

1 ENERGY AND ENVIRONMENT CABINET

2 Department for Environmental Protection

3 Division of Water

4 (Amendment)

5 401 KAR 5:055. Scope and applicability of the KPDES Program.

6 RELATES TO: KRS 224.01-010, 224.01-070, 224.01-400, 224.70-100, 224.70-120, 224.99-  
7 010, 33 C.F.R. 153, 40 C.F.R. 122, 123.44, 144, 300, 401.15, 33 U.S.C. 1251 -1387, 42 U.S.C.  
8 300f – 300j[, ~~EO 2008-507, 2008-531~~]

9 STATUTORY AUTHORITY: KRS 224.10-100, 224.10-110, 224.16-050, 224.18-100,  
10 224.70-100, 40 C.F.R. 122.21,300, 33 U.S.C. 1251 -1387

11 NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 authorizes the cabinet  
12 to require for persons discharging into the waters of the Commonwealth, by administrative  
13 regulation, technological levels of treatment and effluent limitations. KRS 224.16-050(1)  
14 authorizes the cabinet to issue federal permits pursuant to 33 U.S.C. 1342(b) of the Federal  
15 Water Pollution Control Act, 33 U.S.C. 1251 – 1387, subject to the conditions imposed in 33  
16 U.S.C. 1342(b) and (d). KRS 224.16-050(1) requires that any exemptions granted in the issuance  
17 of these permits shall be pursuant to 33 U.S.C. 1311, 1312, and 1326(a). KRS 224.16-050(4)  
18 requires that the cabinet shall not impose under any permit issued pursuant to this administrative  
19 regulation an effluent limitation, monitoring requirement, or other condition that is more  
20 stringent than the effluent limitation, monitoring requirement, or other condition that would have  
21 been applicable under the federal regulation if the permit was issued by the federal government.

1 [~~EO 2008-507 and 2008-531, effective June 16, 2008, abolish the Environmental Protection~~  
2 ~~Cabinet and establish the new Energy and Environment Cabinet.~~] This administrative regulation  
3 establishes the scope and applicability of the KPDES program and identifies categories of point  
4 sources required to obtain a KPDES permit, requirements pertaining to exclusions and  
5 prohibitions, requirements for general permits, requirements for disposal into wells and into  
6 publicly-owned treatment works (POTW), and requirements for disposal by land application.

7 Section 1. Definitions. Definitions established in 40 C.F.R. 122.2 shall apply for the  
8 interpretation of federal regulations that are cited within this administrative regulation.

9 Section 2. Applicability of the KPDES Requirements.

10 (1) A KPDES permit shall be required to discharge pollutants from a point source into waters  
11 of the Commonwealth.

12 (2) Compliance with the KPDES program requirements shall constitute compliance with the  
13 operational permit requirements of 401 KAR 5:005.

14 (3) Failure to obtain a KPDES permit shall not relieve a discharger whose discharge is  
15 subject to the KPDES program from complying with the applicable performance standards of the  
16 KPDES program, 401 KAR 5:050 through 5:080.

17 Section 3. Point Source Categories Requiring a KPDES Permit.

18 (1) The following categories of point sources shall require a KPDES permit to discharge:

19 (a) A point source discharge identified in 40 C.F.R. 122, effective July 1, 2011 [~~2008~~];

20 (b) A concentrated animal feeding operation;

21 (c) A concentrated aquatic animal production facility;

22 (d) A discharge into aquaculture projects;

23 (e) A discharge from separate storm sewers; and

1 (f) A silviculture point source.

2 (2) A facility covered by a general permit issued pursuant to Section 8 of this administrative  
3 regulation, may be required to obtain an individual permit based on contributions to water  
4 pollution.

5 (3) If an individual permit is required pursuant to this section, except as provided in  
6 subsection (4) of this section, the cabinet shall notify the discharger of that decision and the  
7 reasons for it.

8 (a) The discharger shall apply for a permit pursuant to 401 KAR 5:060 within sixty (60) days  
9 of notice, unless an extension is requested by the applicant.

10 (b) The question of whether the permit determination was proper shall remain open for  
11 consideration during the public comment period pursuant to 401 KAR 5:075 and in a subsequent  
12 hearing pursuant to KRS 224.10-420(2).

13 (4) (a) Prior to a determination that an individual permit shall be required for a storm water  
14 discharge, the cabinet may require the discharger to submit information regarding the nature of  
15 the discharge as established in 40 C.F.R. 122.21(e), effective July 1, 2011 [~~2008~~], if:

16 1. The provisions of the general permit are not sufficient to protect human health and the  
17 environment; or

18 2. The discharger has a history of noncompliance with the provisions of the general permit.

19 (b) If an individual permit is required pursuant to this section, the cabinet shall notify the  
20 discharger of that decision and the reasons for it.

21 (c) The discharger shall apply for a KPDES permit within sixty (60) days of notice, unless an  
22 extension is requested by the applicant.

23 (d) The question of whether the initial determination was proper shall remain open for

1 consideration during the public comment period pursuant to 401 KAR 5:075 and in a subsequent  
2 hearing pursuant to KRS 224.10-420(2).

3 Section 4. Exclusions. An exclusion from the requirement to obtain a KPDES permit shall  
4 be:

5 (1) A discharge identified in 40 C.F.R. 122.3, effective July 1, 2011 [~~2008~~], or KRS 224.16-  
6 050(6);

7 (2) An authorization by permit or by rule that is prepared to assure that underground  
8 injection will not endanger drinking water supplies, pursuant to the Safe Drinking Water Act, 42  
9 U.S.C. 300f-300j, and that are issued under a state or federal Underground Injection Control  
10 program;

11 (3) An underground injection control well that is permitted pursuant to 40 C.F.R. 144 if those  
12 permits are protective of public health and welfare and prevent the pollution of ground and  
13 surface waters; or

14 (4) A discharge that is not regulated by the U.S. EPA under the Clean Water Act Section  
15 402, 33 U.S.C. 1342.

16 Section 5. Prohibitions. The cabinet shall not issue a KPDES permit if:

17 (1) The conditions of the permit would violate the provisions of KRS Chapter 224;

18 (2) The regional administrator has objected to issuance of the permit in writing pursuant to  
19 the procedures specified in 40 C.F.R. 123.44, effective July 1, 2011 [~~2008~~];

20 (3) The conditions of the permit do not comply with the water quality standards established  
21 in 401 KAR 10:031; or

22 (4) A prohibition is established in 40 C.F.R. 122.4, effective July 1, 2011 [~~2008~~].

23 Section 6. Variance Requests from Technology-based Effluent Limitations.

1 (1) A non-POTW may request a variance from otherwise applicable effluent limitations as  
2 established in 40 C.F.R. 122.21(m), effective July 1, 2011 [~~2008~~].

3 (2) A non-POTW may request an expedited variance as established in 40 C.F.R. 122.21(o),  
4 effective July 1, 2011 [~~2008~~].

5 Section 7. Effect of a Permit. The effect of a KPDES permit shall be as established in 40  
6 C.F.R. 122.5, effective July 1, 2011 [~~2008~~].

7 Section 8. A General permit shall be issued as established in 40 C.F.R. 122.28, effective July  
8 1, 2011 [~~2008~~].

9 Section 9. Disposal of Pollutants into Underground Injection Control Wells, into Publicly  
10 Owned Treatment Works, or by Land Application.

11 (1) An adjustment of effluent limitations related to disposal of pollutants into wells, into  
12 publicly owned treatment works, or by land application shall be as established in 40 C.F.R.  
13 122.50, effective July 1, 2011 [~~2008~~].

14 (2) The cabinet may issue permits to control the disposal of pollutants into wells if necessary  
15 to protect the public health and welfare and to prevent the pollution of ground and surface  
16 waters.

17 Section 10. Variances from Technology-Based Treatment Requirements Available to KPDES  
18 Applicants. Consistent with KRS 224.16-050, the variance provisions in this section and in 401  
19 KAR 5:080, Sections 2 and 4, establish those variances from technology-based requirements  
20 available to KPDES applicants.

21 (1) Economic capability. The cabinet, with the concurrence of U.S. EPA, may modify BAT  
22 requirements for a point source if the owner or operator demonstrates that the variance satisfies  
23 the requirements of 33 U.S.C. 1311(c).

1 (2) Environmental considerations. The cabinet, with the concurrence of U.S. EPA, may  
2 modify the BAT requirement for a point source that does not discharge toxic pollutants identified  
3 in 40 C.F.R. 401.15, effective July 1, 2011 [~~2008~~], conventional pollutants, or the thermal  
4 component of that discharge, if the owner or operator demonstrates that the modification is  
5 consistent with the conditions established in 33 U.S.C. 1311(g).

6 (3) Innovative technology. The cabinet shall establish a date for complying with the deadline  
7 for achieving BAT not later than two (2) years after the date for compliance with the effluent  
8 limitation would otherwise be applicable, if the innovative technology is as established in 33  
9 U.S.C. 1311(k) and after consultation with the U.S. EPA Regional Administrator, as required by  
10 40 C.F.R. 124.62(a)(2), effective July 1, 2011.

11 (4) Thermal pollution. An alternative effluent limitation for the thermal component of a  
12 discharge shall be as established in 33 U.S.C. 1326(a).

13 Section 11. Substitutions, Exceptions, and Additions to Cited Federal Regulations.

14 (1) "Waters of the Commonwealth" shall be substituted for "Waters of the United States" in  
15 the federal regulations cited in Sections 1 through 10 of this administrative regulation.

16 (2) "Cabinet" shall be substituted for "Director" if the authority to administer the federal  
17 regulations cited in Sections 1 through 10 of this administrative regulation has been delegated to  
18 the cabinet.

19 (3) "KPDES" shall be substituted for "NPDES" if the cabinet has been delegated authority to  
20 implement federal regulations cited in Sections 1 through 10 of this administrative regulation.

21 (4) "Standard metropolitan statistical areas as defined by the University of Louisville Urban  
22 Studies Center, consistent with the U.S. Office of Management and Budget" shall be substituted  
23 for "Standard metropolitan statistical areas as defined by the Office of Management and Budget"

1 in 40 C.F.R. 122.28(a)(1)(vi).

2 (5) "Urbanized areas as designated by the University of Louisville Urban Studies Center  
3 consistent with the U.S. Bureau of the Census" shall be substituted for "Urbanized areas as  
4 designated by the Bureau of the Census according to criteria in 30 FR 15202, effective May 1,  
5 1974" in 40 C.F.R. 122.28 (a)(1)(vi).

“401 KAR 5:055 “Scope and applicability of the KPDES Program.” approved for promulgation:

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Date

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Leonard K. Peters, Secretary  
Energy and Environment Cabinet

**PUBLIC HEARING AND PUBLIC COMMENT PERIOD:** A public hearing on this administrative regulation shall be held on August 28, 2012 at 5:00 P.M. (Eastern Time) at 300 Fair Oaks Lane, Conference Room 301D, Frankfort, Kentucky.

Individuals interested in being heard at this hearing shall notify this agency in writing by August 21, 2012, five workdays 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. Written comments shall be accepted until August 31, 2012. 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:** Karen Cronen  
Division of Water  
200 Fair Oaks Lane  
Frankfort, KY 40601  
Telephone: (502) 564-3410 Fax (502) 564-0111  
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## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation #: 401 KAR 5:055

Contact Person: Sandy Gruzesky, Director

**(1) Provide a brief summary of:**

- (a) What this administrative regulation does:** This administrative regulation establishes the scope and applicability of the KPDES program including specific inclusions and exclusions, prohibitions, requirements for general permits, requirements for disposal into wells and into publicly-owned treat works (POTW) and disposal by land application.
- (b) The necessity of this administrative regulation:** KRS 224.16-050 (1) requires that any exemptions granted in the issuance of these permits shall be pursuant to 33 U.S.C. 1311, 1312, and 1326(a). Further, KRS 224.15-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this administrative regulation an effluent limitation, monitoring requirement or other condition that is more stringent than the effluent limitation, monitoring requirement or other condition that would have been applicable under the federal regulation if the permit were issued by the federal government.
- (c) How this administrative regulation conforms to the content of the authorizing statutes:** KRS 224.10-100 authorizes the cabinet to 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 U.S.C. 1342(b) of the Federal Water Pollution Control Act, 33 U.S.C. 1251-1387.
- (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:** This regulation provides specific bounds for the scope of the KPDES program.

**(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:**

- (a) How the amendment will change this existing administrative regulation:** The amendment to this administrative regulation updates the citations to the corresponding federal regulations and clarifies that the state requirements are the same as the federal requirements. Specifically, the amendment clarifies that the cabinet will consult with EPA's regional administrator as required by 40 C.F.R. 124.62(a)(2), before approving innovative technology.
- (b) The necessity of the amendment to this administrative regulation:** 40 C.F.R. 123.62 requires the cabinet to submit for EPA's approval the Kentucky National Pollutant Discharge Elimination System administrative regulations. The most recent revisions, effective 2009, were submitted to EPA and EPA partially approved Kentucky's administrative regulations in February 2012. The revisions to this administrative regulation are necessary to clarify that Kentucky's regulations are no less stringent than the federal regulations and to gain full approval from EPA.
- (c) How the amendment conforms to the content of the authorizing statutes:** This amendment conforms to KRS 224.16-050, which authorizes the cabinet to implement the Federal Water Pollution Control Act.
- (d) How the amendment will assist in the effective administration of the statutes:** The amendment to this administrative regulation will clarify that Kentucky's regulation is no less stringent than the corresponding federal regulations.

- (3) **List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:** This administrative regulation affects individuals, businesses, and organizations that are engaged in the regulated disposal of treated wastewater under the KPDES permitting program. Although over 10,000 permitted entities are affected by this administrative regulation, the amendment will not change the way the program is implemented.
- (4) **Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:**
- (a) **List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:** The amendment to the administrative regulation does not change the way the program is implemented; so, regulated entities will not need to take any additional action.
- (b) **In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):** Under this regulation, individuals, businesses, and organizations are not expected to experience any additional cost. Because these requirements are already in federal requirements, amending this regulation for consistency with federal regulations will create no additional economic burden upon affected entities.
- (c) **As a result of compliance, what benefits will accrue to the entities identified in question (3):** The regulated community affected by this regulation will not be confused by inconsistencies between existing regulations and the updated federal regulations.
- (5) **Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:**
- (a) **Initially:** No additional cost is anticipated.
- (b) **On a continuing basis:** No additional cost is anticipated.
- (6) **What is the source of the funding to be used for the implementation and enforcement of this administrative regulation?** Existing permit fees, General Funds, and EPA Funds. This amendment does not change any source of funding.
- (7) **Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:** No additional fees or funding are expected to support this amendment.
- (8) **State whether or not this administrative regulation established any fees or directly or indirectly increased any fees:** This amendment does not directly or indirectly affect fees.
- (9) **TIERING: Is tiering applied? (Explain why or why not)**  
Permit requirements are tiered based upon the nature and size of the wastewater discharge.

**FISCAL NOTE ON STATE OR LOCAL GOVERNMENT**

**Regulation #:** 401 KAR 5:055

**Contact Person:** Sandy Gruzesky, Director

- 1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?**  
This regulation affects wastewater treatment systems that discharge to waters of the Commonwealth. This amendment affects all units of state or local government that have a KPDES discharge permit.
  
- 2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.** KRS 224.10-100, 224.10-110, 224.16-050, 224.18-100, 224.70-100, 40 C.F.R. 122.21,300, 33 U.S.C. 1251 -1387
  
- 3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.**  
Because these requirements are already in federal regulations, amending this regulation for consistency with federal regulations will create no additional economic burden upon state or local agencies.
  - (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?** This amendment is not expected to impact revenue.
  - (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?** None
  - (c) How much will it cost to administer this program for the first year?** No additional cost is expected.
  - (d) How much will it cost to administer this program for subsequent years?** No additional cost is expected.

**Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.**

**Revenues (+/-):**

**Expenditures (+/-):**

**Other Explanation:**

## FEDERAL MANDATE ANALYSIS COMPARISON

Administrative Regulation#: 401 KAR 5:055

Contact Person: Sandy Gruzesky, Director

- 1. Federal statute or regulation constituting the federal mandate.**  
40 CFR 122 and U.S.C. 1251-1387.
- 2. State compliance standards.**  
KRS 224.16-050
- 3. Minimum or uniform standards contained in the federal mandate.** The federal standard requires that delegated states meet or exceed the federal requirements for water pollution prevention developed under the Clean Water Act, as Amended (33 U.S.C. 1251-1387).
- 4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements than those required by the federal mandate?**  
No, the amendment to this regulation will not apply stricter standards than those required by the federal mandate.
- 5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.**  
Not applicable