

Statement of Consideration
Relating to 401 KAR 103:005

Energy and Environment Cabinet, Department for Environmental Protection, Division of Waste
Management
(Amended After Comments)

- I. The public hearing on 401 KAR 103:005, scheduled to be held virtually on December 21, 2023, at 10:00 a.m. was cancelled; however, written comments were received during the public comment period.

- II. The following people submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Tom Fitzgerald	Kentucky Resource Council
Amanda Stallings	National Grid Renewables Development, LLC
Stephanie Stumbo	NextEra Energy
Evan Vaughan	MAREC Action

- III. The following people from the promulgating administrative body responded to the written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Tyler Shields, Environmental Control Supervisor	Division of Waste Management

IV. Summary of Comments and Responses

- (1) Subject Matter: Typographical errors
- (a) Comment: Tom Fitzgerald – The proposed regulations need to be carefully reviewed for typographical errors.
 - (b) Response: The proposed regulations were extensively reviewed for typographical errors, addressing concerns listed by the commentor and those caught by the Legislative Research Commission's submission of suggested substitutes.

- (2) Subject Matter: Owner-operator definition.
- (a) Comment: Tom Fitzgerald – The term *owner-operator* should be limited to a manner consistent with KRS 278.710(10)
 - (b) Response: KRS 278.710(10) uses the term *owner-operator* to refer to the party responsible for removing discarded solar panels from the site. The promulgating agency has removed this term from the proposed regulation to avoid potential confusion of facility authority.
- (3) Subject Matter: Owner-operator definition.
- (a) Comment: Amanda Stallings – The term *owner-operator* is the predominant term in the proposed regulation for the person who has the responsibility for the overall operation (or construction or decommissioning, during those phases) of the MEGF; it should be consistently used throughout unless another person is the subject of a regulation.
 - (b) Response: The term *owner-operator* is intended to mean the owning entity of the merchant electric generating facility (MEGF) or the party responsible for overall operation of the MEGF, which can include contractors conducting operational activity. The promulgating agency has removed this term from the proposed regulation to provide clarity of responsibilities related to ownership and operations pursuant to KRS 278.706.
- (4) Subject Matter: Applicant definition.
- (a) Comment: Amanda Stallings – The definition for the term *applicant* should be revised as it omits some persons who might be applying for approval/review and includes aspects for which the term *owner-operator* or *successor* are more appropriate.
 - (b) Response: The term *applicant* is intended to mean any person who is seeking a transfer of a construction certificate for ownership or control, or rights and obligations under a construction certificate, of a constructed and generating MEGF, pursuant to KRS 278.710(3), (5), and (7). Persons who apply for the transfer of a construction certificate prior to the completion of construction and generation are under the authority of the Kentucky State Board of Electric Generation and Transmission Siting (board). The promulgating agency has amended the definition of *applicant* to reflect the intended purpose described above.
- (5) Subject Matter: Construction certificate holder definition.
- (a) Comment: Tom Fitzgerald – Create a definition for *construction certificate holder* to define the entity to whom the construction certificate was issued and who is responsible for compliance with any ongoing obligations imposed under the certificate, or any acquirer of the rights and obligations under the certificate approved by the Board in accordance with KRS 278.710(3)(b).
 - (b) Response: The promulgating agency has created a definition for the term *construction certificate holder* in order to clarify the party responsible for obligations and requirements imposed under the construction certificate. The

promulgating agency also amended the definition of *construction certificate* to reflect addition of *construction certificate holder*.

(6) Subject Matter: Decommissioning bond definition.

- (a) Comment: Amanda Stallings – The term *decommissioning bond* is used only once, in the proposed administrative regulations; otherwise “*financial assurance*” or “*financial mechanism*” are used. Unless the term “*decommission(ing) bond*” is meant to narrowly refer to an approved surety bond for decommissioning purposes, then it need not be specifically defined and the term used should be *financial assurance mechanism*, which could be modified with approved where applicable. *Approved* should be dropped from the definition of *decommissioning bond* and should be used where *financial assurance mechanism* appears.
- (b) Response: The term *decommissioning bond* is used in KRS 278.706 to describe financial assurance mechanisms as bonds or other similar securities. The promulgating agency has removed the term *decommissioning bond*, replacing it with *financial assurance mechanisms* pursuant to KRS 278.706.

(7) Subject Matter: Decommission definition.

- (a) Comment: Amanda Stallings – The definition is an element of other defined terms (subsections (12), (14), (30)) and is the focus of proposed regulations 401 KAR 103:020 and 103:030. The definition(s) should be revised to be consistent with each other and not inappropriately limit certain circumstances or subsets of removal or restoration activities. Not all MEGFs are solar and solar MEGFs contain components and facilities that are not part of *solar panel systems*, yet the definition of *decommission* is restricted to “removal or closing of solar panel system at the end of the useful life.” Furthermore, the removal and restoration processes described in *decommission bond*, *decommission costs*, and *decommission plan* are all a bit different from each other, but are not limited to solar or to removal of facilities or components at the end of their useful life. A consistent definition of what is involved in decommissioning should be used for *decommission* and then other definitions can be referenced.
- (b) Response: The term *decommission* is intended to mean the process of removal or closing of components and facilities at the end of their useful life. The term should not limit the type of facility or components associated with the facility. The promulgating agency has amended the definition for *decommission* to include all facilities and associated components that meet the term *merchant electric generating facilities*, pursuant to KRS 278.700.

(8) Subject Matter: Liability of decommissioning plan and bond requirements in relation to transfer of certificate holder.

- (a) Comment: Tom Fitzgerald – When establishing a definition for construction certificate holder, clarify that any entity whom ownership, control, or the right control, has been transferred by the certificate holder, is jointly liable for decommissioning plan and bonding requirements, but the certificate holder remains responsible for those and other certificate requirements unless those

certificate obligations are also acquired by the new owner or controller of the facility on approval by the Board.

- (b) Response: According to KRS 278.710(3)(b) a person that has received a construction certificate for a merchant electric generating facility shall not transfer rights and obligation under the certificate without having first applied for and received a board determination that the acquirer has a good environmental compliance history, and has the financial, technical, and managerial capacity to meet the obligation imposed by the terms of approval or has the ability to contract to meet these obligations. Pursuant to KRS 278.710(5) any person who transfers or sells ownership, control, or the right to control a merchant electric generating facility shall remain liable for all existing decommissioning obligation and bond requirements until the person who acquires ownership, control, or the right to control the merchant electric generation facility files with the Energy and Environment Cabinet the documents required by subsection (4) of this section and they are accepted as complete by the secretary. The promulgating agency amended language related to liability, and to be in accordance with statute.

V. Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body

The public hearing on this administrative regulation was cancelled; however, written comments were received. The Division of Waste Management responded to the comments and amends the administrative regulation as follows:

Page 2

Section 1(4)

Lines 1-3

After "the transfer of", insert the following:

a construction certificate for control, or rights and obligations under

After "ownership of a", insert the following:

constructed and generating

Delete "who received a construction certificate pursuant to KRS 278.710, or"

Delete "controlling rights, or ownership"

Page 2

Section 1(8)

Lines 8-11

Delete "Siting"

Delete "to an owner-operator, or persons who have controlling rights, of a merchant electric generating facility"

After "that authorizes", insert the following:

a

Delete "s" from persons

Page 2
Section 1(9)
Line 12

After "(9)", insert the following:

"Construction certificate holder" means any person who received board approval to construct a merchant electric generating facility pursuant to KRS 278.710 or any person who received approval to acquirer rights and obligation under the construction certificate pursuant to KRS 278.710(3)(b)

Page 2
Section 1(10)
Line 13

Insert the following:

11

Delete "10"

Page 2
Section 1(11)
Line 16

Insert the following:

12

Delete "11"

After "the process of", insert the following:

removing components

Delete "removal"

After "or closing of", insert the following:

facilities

Delete "solar panel system"

Page 2
Section 1(12)
Lines 18-21

Delete "(12) Decommission bond" or "Decommissioning bond" means an approved financial assurance mechanism used to guarantee the land used for a merchant electric generating facility will be returned to a substantially similar state upon decommissioning or abandonment of the project, unless otherwise requested by the landowner;"

Pages 2 and 3
Section 1(13)
Lines 23-2

After "connection with the", insert the following:

decommissioning

Delete "dismantlement, removal, and disposal of structures, systems, and components"

Delete "at the time of decommissioning"

Page 4
Section 1(28)
Lines 4-6

Delete "(28) Owner-operator" is defined as any person who owns a merchant electric generating facility or is responsible for overall operation of a merchant electric generating facility, including any contractor conducting operational activities;"

Page 4
Section 1(29)
Line 7

Insert the following:

28

Delete "29"

Page 4
Section 1(30)
Line 8

Insert the following:

29

Delete "30"

Page 4
Section 1(31)
Line 11

Insert the following:

30

Delete "31"

Page 4
Section 1(32)
Line 12

Insert the following:

31

Delete "32"

Page 4
Section 1(33)
Line 13

Insert the following:

32

Delete "33"

Page 4
Section 1(34)
Line 14

Insert the following:

33

Delete "34"

Page 4

Section 1(35)

Line 16

Insert the following:

34

Delete 35"

Page 4

Section 1(36)

Line 18

Insert the following:

35

Delete "36"

Page 4

Section 1(37)

Line 20

Insert the following:

36

Delete "37"