

STATEMENT OF CONSIDERATION RELATING TO

401 KAR 51:001. Definitions for 401 KAR Chapter 51.
401 KAR 51:017. Prevention of significant deterioration of air quality.

Energy and Environment Cabinet
Department for Environmental Protection
Division for Air Quality

Amended After Comments

- (1) A public hearing on the above administrative regulations was held on July 24, 2012, at 10:00 a.m. in Conference Room 201B of the Division for Air Quality, 200 Fair Oaks Lane, Frankfort, Kentucky 40601.
- (2) The following people attended this public hearing or submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>	<u>Testimony</u>
Tom FitzGerald Director	Kentucky Resources Council	Written
R. Scott Davis Chief, Air Planning Branch	U.S. Environmental Protection Agency (U.S. EPA)	Written
Chad Harpole Director, Public Affairs	Kentucky Chamber of Commerce	Written

- (3) The following people from the promulgating administrative body attended this public hearing:

Name and Title

Sean Alteri, Assistant Director
Lora Gowins, Environmental Control Supervisor
Jim Eubank, Environmental Technologist II
Benjamin Matar, Environmental Engineer Assistant I
*Laura Lund, Environmental Technologist III

*Agency Representative

Summary of Comments and Responses

(1) General Comment

- (a) **Comment** – Support of proposed amendments.
Chad Harpole, Kentucky Chamber of Commerce

“The Chamber generally supports the proposed amendments which will make the Kentucky regulations consistent with the federal requirements.”

- (b) **Response** – The Cabinet acknowledges this comment.

(2) General Comment

- (a) **Comment** – Litigation could impact SIP submittal approvability.
R. Scott Davis, U.S. EPA

“The EPA recommends KDAQ continue with rulemaking but note that future Court action may necessitate subsequent rule revisions and SIP submittals on your part.”

- (b) **Response** – The Cabinet acknowledges this comment.

(3) General Comment

- (a) **Comment** – Litigation could impact SIP submittal approvability.
R. Scott Davis, U.S. EPA

“The EPA’s authority to implement the PM_{2.5} SILs and SMC for Prevention of Significant Deterioration (PSD) purposes as promulgated on October 20, 2010, has been challenged by the Sierra Club... The outcome of this litigation could impact the EPA’s ability to approve these provisions into the Commonwealth’s SIP.”

- (b) **Response** – The Cabinet acknowledges this comment.

(4) 401 KAR 51:001 Section 1

- (a) **Comment** – Citations of federal rules should have an effective date.
R. Scott Davis, U.S. EPA

“The incorporation by reference (IBR) effective date, July 1, 2010, is proposed for deletion. This date was added in the December 13, 2010, Tailoring Rule SIP revision submittal to incorporate the version of the CFR containing the definition of ‘subject to regulation’. Without a specific date, it is unclear which version of the federal rule is being incorporated by reference. The EPA suggests KDAQ not remove this date to establish which version of the 40 CFR is incorporated into the SIP.”

(b) **Response** – The Cabinet concurs in part. Kentucky Revised Statute 13A.2261 states that, “Federal statutes and regulations shall not be incorporated by reference.” The Cabinet is adopting the relevant provisions of the most recent CFR.

(5) **401 KAR 51:001**
Section 1(21)

(a) **Comment** – The proposed definitions are inconsistent with the federal rule.
Tom FitzGerald, Kentucky Resources Council

“... The proposed state revision eliminates the phrase ‘equal to or greater than’ with respect to the PM_{2.5} reference, so that only where a source was emitting precisely 0.3µg/m³ of PM_{2.5}, would the definition be triggered. In order to maintain consistency, either a colon should be placed after ‘equal to or greater than’ and before ‘one (1) µg/m³’ or the phrase ‘equal to or greater than’ should be inserted before 0.3 µg/m³ for PM_{2.5}.”

(b) **Response** – The Cabinet concurs. The regulation is amended accordingly.

(6) **401 KAR 51:001**
Section 1(207)

(a) **Comment** – The proposed definitions are inconsistent with the federal rule.
Tom FitzGerald, Kentucky Resources Council
R. Scott Davis, U.S. EPA

The amendment includes precursors in “all attainment and unclassifiable areas.” To the extent that the Cabinet intends to use a common definition of “regulated NSR pollutant” to cover both the PSD and NSR programs, the definition should be revised or a second definition be adopted that incorporates and applies the definition in full to those permits issued pursuant to the state counterpart of 40 CFR 51.165. It should be revised so that it applies in nonattainment areas as well.

(b) **Response** – The Cabinet concurs. The regulation is amended accordingly.

(7) **401 KAR 51:001**
Section 1(207)(a)3 and 4

(a) **Comment** – The proposed definitions are inconsistent with the federal rule.
R. Scott Davis, U.S. EPA

“The definition includes the standard federal language indicating that nitrogen oxides (NO_x) is presumed to be a PM_{2.5} precursor and volatile organic compounds (VOC) is presumed not to be a precursor unless demonstrated otherwise. The definition is unclear as to who can approve demonstrations of NO_x insignificance and VOC significance as a PM_{2.5} precursor. Pursuant to the May 16, 2008, NSR PM_{2.5} Rule, a demonstration

to show that NO_x is not a PM_{2.5} precursor or that VOCs and/or ammonia should be precursors would have to be submitted to the EPA for approval into the SIP to change the presumption. Please clarify the Department's position on which pollutants are precursors for PM_{2.5} in Kentucky. Additionally, the phrase 'to the EPA Administrator's satisfaction' should be added following the word 'demonstrated' to clarify that the EPA approval of such demonstration would be required for reversal of precursor presumptions."

(b) Response – The Cabinet concurs. The regulation is amended accordingly.

**(8) 401 KAR 51:001
Section 1(207)(a)4**

(a) Comment – The proposed definitions are inconsistent with the federal rule.
R. Scott Davis, U.S. EPA

"The definition provides that VOCs are presumed not to be a PM_{2.5} precursor. However, to be consistent with the federal rule... the EPA recommends adding that ammonia also is presumed not to be a PM_{2.5} precursor in nonattainment areas."

(b) Response – The Cabinet concurs. The regulation is amended accordingly. Furthermore, the Cabinet does not consider ammonia to be a precursor for PM_{2.5} in attainment or unclassifiable areas.

**(9) 401 KAR 51:001
Section 1(207)(a)5**

(a) Comment – The proposed definitions are inconsistent with the federal rule.
R. Scott Davis, U.S. EPA

"The definition does not include the January 1, 2011, applicability date for consideration of gaseous PM₁₀ and PM_{2.5} emissions. Please note that based on this draft Kentucky rule, all permit applicants will be required to include gaseous emissions as part of PM₁₀ and PM_{2.5} emissions, including any for which applicability determinations may have been made prior to this date. Also, regarding condensables, the definitions includes 'particulate matter emissions' as well as PM₁₀ and PM_{2.5} emissions. Consistent with EPA's proposed rule revisions, we recommend leaving out 'particulate matter emissions.'"

(b) Response – The Cabinet concurs. The regulation is amended accordingly.

**(10) 401 KAR 51:001
Section 1(207)(a)5**

(a) Comment – The proposed definitions are inconsistent with the federal rule.
Chad Harpole, Kentucky Chamber of Commerce

"...Section 1(207)(a)5 does not include the full text of the associated federal provision in 40 CFR 51.166(b)(49) with respect to condensable PM emissions. The Chamber believes the provisions should be consistent. If the Division disagrees, please explain the basis for the discrepancy in the response to comments."

(b) Response – The Cabinet concurs. The regulation is amended accordingly.

(11) 401 KAR 51:001

Section 1(218)(a) and (d)

(a) Comment – The proposed definitions are inconsistent with the federal rule.
Tom FitzGerald, Kentucky Resources Council

"The revision to the definition of 'significant' to incorporate the TPY limits for nitrogen oxides and sulfur dioxide is ambiguous and needs revision in order to clearly incorporate the corresponding federal provisions... The corresponding state regulation defines significant to mean, in relevant part, '40 tpy of sulfur dioxide or nitrogen oxides for precursors*', thus creating some ambiguity as to whether the phrase 'for precursors' modifies both sulfur dioxide and nitrogen oxides. A revision is appropriate to clarify that the consideration of whether the emissions are precursors is limited to nitrogen oxides and does not affect the threshold for PM_{2.5} when expressed as sulfur dioxide."

(b) Response – The Cabinet concurs. The regulation is amended accordingly.

(12) 401 KAR 51:001

Section 1(218)(a) and (d)

(a) Comment – The proposed definitions are inconsistent with the federal rule.
R. Scott Davis, U.S. EPA

"... The table for the definition of 'significant'... contains a footnote indicating that NO_x is evaluated unless demonstrated not to be a precursor... The phrase 'to the EPA Administrator's satisfaction' should be added following the word 'demonstrated' to clarify that the EPA approval of such demonstration would be required for reversal of precursor presumptions."

(b) Response – The Cabinet does not concur. The footnote references the definition that states that the demonstration is done to the EPA Administrator's satisfaction or done by EPA.

(13) 401 KAR 51:017

Section 9(2)

(a) Comment – Class III area impacts should be included.
Chad Harpole, Kentucky Chamber of Commerce

“Proposed 401 KAR 51:017, Section 9(2), does not include the federal provision for Class III area impacts. The Chamber believes the provisions should be consistent. If the Division disagrees, please explain the basis for the discrepancy in the response to comments.”

(b) Response – The Cabinet does not concur. There are no Class III areas in the Commonwealth of Kentucky and therefore no need to include the provision.

(14) 401 KAR 51:017
Section 14(5)(b)

(a) Comment – Citations of federal rules should have an effective date.
R. Scott Davis, U.S. EPA

“The Class I variances revisions proposed to IBR [incorporate by reference] ‘the pollutants as specified in 40 C.F.R. 51.166(p)(4).’ However, this IBR does not include an effective date. Without a specific date, it is unclear which version of the federal rule is being incorporated by reference. The EPA suggests KDAQ specify the IBR date to ensure that the correct version of 40 CFR is intended for adoption into the SIP.”

(b) Response – The Cabinet concurs. The regulation is amended accordingly.

Summary of Statement of Consideration

General Summary

On July 24, 2012, the Cabinet conducted a public hearing to receive comments on the proposed administrative regulations listed below. This Statement of Consideration (SOC), filed with the Legislative Research Commission in accordance with the requirements of KRS Chapter 13A, relates to these administrative regulations:

401 KAR 51:001. Definitions for 401 KAR Chapter 51.
401 KAR 51:017. Prevention of significant deterioration of air quality.

The proposed administrative regulation was published in the July 1, 2012, issue of the *Administrative Register of Kentucky*.

This SOC presents a summary of all comments submitted and the Cabinet's responses.

Prominent advertisement of the public hearing was published at least thirty days prior to the hearing in accordance with KRS Chapter 13A. The Public Hearing Notice and copies of the proposed administrative regulations were distributed to individuals on the Cabinet's mailing list. Copies of the proposed administrative regulations were distributed to all division personnel, to members of the Environmental Quality Commission, and to other interested persons. Copies were also kept on file for public inspection in the Division's Regional Offices, select County Clerk Offices, and the Louisville Metro Air Pollution Control District for at least thirty (30) days prior to the hearing.

Summary of Comments

The Cabinet received **three (3)** written statements regarding the proposed administrative regulations prior to adjournment of the public comment period. No oral statements were received.

The written statements contained a total of **fourteen (14)** comments, which included the following subjects:

- | | |
|-------------------------------------------------------------------|------------|
| • Class III area impacts should be included | 1 comment |
| • Support of proposed amendments | 1 comment |
| • Litigation could impact SIP submittal approvability | 2 comments |
| • Citations of federal rules should have an effective date | 2 comments |
| • The proposed definitions are inconsistent with the federal rule | 8 comments |

Action Taken by Promulgating Administrative Body

The Cabinet proposes the following amendments:

401 KAR 51:001. Definitions for 401 KAR Chapter 51.

Page 1

Section 1

Line 17

After "through 96", insert ", as published on July 1, 2012".

Page 7

Section 1(21)

Line 15

After "PM₁₀ or", insert the following:
equal to or greater than

Page 10

Section 1(30)

Line 4

After "(30) """, insert a degree symbol.

Page 41

Section 1(207)

Line 6

After "means", delete "the following".

Page 41

Section 1(207)(a)

Line 7

After "(a)", insert the following:
For 401 KAR 51:017: 1.

Page 41

Section 1(207)(a)

Line 8

After "precursors", insert "to such pollutant"

Page 41

Section 1(207)(a)

Line 9

Insert "a.", delete "1."

Line 11

Insert "b.", delete "2."

Line 12

Insert "c.", delete "3."

Line 13

After "areas unless", insert the following:
the Cabinet demonstrates to the EPA Administrator's satisfaction or EPA demonstrates

Delete "it is demonstrated".

Line 16

Insert "d.", delete "4.".

After "PM_{2.5} in", insert "an".

Delete "any".

Line 17

After "unless", insert the following:

the Cabinet demonstrates to the EPA Administrator's satisfaction or EPA demonstrates

Delete "it is demonstrated".

Line 20

Insert "e.", delete "5. Particulate matter emissions,".

After "PM_{2.5} emissions", delete the comma.

After "PM₁₀ emissions", delete "shall".

Line 22

After "temperatures;", insert the following:

(i) On or after January 1, 2011, condensable particulate matter is included in applicability determinations and in establishing emissions limitations for PM_{2.5} and PM₁₀ in permits issued pursuant to 401 KAR 51:017;

(ii) Compliance with emissions limitations for PM_{2.5} and PM₁₀ issued prior to January 1, 2011, is not based on condensable particulate matter unless required by the terms and conditions of a permit; and

(iii) Applicability determinations made prior to January 1, 2011, without accounting for condensable particulate matter are not considered in violation of this section; 2.

Delete "(b)".

Line 23

After "subject to", insert "a".

Delete "any".

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Section 1(207)

Line 1

Insert "3.", delete "(c)".

Line 3

Insert "4.", delete "(d)".

Line 8

After "7408", insert the following:

; or

(b) For 401 KAR 51:052:

1. Nitrogen oxides or volatile organic compounds; or

2. A pollutant for which a national ambient air quality standard has been promulgated and the following constituents or precursors to such pollutant:

a. Volatile organic compounds and nitrogen oxides are precursors to ozone in all ozone nonattainment areas;

b. Sulfur dioxide is a precursor to PM_{2.5} in all PM_{2.5} nonattainment areas;

c. Nitrogen oxides are presumed to be precursors to PM_{2.5} in all PM_{2.5} nonattainment areas unless the Cabinet demonstrates to the EPA Administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient PM_{2.5} concentrations;

d. Volatile organic compounds and ammonia are presumed not to be precursors to PM_{2.5} in a PM_{2.5} nonattainment area unless the Cabinet demonstrates to the EPA Administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds or ammonia from sources in a specific area are a significant contributor to that area's ambient PM_{2.5} concentrations; and

e. PM_{2.5} emissions and PM₁₀ emissions include gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures;

(i) On or after January 1, 2011, condensable particulate matter is included in applicability determinations and in establishing emissions limitations for PM_{2.5} and PM₁₀ in permits issued pursuant to 401 KAR 51:052;

(ii) Compliance with emissions limitations for PM_{2.5} and PM₁₀ issued prior to January 1, 2011, is not based on condensable particulate matter unless required by the terms and conditions of a permit; and

(iii) Applicability determinations made prior to January 1, 2011, without accounting for condensable particulate matter are not considered in violation of this section

Page 45

Section 1(218)(a)

Table, PM_{2.5} section

After "or nitrogen oxides", delete "for precursors".

Page 47

Section 1(218)(a)

Line 2

After "(207)(a)", insert "1.c.".

Delete "(3)".

Page 48

Section 1(218)(d)

Table, PM_{2.5} section

After "or nitrogen oxides", delete "for precursors".

Line 2

After "(207)", insert "(b)2.c.".

Delete "(a)(3)".

Page 48

Section 1(218)(e)2

Line 8

After "2.", insert "An".

Delete "Any".

401 KAR 51:017. Prevention of significant deterioration of air quality.

Page 24

Section 14(5)(b)

Line 18

After "51.166(p)(4)", insert ", as published on July 1, 2012,".