50) percent ground cover) area greater than 0.25 acre in size.

(3) For previously mined areas that were not reclaimed to the requirements of 405 KAR Chapters 16 through 20, the ground cover of living plants shall not be less than the ground cover existing before the redisturbance and shall be at least eighty (80) percent with a statistical confidence of ninety (90) percent, with no sign of significant erosion as set forth in 405 KAR 18:190, Section 4.

Section 6. Tree and Shrub Stocking. This section sets forth stocking standards and criteria for counting woody plants for measuring stocking success, and shall apply [~~applies~~] in addition to Section 5 of this administrative regulation, where the approved postmining land use or the approved fish and wildlife protection and enhancement plan requires the planting of trees or shrubs.

(1) If forest land is the [~~an~~] approved postmining land use, [~~:~~

~~(a) The forested area shall have~~] a minimum stocking density of 300 [~~450~~] trees or trees and shrubs per acre determined with a statistical confidence of ninety (90) percent, with tree (not shrub) species comprising at least seventy-five (75) [~~fifty (50)~~] percent of the total stock, shall be achieved on at least seventy (70) percent of the area stocked. [~~woody plant species;~~]

(a) For noncommercial (unmanaged) forest land, [~~(b)~~] at least four (4) species of trees or trees and shrubs shall be planted in a mixed distribution pattern [~~for noncommercial (unmanaged) forest land~~] with each of the four (4) species comprising at least ten (10) percent of the total stock; however, none of the species shall comprise more than fifty (50) percent of the total stock. [~~; and~~]

(b) [~~(c)~~] For [~~areas to be used as~~] commercial (managed) forest land, at least seventy-five (75) percent of the total stock [~~woody plant stocking~~] shall be [~~with~~] tree (not shrub) species providing good to excellent commercial value. The species shall be selected from those listed in TRM #21 [~~20~~], except the cabinet may approve other species on a case-by-case basis.

(2) For other postmining land uses:

(a) If fish and wildlife is the postmining land use, at least thirty (30) percent of the area shall be planted in [~~comprised of~~] multiple rows or plots of trees or shrubs [~~if fish and wildlife is the postmining land use~~].

(b) For subareas within the area affected by surface operations and facilities where trees or shrubs will be planted for the purpose of creating wildlife habitat (either for a fish and wildlife postmining land use or for fish and wildlife enhancement of other postmining land uses):

1. The minimum stocking density [~~rate~~] shall be 300 [~~450~~] woody plants per acre, except the cabinet may approve a lesser stocking density if the specific stocking density and species are recommended by the Kentucky Department of Fish and Wildlife Resources for the permit area based upon site-specific considerations and consist of at least 150 trees or shrubs per acre of recommended species, determined with a statistical confidence of ninety (90) percent;

2. At least six (6) [~~four (4)~~] species of trees or shrubs listed in Appendix A of TRM #21 shall be planted, including at least three (3) hard mast species, one (1) conifer species, and two (2) soft mast or shrub species, with each of the six (6) [~~four (4)~~] species comprising at least ten (10) percent of the total stock; however, none of the species shall comprise more than thirty (30) [~~fifty (50)~~] percent of the total stock; and

3. Tree and shrub species shall be selected, grouped, and distributed in a manner which optimizes edge effect, cover, and food for wildlife.

(c) For subareas within the area affected by surface operations and facilities where trees and shrubs will be planted for the purposes of creating recreation areas, green belts, fence rows, woodlots, or shelter belts for wildlife, or otherwise facilitating the postmining land use, the minimum stocking density [~~rate~~] shall be 300 [~~450~~] woody plants per acre, unless a lesser density is approved by the cabinet based on site-specific considerations.

(3) For determining tree or shrub stocking success for areas within the area affected by surface operations and facilities to be stocked with woody plants, the following criteria shall apply:

(a) At Phase II bond release, each tree or shrub counted shall be alive and healthy and shall have been in place for not less than one (1) growing season. At Phase III bond release, each tree or shrub counted shall be alive and healthy and shall have been in place for not less than two (2) growing seasons:

(b) At Phase III bond release each tree or shrub counted shall have at least one-third (1/3) of its height in live crown;

(c) At Phase III bond release, only woody plants over one (1) foot in height shall be counted, and if multiple stems occur on the same plant, only the tallest stem shall be counted;

(d) Up to a cumulative twenty (20) percent of the woody plants needed to meet the approved stocking [~~standard of 450 per acre~~] may be replanted during the liability period without restarting the liability period;

(e) At Phase III bond release, at least eighty (80) percent of the trees and shrubs used to determine success shall have been in place for three (3) years or more; [~~and~~]

(f) Volunteer plants that meet all applicable requirements of this administrative regulation may be counted; and

(g) [~~(f)~~] Portions of the site occupied by approved rock areas, brush piles, permanent impoundments, permanent roads, and surface drainageways shall be excluded from the stocking success determinations.

Section 7. Use of Reference Areas. (1) Access.

(a) If the reference area is not under the control of the permittee, there shall be a written agreement between the permittee and the landowner specifying that the area may be used for the purposes of a reference area;

(b) The agreement shall also specify that representatives of the cabinet and OSM have right of entry for the purpose of observing and measuring vegetation; and

(c) The agreement shall be effective until final bond release on the permit area, and a copy of the agreement shall be submitted in the permit application.

(2) Selection and management.

(a) Reference areas shall be:

1. Located in unmined areas;

2. Of sufficient area to allow meaningful vegetation measurements and comparisons with the area affected by surface operations and facilities;

3. As close to the area affected by surface operations and facilities as practicable;

4. Representative of the geology, soil, and slope of the area affected by surface operations and facilities, and have the same vegetative type or crops proposed for the postmining land use; and

5. Delineated on the vegetation map pursuant to 405 KAR 8:040, Section 19 or on another appropriate map.

(b) Management of the reference area shall be comparable to that which is required for the approved land use of the area affected by surface operations and facilities.

Section 8. Planting Report. (1) Prior to or simultaneously with the submittal of an application for Phase I bond release on an area, the permittee shall file a certified planting report with the cabinet, on a form prescribed and furnished by the cabinet, giving the following information:

(a) Identification of the operation;

(b) The type of planting or seeding, including mixtures and amounts;

(c) The date of planting or seeding;

(d) The area of land planted or seeded; and

(e) Any other relevant information that the cabinet requires.

(2) A planting report as described in subsection (1) of this section shall also be submitted to the cabinet if any augmentive reseeding or replanting, or other augmentive work, is performed within the area affected by surface operations and facilities.

Section 9. Measurement of Vegetation Success. (1) Ground cover and tree and shrub stocking shall be measured using the techniques outlined in TRM #19. TRM #19, "Field Sampling Techniques for Determining Ground Cover, Productivity, and Stocking Success of Reclaimed Surface Mined Lands", Department for Surface Mining Reclamation and Enforcement, June 28, 1991, is incorporated by reference. It may be reviewed, copied, or obtained at the Department for Surface Mining Reclamation and Enforcement, #2 Hudson Hollow, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

(2) Productivity for pastureland and cropland shall be measured by either:

(a) The techniques established in TRM #19 or alternatives approved under subsection (3) of this section;

(b) Harvesting and weighing the entire crop or forage by the permittee to determine total yield from the entire surface operations and facilities' area or the entire portion designated as cropland (including prime farmland) or pastureland. Representative samples shall be taken to determine moisture content. Procedures for determining total yields under this option shall be approved in advance by the cabinet[~~; or~~

~~(c) For cropland where hay is grown that is not prime farmland and for pastureland, harvesting and weighing by the permittee of the forage from a productivity test area that is an approved representative subarea of the area designated as pastureland or cropland, under subsection (5) of this section~~].

(3) The cabinet may approve alternative sampling and measurement techniques for productivity determinations in addition to those established by TRM #19 if:

(a) A complete description and justification of the methodology is submitted to the cabinet;

(b) The cabinet determines that use of the methodology would provide substantial benefit to the user in terms of cost, efficiency, or accuracy of measuring productivity;

(c) The methodology is determined by the cabinet to be procedurally and statistically valid and in compliance with this administrative regulation;

(d) Methodologies used for prime farmland shall be approved in consultation with SCS; and

(e) Alternative methodologies shall not be used unless they are approved by OSM.

(4) Measurements of ground cover, tree and shrub stocking, and productivity for Phase II and Phase III bond release shall be made by the cabinet, except the permittee may measure productivity.

(a) If the permittee intends to measure productivity, he shall notify the department's appropriate regional office of the measurement dates in order to provide the opportunity for cabinet personnel to observe the measurements. This notification shall be provided in writing at least thirty (30) days prior to the anticipated measurement dates and shall be provided by telephone or in person within two (2) days prior to the measurement dates.

(b) If the permittee measures productivity, he shall ensure that the measurements are made by qualified persons.

(c) The cabinet may make measurements or take other appropriate action as deemed necessary to verify measurements made by the permittee.

(5) [~~Productivity test area for cropland where hay is grown that is not prime farmland and for pastureland. If approved by the cabinet a permittee may determine productivity by mowing, baling and weighing the forage on a test area that is a representative subarea of the area designated as pastureland or cropland.~~

~~(a) The test area shall be one (1) contiguous subarea of the larger area to be represented, shall include ten (10) percent or more of the larger area but shall not be less than one (1) acre; shall be representative of the soil types, slopes and aspect of the larger area; and at the time of harvesting shall be representative of the vegetative species, ground cover, and extent of vegetative growth on the larger area.~~

~~(b) Prior to submitting an application for Phase II bond release the permittee shall submit a copy of the MRP map marked to show the proposed test area. The cabinet shall evaluate the proposed test area and shall notify the permittee in writing whether the proposed test area is approved. The approval shall be conditioned that fertilization and other management of the test area shall be the same as that of the larger area, and that at the time of harvesting the test area shall be representative of the vegetative species, ground cover, and extent of vegetative growth on the larger area. If the cabinet approves the test area the permittee shall physically mark the location of the test area with appropriate markers. The cabinet in its approval may specify the type of markers required.~~

~~(c) Within ten (10) working days of receipt of the written notice of anticipated measurement dates under subsection (4)(a) of this section, the cabinet shall inspect the area to determine if species composition, ground cover, and extent of vegetative growth on the test area are representative of the larger area. If the cabinet determines that the test area does not meet the applicable criteria, it shall promptly notify the permittee in writing and set forth the reasons for its determination. If the cabinet determines that the test area meets the applicable criteria, it shall promptly notify the permittee in writing that the test area may be harvested to determine productivity.~~

~~(d) The permittee shall mow, bale and weigh the yield from the test area, and shall ensure that the yield from the test area is kept separate from the yield from surrounding areas. Representative samples shall be taken to determine moisture content. Personnel of the cabinet may observe the mowing, baling and weighing and may take any reasonable actions necessary to verify the validity of these activities.~~

~~(e) The permittee shall submit the results of the yield measurements to the cabinet. The cabinet shall have the right to reject the results, in whole or in part, for good cause. The cabinet shall evaluate the results and shall notify the permittee in writing of the extent to which the results fulfill the requirement to demonstrate productivity for the larger area.~~

~~(6)~~] All crop and forage yields shall be adjusted to standard moisture content: fifteen (15) percent for pasture and hay, fifteen and five-tenths (15.5) percent for corn, and twelve and five- tenths (12.5) percent for soybeans and wheat.

(6) [~~(7)~~] Whether measured by the cabinet or the permittee, vegetation success shall be measured prior to the submittal of an application for a Phase II or Phase III bond release.

PHILLIP J. SHEPHERD, Secretary

APPROVED BY AGENCY: July 13, 1994

FILED WITH LRC: July 14, 1994 at 10 a.m.

PUBLIC HEARING: A public hearing on this proposed amendment has been scheduled for 9 a.m. (Eastern time) Tuesday, August 30, 1994 in the Department for Surface Mining Reclamation and Enforcement's Training Room (Room D-16) at the Hudson Hollow Office Park, 2 Hudson Hollow Road, Frankfort, Kentucky. Persons who wish to testify at the hearing shall notify the contact person listed below, in writing, by August 25, 1994. The scheduled hearing may be cancelled if the contact person has not received any written notice of intent to testify by August 25, 1994, five days before the scheduled hearing date. If the hearing is held, it will be open to the public. Any person in attendance who wishes to testify on the proposed amendment will be given a fair and reasonable opportunity to do so, regardless of whether the person has given the cabinet prior written notice of his intent to testify. To assure an accurate record, the cabinet requests each person testifying at the hearing to provide the cabinet with a written copy of his testimony. The cabinet is not required to make a recording or transcript of the hearing unless someone makes a written request for it, in which case the person requesting the recording or transcript shall pay for it.

WRITTEN COMMENTS: A person who wishes to comment on this proposed amendment but does not wish to testify at the hearing may submit written comments on the proposed amendment at any time before 4:30 p.m. (Eastern time) on August 30, 1994. Comments received after that time will not be considered. Written comments and written notices of intent to testify at the hearing shall be submitted to: Jim Villines, Kentucky Department for Surface Mining, 2 Hudson Hollow Road, Frankfort, KY 40601, (502) 564-2377.

REGULATORY IMPACT ANALYSIS

Agency Contact: Jim Villines

(1) Type and number of entities affected: This administrative regulation for underground mining operations and its counterpart 405 KAR 16:200 for surface mining operations establish revegetation requirements. There are about 3600 permanent program permits in effect, under which about 800 mining operations are currently active. This regulation will primarily affect operations where tree and shrub plantings are necessary but have not been completed. This regulation will affect surface owners by affecting the reclamation of the land, and will indirectly affect the general public in the coal field regions. These amendments are being made: to correct deficiencies noted by the federal Office of Surface Mining; to revise the stocking success standards for trees and shrubs based upon consultation with the Kentucky Department of Fish and Wildlife Resources and the Kentucky Department for Natural Resources, Division of Forestry; to delete a document currently incorporated by reference (TRM #20) that contains material not related to this administrative regulation and to incorporate by reference a new document (TRM #21) that relates only to certain revegetation requirements; and to incorporate by reference recent editions of "Kentucky Agricultural Statistics." A few nonsubstantive editorial changes are also being made.

(a) Direct and indirect costs or savings to those affected:

1. First year: On balance, these amendments will likely allow some reductions in the cost of reclamation to the industry, primarily due to reductions in the required stocking densities for trees and shrubs and the opportunity for further reductions in some circumstances. The magnitude of these effects will be site specific, depending upon the postmining land use and the mix of revegetation measures chosen by the permittee.

2. Continuing costs or savings: Same as first year.

3. Additional factors increasing or decreasing costs (note any effects upon competition): None

(b) Reporting and paperwork requirements: None

(2) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings: None

1. First year: None

2. Continuing costs or savings: None

3. Additional factors increasing or decreasing costs: None

(b) Reporting and paperwork requirements: None

(3) Assessment of anticipated effect on state and local revenues: No effect.

(4) Assessment of alternative methods; reasons why alternatives were rejected: Although the provisions regarding tree and shrub stocking densities and species were developed jointly with other agencies, no significant alternatives were considered.

(5) Identify any statute, administrative regulation, or governmental policy which may be in conflict, overlapping or duplication: None

(a) Necessity of proposed regulation if in conflict: Not applicable.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions: Not applicable.

(6) Any additional information or comments: None

TIERING: Was tiering applied? No. Tiering is not applicable to this proposed amendment because, under the federal and Kentucky surface mining laws and regulations, these requirements must apply equally to all permittees under 405 KAR Chapters 7-24.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. 30 CFR Parts 730-733, 735, 817.111-.116, 917; 30 USC 1253, 1255, 1266.

2. State compliance standards. These amendments are being made: to correct deficiencies noted by the federal Office of Surface Mining; to revise the stocking success standards for trees and shrubs based upon consultation with the Kentucky Department of Fish and Wildlife Resources and the Kentucky Department for Natural Resources, Division of Forestry; to delete a document currently incorporated by reference (TRM #20) that contains material not related to this administrative regulation and to incorporate by reference a new document (TRM #21) that relates only to certain revegetation requirements; and to incorporate by reference recent editions of "Kentucky Agricultural Statistics." A few nonsubstantive editorial changes are also being made.

The amendments made to correct deficiencies noted by OSM include:

1) New language at Section 1(4) to ensure it does not inadvertently negate the 405 KAR 18:180 Section 3(2) requirement that "where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the permittee shall intersperse the fields with trees, hedges, or fence rows through-

out the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals." This new language will assure the Kentucky regulations are consistent with 30 CFR 817.97(h).

2) New language in Section 5(2)(a)2 for pastureland and hay cropland, and Section 5(2)(b)2 for row crops, to specifically identify the "Kentucky Agricultural Statistics" documents being relied on (except on prime farmland) for average county yields. New subparagraph at Section 5(2)(a)3 to incorporate the 1989-90 through 1992-93 editions of these documents by reference.

3) Deletion of Section 9(2)(c) and 9(5) regarding use of productivity test areas rather than statistical evaluation of productivity.

The amendments made through consultation with the Kentucky Department of Fish and Wildlife Resources and the Division of Forestry in the cabinet's Department for Natural Resources include:

1) Revisions throughout Section 6, the success standards for stocking of trees and shrubs.

2) Development of new TRM #21, "Plant Species, Distribution Patterns, Seeding Rates, and Planting Arrangements for Revegetation of Mined Lands."

3. Minimum or uniform standards contained in the federal mandate. The federal regulation for revegetation is different in character than many of the other federal performance standards. Although it contains certain minimum requirements, it charges each state with establishing much of the detail of the revegetation standards so local and regional conditions can be taken into account. Minimum provisions are included for establishing vegetation, introduced species, timing, mulching, success standards, statistically valid sampling techniques, husbandry practices, and others.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No. Although the state administrative regulation contains more detail than the corresponding federal regulation, as explained above, the states are charged with establishing the detailed requirements.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. Not applicable.

DEPARTMENT OF CORRECTIONS
(Proposed Amendment)

501 KAR 6:050. Luther Luckett Correctional Complex.

RELATES TO: KRS Chapters 196, 197, 439

STATUTORY AUTHORITY: KRS 196.035, 197.020, 439.470, 439.590, 439.640

NECESSITY AND FUNCTION: KRS 196.035, 197.020, 439.470, 439.590, and 439.640 authorize the commissioner to adopt, amend or rescind administrative regulations necessary and suitable for the proper administration of the department or any division therein. These policies and procedures are incorporated by reference in order to comply with the accreditation standards of the American Correctional Association. These administrative regulations are in conformity with those provisions.

Section 1. Pursuant to the authority vested in the Department of Corrections the following policies and procedures, revised July 13 [~~May 23~~], 1994 are incorporated by reference and shall be referred to as Luther Luckett Correctional Complex Policies and Procedures. Copies of the procedures may be obtained from the Office of the General Counsel, Department of Corrections, State Office Building, Frankfort, Kentucky 40601 or may be reviewed at the Office of General Counsel weekdays from 8 a.m. to 4:30 p.m.

LLCC 01-12-01	Duty Officer Responsibilities
LLCC 01-13-01	Smoking: LLCC Facility
LLCC 02-01-02	Fiscal Management: Accounting Procedures
LLCC 02-01-03	Fiscal Management: Agency Funds
LLCC 02-01-04	Fiscal Management: Insurance
LLCC 02-03-01	Fiscal Management: Audits
LLCC 08-01-01	Offender Records
LLCC 08-04-01	Storage of Expunged Records
LLCC 08-05-01	Psychological and Psychiatric Reports
LLCC 11-09-01	Rules and Regulations of the Unit (Amended 7/13/94)
LLCC 11-13-01	Inmate Dress and Use of Access Areas
LLCC 11-18-02	Use of Monitor Telephone
LLCC 11-19-01	Unit Shakedowns/Control of Excess Property
LLCC 11-20-01	Program Services for "Special Needs"/Mentally Ill Inmates
LLCC 12-01-01	Special Management Inmates
LLCC 12-01-02	Pretrial Contract Hold Status
LLCC 13-01-01	Dining Room Guidelines
LLCC 13-04-01	Food Service: Meals
LLCC 13-04-02	Food Service: Menu, Nutrition and Special Diets
LLCC 13-05-02	Medical Screening of Food Handlers
LLCC 13-06-01	Food Service: Inspections and Sanitation
LLCC 13-07-01	Food Service: Purchasing, Storage and Farm Products
LLCC 13-08-01	OJT Food Service Training Placement
LLCC 14-01-01	Sanitation, Living Condition Standards, and Clothing Issue
LLCC 14-05-01	Institutional Inspections
LLCC 15-01-01	Health Maintenance Services; Sick Call and Pill Call
LLCC 15-03-01	Pharmacy
LLCC 15-03-02	Pharmacy Personnel
LLCC 15-03-03	Distribution, Procurement and Control
LLCC 15-03-04	Inmate - Self Administration of Medication
LLCC 15-03-05	Use of Psychotropic Medications
LLCC 15-05-02	Licensure and Training Standards
LLCC 15-06-02	Specialized Health Services
LLCC 15-06-03	Emergency Medical/Dental Care Services
LLCC 15-06-04	First Aid/CPR Training Program
LLCC 15-06-05	Suicide Prevention and Intervention Program
LLCC 15-07-01	Health Records
LLCC 15-08-01	Special Diets
LLCC 15-14-01	Informed Consent
LLCC 15-15-01	Medical Restraints
LLCC 15-16-01	Health Education/Special Health Programs
LLCC 15-17-01	Serious and Infectious Diseases
LLCC 16-01-01	Inmate Rights and Responsibilities
LLCC 16-03-01	Inmate Legal Services
LLCC 18-01-01	Inmate Correspondence (Amended 7/13/94)
LLCC 18-01-02	Inmate Privileged or Legal Mail Policy (Added 7/13/94
LLCC 18-01-03	Inmate Packages (Added 7/13/94)
LLCC 18-02-01	Inmate Visiting
LLCC 18-02-03	Extended Visit and Furloughs
LLCC 18-02-04	Meritorious Visits [~~(Amended 5/23/94)~~]
LLCC 18-03-01	Entry and Identification of Visitors for Inmate Visitation
LLCC 18-03-03	Inmate Visiting Disciplinary Segregation Administrative Segregation
LLCC 18-03-04	Parole Hearings
LLCC 20-01-01	Personal Property Control (Amended 7/13/94)
LLCC 20-04-01	Inmate Canteen Committee
LLCC 20-04-02	Inmate Canteen
LLCC 20-04-03	Canteen Purchase Limits
LLCC 20-05-01	Inmate Control of Personal Funds
LLCC 20-05-02	Storage and Disposition of Monies Received on Weekends, Holidays, and Between 4 p.m. and 8 a.m. Weekdays

LLCC 20-05-03	Theft of Inmate Personal Property
LLCC 20-06-01	Procedure for Sending Appliances to Outside Dealers for Repair
LLCC 21-02-01	Classification/Security Levels
LLCC 21-03-01	Classification Process
LLCC 23-01-01	Academic School
LLCC 26-01-01	Religious Services
LLCC 26-01-02	Prayer
~~[LLCC 28-03-01~~	~~Temporary Release/Community Center Release (Deleted 7/13/94)~~
~~LLCC 28-04-01~~	~~Preparole Progress Report (Deleted 7/13/94)~~
~~LLCC 28-04-02~~	~~Parole Eligibility Dates (Deleted 7/13/94)~~

JACK C. LEWIS, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at 3 p.m.
PUBLIC HEARING: A public hearing on this regulation has been scheduled for August 22, 1994, at 9 a.m., in the Auditorium of the State Office Building. Those interested in attending this hearing shall notify in writing: Jack Damron and William Seabold, Department of Corrections, 5th Floor, State Office Building, Frankfort, Kentucky 40601.

REGULATORY IMPACT ANALYSIS

Agency Contact Person: Jack Damron
(1) Type and number of entities affected: 288 employees of the Luther Luckett Correctional Complex, 1053 inmates, and all visitors to state correctional institutions.
(a) Direct and indirect costs or savings to those affected:
1. First year: None
2. Continuing costs or savings: None
3. Additional factors increasing or decreasing costs (note any effects upon competition): None
(b) Reporting and paperwork requirements: None
(2) Effects on the promulgating administrative body:
(a) Direct and indirect costs or savings:
1. First year: None - All of the costs involved with the implementation of the regulations are included in the operational budget.
2. Continuing costs or savings: Same as 2(a)1.
3. Additional factors increasing or decreasing costs: Same as 2(a)1.
(b) Reporting and paperwork requirements: Monthly submission of policy revisions.
(3) Assessment of anticipated effect on state and local revenues: None
(4) Assessment of alternative methods; reasons why alternatives were rejected: None
(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None
(a) Necessity of proposed regulation if in conflict:
(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:
(6) Any additional information or comments: None
TIERING: Was tiering applied? No. Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it. Disparate treatment of any person or entity subject to this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the 14th Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

DEPARTMENT OF CORRECTIONS
(Proposed Amendment)

501 KAR 6:130. Western Kentucky Correctional Complex.

RELATES TO: KRS Chapters 196, 197, 439
STATUTORY AUTHORITY: KRS 196.035, 197.020, 439.470, 439.590, 439.640
NECESSITY AND FUNCTION: KRS 196.035, 197.020, 439.470, 439.590 and 439.640 authorizes the commissioner to adopt, amend or rescind administrative regulations necessary and suitable for the proper administration of the department or any division therein. These policies and procedures are incorporated by reference in order to comply with the accreditation standards of the American Correctional Association. This administrative regulation is in conformity with those provisions.

Section 1. Pursuant to the authority vested in the Department of Corrections the following policies and procedures, revised July 13, [~~March 15,~~], 1994 are incorporated by reference and shall be referred to as Western Kentucky Correctional Complex Policies and Procedures. Copies of the procedures may be obtained from the Office of the General Counsel, Department of Corrections, State Office Building, Frankfort, Kentucky 40601 or may be reviewed at the Office of General Counsel weekdays from 8 a.m. to 4:30 p.m.

WKCC 02-01-01	Inmate Funds
WKCC 02-01-02	Inmate Canteen
WKCC 02-00-03	Invoice and Voucher Processing
WKCC 02-00-04	Monetary Receipts During Nonbusiness Hours
WKCC 02-00-06	Purchasing Procedures [~~(Amended 3/15/94)~~]
WKCC 02-01-01	Inmate Funds
WKCC 02-02-01	Agency Funds and Accounting Procedures
WKCC 02-08-01	Property Receipt and Inventory Procedures [~~(Amended 3/15/94)~~]
WKCC 04-01-01	Travel Reimbursement for Official Business in Attendance at Professional Meetings
WKCC 04-02-01	Employee Training and Development
WKCC 04-04-01	Educational Assistance Program
WKCC 05-01-01	Research, Consultants, and Student Interns
WKCC 06-00-01	Offender Records and Information Access
WKCC 06-00-02	Court Orders, Orders of Appearance, Warrants, Detainers, Etc.
WKCC 09-00-01	Drug Abuse and Alcohol Testing
WKCC 10-02-01	Special Management Inmates [~~(Amended 3/15/94)~~]
WKCC 11-00-02	Food Service Inmate Work Responsibilities, Evaluations, and Health Requirements
WKCC 11-00-03	Food Service Inspections, Sanitation, Purchasing, and Storage of Food [~~(Amended 3/15/94)~~]
WKCC 11-00-04	Food Service Security
WKCC 11-00-05	Food Service General Guidelines
WKCC 11-03-01	Food Service Meals, Menus, Nutrition and Special Diets
WKCC 12-01-01	Inmate Clothing
WKCC 13-00-01	Special Health Programs
WKCC 13-01-01	Use of Pharmaceutical Products
WKCC 13-02-01	Health Care Services
WKCC 14-04-01	Legal Services Program
WKCC 14-06-01	Inmate Grievance Procedure
WKCC 15-01-01	Hair and Grooming Standards [~~(Amended 3/15/94)~~]
WKCC 15-03-01	Meritorious Good Time
WKCC 15-05-01	Restoration of Forfeited Good Time
WKCC 16-01-01	Visiting Policy and Procedures (Amended 7/13/94) [~~(Amended 3/15/94)~~]
WKCC 16-02-01	Inmate Correspondence

WKCC 16-03-01	Inmate Access to Telephones
WKCC 16-04-01	Inmate Packages
WKCC 17-01-01	Inmate Personal Property
WKCC 17-02-01	Inmate Reception and Orientation
WKCC 18-01-01	Structure, Guidelines, and Functions of the Classification Committee
WKCC 20-01-01	Education Program [~~(Amended 3/15/94)~~]
WKCC 22-00-01	Inmate Recreation and Leisure Time Activities
WKCC 22-00-02	Inmate Clubs and Organizations
WKCC 23-00-01	Religious Services (Amended 7/13/94) [~~(Amended 3/15/94)~~]
WKCC 25-02-01	Inmate Release Process
WKCC 25-03-01	Prerelease Programs

JACK C. LEWIS, Commissioner
APPROVED BY AGENCY: July 13, 1994
FILED WITH LRC: July 13, 1994 at 3 p.m.
PUBLIC HEARING: A public hearing on this regulation has been scheduled for August 22, 1994 at 9 a.m., in the State Office Building Auditorium. Those interested in attending this hearing shall notify in writing: Jack T. Damron and William Seabold, Office of General Counsel, 5th Floor, State Office Building, Frankfort, Kentucky 40601.

REGULATORY IMPACT ANALYSIS

Agency Contact Person: Jack Damron
(1) Type and number of entities affected: 142 employees of the Western Kentucky Correctional Complex, 410 inmates, and all visitors to state correctional institutions.
(a) Direct and indirect costs or savings to those affected:
1. First year: None
2. Continuing costs or savings: None
3. Additional factors increasing or decreasing costs (note any effects upon competition): None
(b) Reporting and paperwork requirements: None
(2) Effects on the promulgating administrative body:
(a) Direct and indirect costs or savings:
1. First year: None - All of the costs involved with the implementation of the regulations are included in the operational budget.
2. Continuing costs or savings: Same as 2(a)1.
3. Additional factors increasing or decreasing costs: Same as 2(a)1.
(b) Reporting and paperwork requirements: Monthly submission of policy revisions.
(3) Assessment of anticipated effect on state and local revenues: None
(4) Assessment of alternative methods; reasons why alternatives were rejected: None
(5) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication: None
(a) Necessity of proposed regulation if in conflict:
(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:
(6) Any additional information or comments: None
TIERING: Was tiering applied? No. Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it. Disparate treatment of any person or entity subject to this administrative regulation could raise questions of arbitrary action on the part of the agency. The "equal protection" and "due process" clauses of the 14th Amendment of the U.S. Constitution may be implicated as well as Sections 2 and 3 of the Kentucky Constitution.

DEPARTMENT OF STATE POLICE
(Proposed Amendment)

502 KAR 45:015. Qualifications.

RELATES TO: 1994 Ky. Acts ch. 16 [~~KRS 16.040~~]
STATUTORY AUTHORITY: KRS 16.040, 16.080
NECESSITY AND FUNCTION: KRS 16.040 sets forth the basic qualifications for appointment as an officer. KRS 16.080 vests in the commissioner the authority to adopt administrative regulations for enlistment. This administrative regulation establishes the procedure to be used to determine whether applicants possess the basic qualifications.

Section 1. Applicants shall submit a birth certificate to establish that they meet the age qualification of KRS 16.040(2)(a).

Section 2. Applicants shall submit to a background investigation which may include a polygraph examination to establish the good moral character qualification of KRS 16.040(2)(b).

Section 3. Applicants who are offered conditional employment as cadet troopers shall submit to a medical examination to establish the good health qualification of KRS 16.040(2)(b).

Section 4. Applicants who are citizens of another country at the time of application shall submit naturalization certificates prior to employment to establish the citizenship qualification of KRS 16.040(2)(c).

Section 5. Applicants who are citizens of another state at the time of application shall submit Kentucky motor vehicle operator's licenses prior to employment to establish the residency qualification of KRS 16.040(2)(c).

Section 6. Applicants shall submit a college transcript verifying college credits and degrees or a high school diploma with a copy of their DD-214 or notarized letter from law enforcement employer certifying sworn officer employment [~~high school diplomas or GED equivalency certificates~~] to establish the education qualification of KRS 16.040(2)(d). [~~Five (5) years of full time employment as a law enforcement officer or police administrator shall suffice to meet the education qualification.~~]

Section 7. All persons appointed as officers shall be physically able to safely perform essential job tasks, either with or without reasonable accommodation, including but not limited to reading, writing, operating a police pursuit vehicle at high speed under all weather and lighting conditions, running, climbing stairs and fences and hillsides, overcoming violent physical resistance from persons arrested or detained, handcuffing persons arrested or detained, lifting and carrying or dragging incapacitated persons, firing a handgun with either hand and reloading, and firing and reloading a shotgun. To determine these physical qualifications, a medical examination shall be conducted of applicants who are offered employment as cadet troopers. The medical examination may include physical tests to determine ability to perform the essential job tasks. Applicants hired as cadet troopers shall be required to perform simulated essential job tasks during basic training at the Kentucky State Police Academy. Inability to safely perform essential job tasks, either with or without reasonable accommodation, shall be grounds for disqualification or dismissal.

JERRY W. LOVITT, Commissioner
APPROVED BY AGENCY: July 11, 1994
FILED WITH LRC: July 11, 1994 at 4 p.m.
PUBLIC HEARING: A public hearing on this administrative regula-