

Proposed

**STATE OF KANSAS**

**Department of Health and Environment**

**Notice of Hearing on Proposed Kansas Administrative Regulations**

The Kansas Department of Health and Environment (KDHE), Division of Environment, Bureau of Air, will conduct a public hearing at 10 a.m. Monday, May 23, in Room 530 of the Curtis State Office Building, 1000 S.W. Jackson, Topeka, to consider the adoption of K.A.R. 28-19-645a, a proposed new regulation regarding open burning restrictions that supersede the provisions of K.A.R. 28-19-645 for certain counties during the month of April. This regulation is being promulgated as both a temporary and a permanent regulation. A summary of the proposed regulation and the estimated economic impact follows:

**Summary of Regulation:**

**K.A.R. 28-19-645a** is necessary due to KDHE's adoption of the Flint Hills Smoke Management Plan (SMP), which calls for restrictions on open burning in the following counties during the month of April: Butler, Chase, Chautauqua, Cowley, Elk, Geary, Greenwood, Johnson, Lyon, Marion, Morris, Pottawatomie, Riley, Sedgwick, Wabaunsee, and Wyandotte. The SMP was created to help address prior violations of National Ambient Air Quality Standards in the Kansas City and Wichita metropolitan areas that were directly caused by fire emissions from the Flint Hills and to mitigate future air quality impacts of burning in the Flint Hills.

**Economic Impact:**

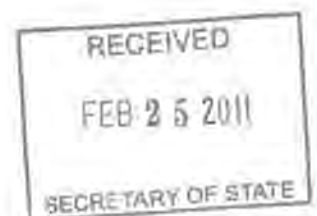
Compliance costs resulting from proposed K.A.R. 28-19-645a are expected to be minimal, as it is anticipated that prescribed burning not exempted in this regulation will be conducted in March or May.



The time period between the publication of this notice and the scheduled hearing constitutes a 60-day public comment period for the purpose of receiving written public comments on the proposed regulatory action. All interested parties may submit written comments prior to 5 p.m. on the day of the hearing to Keith Weber, Kansas Department of Health and Environment, Bureau of Air, 1000 S.W. Jackson, Suite 310, Topeka, 66612, by fax to (785) 296-7455, or by e-mail to [kweber@kdheks.gov](mailto:kweber@kdheks.gov). All interested parties will be given a reasonable opportunity to present their views orally on the proposed regulatory action during the hearing, as well as to submit their written comments at that time. In order to give all parties an opportunity to present their views, it may be necessary to require each participant to limit any oral presentation to five minutes.

Copies of the proposed regulation and complete economic impact and environmental benefit statements may be obtained from the KDHE Bureau of Air by contacting Keith Weber at (785) 291-3278 or [kweber@kdheks.gov](mailto:kweber@kdheks.gov). Copies also may be viewed at the following locations:

- Department of Air Quality, Unified Government of Wyandotte County - Kansas City, Kansas Health Department, 619 Ann Ave., Kansas City, Kansas
- Johnson County Environmental Department, 11811 S. Sunset, Suite 2700, Olathe
- Curtis State Office Building, 1000 S.W. Jackson St, Suite 310, Topeka
- KDHE Northeast District Office, 800 W. 24th St., Lawrence
- KDHE Northwest District Office, 2301 E. 13th St., Hays
- KDHE North Central District Office, 2501 Market Place, Suite D, Salina
- KDHE South Central District Office, 130 S. Market, Suite 6050, Wichita
- KDHE Southeast District Office, 1500 W. 7th St., Chanute
- KDHE Southwest District Office, 302 W. McArtor Road, Dodge City



- Wichita-Sedgwick County Dept. of Community Health, 1900 E. 9th St., Wichita

The material is also available on the Bureau of Air's Web site at

[http://www.kdheks.gov/bar/public\\_notice.html](http://www.kdheks.gov/bar/public_notice.html). Questions pertaining to the proposed regulation should be directed to Keith Weber.

Any individual with a disability may request accommodation in order to participate in the public hearing and may request the proposed regulation and the economic impact and environmental benefit statements in an accessible format. Requests for accommodation to participate in the hearing should be made at least five working days in advance of the hearing by contacting Keith Weber.

Robert Moser, MD

Secretary of Health and Environment



28-19-645a. Restrictions on open burning operations that supersede the provisions of K.A.R. 28-19-645 for certain counties during the month of April. (a) A person shall not cause or permit open burning operations of any waste, including vegetation and wood waste, structures, or any other materials on any premises during the month of April in Butler, Chase, Chautauqua, Cowley, Elk, Geary, Greenwood, Johnson, Lyon, Marion, Morris, Pottawatomie, Riley, Sedgwick, Wabaunsee, and Wyandotte counties, except as authorized by subsections (b) through (d).

(b) The following activities shall be exempt from the prohibition in subsection (a):

(1) Open burning operations for the purpose of range or pasture management and conservation reserve program (CRP) burning activities meeting the requirements in K.A.R. 28-19-648 (a)(1) through (a)(4); and

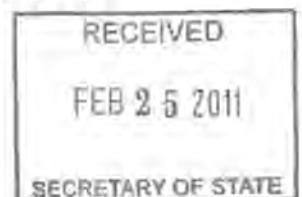
(2) open burning operations listed in K.A.R. 28-19-647 (a)(1) and (a)(2).

(c) A person may obtain approval by the secretary to conduct an open burning operation that is not otherwise exempt if the conditions and requirements of the following are met:

(1) K.A.R. 28-19-647 (b)(1) through (b)(3); and

(2) K.A.R. 28-19-647 (d) and (e).

(d) Open burning operations that shall require approval by the secretary and are deemed necessary and in the public interest shall include the open burning operations listed in K.A.R. 28-19-647 (c)(1) through (c)(3).



ATTORNEY GENERAL

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APPROVED BY *[Signature]*

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(e) In Johnson, Wyandotte, and Sedgwick counties, the open burning operations listed in K.A.R. 28-19-647 (c)(4) and (c)(5) shall require approval by the local authority.

(f) Nothing in this regulation shall restrict the authority of local jurisdictions to adopt more restrictive ordinances or resolutions governing agricultural open burning operations. (Authorized by K.S.A. 2010 Supp. 65-3005; implementing K.S.A. 2010 Supp. 65-3005 and K.S.A. 65-3010; effective, T-\_\_\_\_\_, \_\_\_\_\_; effective P-\_\_\_\_\_.)

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ATTORNEY GENERAL

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Proposed

**Kansas Department of Health and Environment  
Division of Environment  
Bureau of Air**



**REGULATORY IMPACT STATEMENT CONSISTING OF:**

**I. ENVIRONMENTAL BENEFIT STATEMENT**

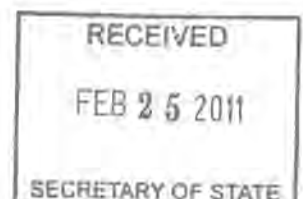
**AND**

**II. ECONOMIC IMPACT STATEMENT**

Pursuant to K.S.A. 77-416

**PROPOSED NEW PERMANENT AIR QUALITY REGULATION:  
K.A.R. 28-19-645a. Open Burning Restrictions That Supersede the Provisions of  
K.A.R. 28-19-645 for Certain Counties During the Month of April**

February 17, 2011



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SECRETARY OF STATE

**Background of Proposed New Regulation**

**Introduction**

Kansas Administrative Regulation (K.A.R.) 28-19-645a, Open Burning Restrictions for Certain Counties During the Month of April, is a proposed new regulation in support of the State of Kansas Flint Hills Smoke Management Plan (SMP) that was formally adopted by the Kansas Department of Health and Environment (KDHE) on December 29, 2010. This regulation is being proposed in parallel as a temporary and as a permanent regulation in an effort to have the regulatory component of the SMP in place for the Flint Hills burn season this March-April 2011.

**History and Development**

Burning in the Flint Hills and its impacts on public health first gained publicity in 2003 when air quality monitors that measure ozone in the Kansas City area recorded high readings on April 12 and April 13. Three Kansas City-Missouri monitors recorded readings that exceeded the federal 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. The smoke plume impacted several states east of Kansas, generating numerous complaints to the KDHE from cities and states as far away as Tennessee about poor air quality and high ozone readings.

In the fall of 2003, the KDHE staff presented information regarding the effects of the Flint Hills burning on air quality, including elevated ozone levels, to agricultural interests at a conference held at Kansas State University (KSU). KSU range management researchers, KSU Research and Extension, the Kansas Department of Agriculture, the Kansas Livestock Association, and other agricultural interests attended the conference. With the help of the organizations present, the KDHE planned to take an initial voluntary and educational approach towards addressing the issue.

The KDHE continued to engage the agricultural community in the following years. After a second episode in April 2009, in which the smoke from the Flint Hills burning contributed to exceedances of NAAQS for ozone in Kansas City and Wichita, the KDHE and the agricultural community agreed that a more formal plan to address this issue needed to be developed.

A formal Flint Hills Smoke Management Advisory Committee was formed in early 2010 to develop a Smoke Management Plan (SMP) for the Flint Hills. The committee was co-chaired by Senator Carolyn McGinn, Representative Tom Moxley, and the Director of the Division of

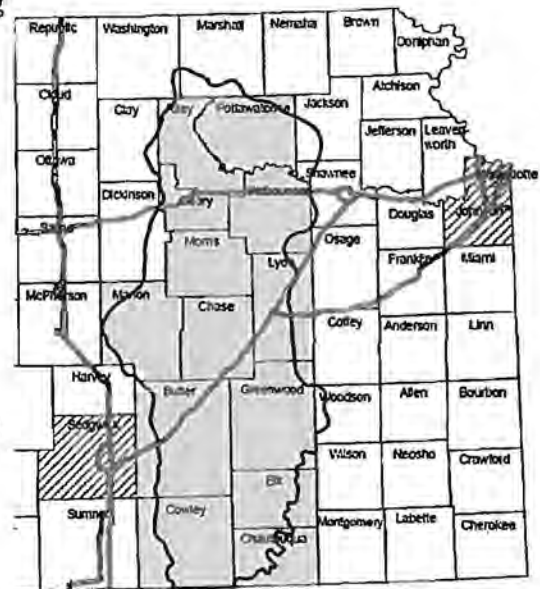




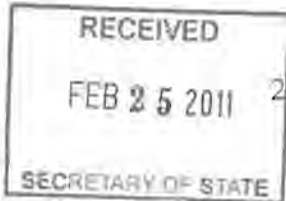
Environment at the KDHE, John Mitchell, and included a wide range of stakeholders. A smaller subcommittee was tasked with writing the SMP. After several meetings, with ideas and drafts presented and discussed, agreement was reached within the subcommittee and the larger Advisory Committee. The general public was invited to comment on the Flint Hills SMP and its implementation in December 2010. On December 29, 2010, the State of Kansas Flint Hills Smoke Management Plan was formally adopted by the KDHE.

Regulatory Development

In support of the recently-adopted SMP and following the federal “Interim Air Quality Policy on Wildland and Prescribed Fires,” the KDHE Bureau of Air (BOA) drafted a regulation that restricts burning activities in certain counties for the month of April only. The regulation will apply to 16 counties: Butler, Chase, Chautauqua, Cowley, Elk, Geary, Greenwood, Johnson, Lyon, Marion, Morris, Pottawatomie, Riley, Sedgwick, Wabaunsee, and Wyandotte. The figure below identifies the 16 counties (all shaded counties) subject to the April burn restrictions. Shaded counties represent those in the heart of the Flint Hills where the majority of agricultural related prairies and grassland burning occur. Hatched counties represent metropolitan areas that would be subject to the April burn restrictions.



Burning that will continue to be allowed in these counties during April include agricultural burning related to the management of prairie or grasslands (range or pasture management) and conservation reserve program (CRP) burning activities. Restricted activities include burning of materials such as land clearing debris, crop residues, construction debris, fire fighter training burns, and yard waste. Existing exemptions in K.A.R. 28-19-647(a)(1) and (a)(2) have been retained in the proposed new regulation as K.A.R. 28-19-645a(b)(2) and allow for the following: (1) open burning on a residential premise containing five or less dwelling units and incidental to the normal habitation of the dwelling units; and (2) open burning for cooking or ceremonial purposes on public or private lands regularly used for recreational purposes. Other



exemptions may be considered on a case-by-case basis for certain activities, of which the burning of storm debris would be a good example of a possible qualifying exemption.

Burn activities not explicitly exempted in the new regulation will be subject to review and approval by the KDHE. Any proposed burn activity must be proven to be necessary, to be in the public interest, and not to be prohibited by any local government or local fire authority.

April burn activities involving nonagricultural land clearing debris and construction debris in Johnson, Wyandotte, and Sedgwick counties will be subject to review and approval by the respective local authorities.

**I. Environmental Benefit Statement**

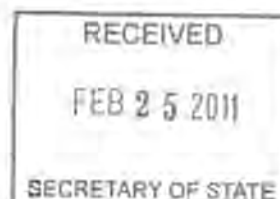
**1) Describe the need for the proposed new regulation and the environmental benefit to accrue as a result of the regulation.**

**a) Need**

In order to help address violations of the NAAQS for the Kansas City and Wichita metropolitan areas, this regulation is being drafted as part of the Kansas Flint Hills Smoke Management Plan which was formally adopted by the KDHE on December 29, 2010. Chapter 4 of the plan discusses restrictions for burning activities in certain counties during the month of April only. Almost all grassland burning takes place during the month of April.

**b) Environmental Benefit**

This regulation will aid in the effort to minimize the air quality impacts associated with prescribed fires while continuing to allow grassland burning to maintain the Flint Hills ecosystem. One of the goals of the SMP and this regulation is to ensure that all Kansas monitors meet the National Ambient Air Quality Standards (NAAQS), particularly for ozone and particulate matter. The primary NAAQS is set to protect public health, and the secondary NAAQS is set to protect public welfare (i.e., visibility impairment and damage to ecosystems).



**2) As applicable, summarize the research indicating the level of risk to the public health or the environment being removed or controlled by the proposed regulation.**

Section 109 of the Clean Air Act (CAA) requires the EPA to set the primary NAAQS for each of the criteria pollutants at levels “the attainment and maintenance of which ... are requisite to protect the public health” and to set any secondary NAAQS at “a level of air quality the attainment and maintenance of which ... is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in ambient air.” (42 U.S.C. §7409(b)(1) and (b)(2)). The EPA has conducted or utilized research on the effects of the various pollutants on health and welfare. Each standard has been subjected to peer review and often to litigation as well.

**3) If specific contaminants are to be controlled by the proposed regulation, describe the indicating level at which the contaminants are considered harmful according to current available research.**

These determinations have been made at the federal level through extensive research and peer review. The current NAAQS affected by burning are:

Pollutant	Primary Standards		Secondary Standards	
	Level	Averaging Time	Level	Averaging Time
Particulate Matter (PM <sub>10</sub> )	150 µg/m <sup>3</sup>	24-hour	Same as Primary	
Particulate Matter (PM <sub>2.5</sub> )	15.0 µg/m <sup>3</sup>	Annual	Same as Primary	
	35.0 µg/m <sup>3</sup>	24-hour	Same as Primary	
Ozone	0.075 ppm (2008 Std)	8-hour	Same as Primary	
	0.08 ppm (1997 Std)	8-hour	Same as Primary	
Nitrogen Dioxide	53 ppb	Annual	Same as Primary	
	100 ppb	1-hour	None	

The NAAQS for lead (Pb), sulfur dioxide (SO<sub>2</sub>), and carbon monoxide (CO) are not affected by grassland burning.



**II. Economic Impact Statement**

- 1) Is the proposed regulation mandated by federal law as a requirement for participating in or implementing a federally subsidized or assisted program?**

The proposed regulation is not directly mandated by federal law. However, the state is responsible for attainment and maintenance of the federal NAAQS. The burning in the Flint Hills has been demonstrated to contribute to violations of the NAAQS. The Flint Hills SMP was prepared to address these violations. The proposed new regulation is a component of the SMP.

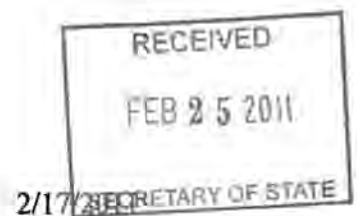
- 2) Does the proposed regulation exceed the requirements of applicable federal law?**

The proposed regulation does not exceed the requirements of applicable federal law because its purpose is to support the Flint Hills SMP in minimizing the air quality impacts of prescribed fires and preventing exceedance of the NAAQS.

- 3) Describe the costs to agencies, to the general public, and to persons who are affected by or are subject to the proposed regulation as follows:**

- a) Capital and annual costs of compliance with the proposed regulation and the persons who will bear those costs.**

Costs associated with compliance with the proposed April burn restrictions are expected to be minimal. It is anticipated that prescribed burning not exempted in the rule will be able to be conducted in March or May. However, exemptions may be considered on a case-by-case basis for certain activities, with the burning of storm debris being a good example of a possible qualifying exemption. Any proposed burn activity not explicitly exempted by the regulation will be subject to review and approval and must be proven to be necessary and to be in the public interest.



- b) Initial and annual costs of implementing and enforcing the proposed regulation, including the estimated amount of paperwork, and the state agencies, other governmental agencies, or other persons or entities who will bear the costs.**

The KDHE has agreed to contract the services of Kansas State University for \$40,000 to develop a website and outreach/education program to implement the overall SMP. Of this amount, \$5,000 would be categorized for implementation of the April burn restrictions portion of the SMP, which will be supported by the proposed new regulation.

- c) Costs that would likely accrue if the proposed regulation is not adopted, the persons who would bear the costs and those who will be affected by the failure to adopt the regulation.**

Failure to adopt the proposed regulation will weaken the effectiveness of the Flint Hills SMP and possibly lead to exceedance of the NAAQS. Without the new regulation in place, the SMP does not meet federal requirements and does not justify with EPA a case for a possible exceptional events flag for an exceedance during burn season.

When an area violates the NAAQS, certain measures must be implemented to mitigate the air quality problems. These measures can add costly regulatory burdens that inhibit economic development.

Reasonably Available Control Technology (RACT) rules implemented due to nonattainment impose requirements on certain industrial sectors for control equipment, process changes, or material changes. Facilities can incur capital and annual costs that are then passed down to consumers. As an example, the NO<sub>x</sub> RACT rules that recently went into effect in Kansas City are estimated to incur a combined \$50 million in capital expenditures for the three affected facilities with additional costs in future to operate and maintain controls.

Other examples of costly requirements for a nonattainment area include low Reid vapor pressure fuels (adding 1.5 to 2.5 cents per gallon as estimated in 2001), transportation conformity for emissions associated with transportation projects using federal dollars, and inspection and maintenance (I/M) programs for all registered vehicles in an area (e.g., consumer costs estimated in 2010 at \$34 million annually for an I/M program in Johnson and Wyandotte counties).



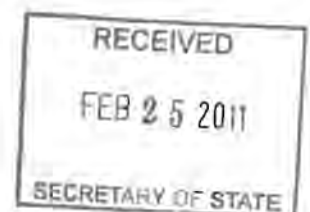
In addition, state implementation plans (SIPs) are required to document measures planned to get an area back into attainment and to maintain the NAAQS. Activities associated with the SIP involve increased costs for additional agency staff labor and time performing inventory, modeling, permitting, inspection, compliance, and public outreach.

**d) A detailed statement of the data and methodology used in estimating the costs described in this economic impact statement.**

The KDHE utilizes various resources in estimating potential costs. Resources include surveys of regulated industries, contacts with other state and local agencies with areas in nonattainment and with control measures implemented, information provided on EPA's website ([www.epa.gov/otaq/](http://www.epa.gov/otaq/)), and contact with EPA Region 7 staff.

**e) Describe any less costly or less intrusive methods that were considered by the agency and why such methods were rejected in favor of the proposed regulation.**

The least intrusive method was to do nothing, to not develop the Flint Hills SMP or the associated regulation. Previous efforts involving public outreach and education were unsuccessful at minimizing the air quality impacts of burning activities. At this point, doing nothing would become more costly. Ozone monitor readings for the past two years and the upcoming finalization of a lower ozone standard point to the likelihood that there will be an exceedance of the NAAQS unless more effort is made to minimize the air quality impacts during burn season. Without the SMP and associated regulation in place, there is no case to make with the EPA for a possible exceptional events flag for an ozone exceedance during the Flint Hills burn season. KDHE submitted a request to the EPA for an exceptional events flag for the high ozone readings in April 2009 and was denied because there was no SMP in place.



- f) **Consultation with League of Kansas Municipalities, Kansas Association of Counties, and Kansas Association of School Boards for determination of potential revenue increases or decreases or imposition of functions or responsibilities that increase expenditures or fiscal liability for cities, counties, or school districts.**

The department has provided copies of this Regulatory Impact Statement to each of these organizations concurrently with this submittal.

