

Statement of Consideration
Relating to 401 KAR 103:020

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

- I. The public hearing on 401 KAR 103:020, 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
Tyler Shields	Division of Waste Management
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: Decommissioning notification.
- (a) Comment: Amanda Stallings – Reference to “notification ... of intent to start the decommissioning process” appears to be in error, since such notice does not otherwise appear in the proposed regulations or the related statutes; Section 1(3)(c) should perhaps simply state: “define the conditions upon which decommissioning will be made...” If it is the Cabinet’s intent to establish a requirement of “notification of intent to start the decommissioning process,” this notification needs to be better defined; for example, is notification to the Cabinet, the affected landowner(s), or both?

- (b) Response: The intent is to ensure the MEGF defines the conditions upon which decommissioning will be initiated within the decommissioning plan. Additionally, the cabinet would like to ensure facilities provide notification in accordance with 401 KAR 103:010(1). The administrative body has amended the administrative regulation to include citation of 401 KAR 103:010(1).
- (2) Subject Matter: Time frame of decommissioning.
- (a) Comment: Amanda Stallings – Section 1(3)(d) would be clarified by adding *anticipated* or *estimated* before “timeframe,” since this is a component of decommissioning plan filed years or decades before decommissioning occurs and is subject to periodic updates.
 - (b) Response: The administrative body has amended this paragraph to include *estimated* in an effort to clarify the intent of the requirement.
- (3) Subject Matter: Landowner accommodations.
- (a) Comment: Amanda Stallings – Section(1)(h) it should be clarified what is the plan requirement if a special accommodation is made to not remove equipment or facilities which parts (i) and (j) list as removed. In addition, as to subparts number 1-3: Subpart 1 should be omitted. The requirement to “incorporate the accommodations as requirements into the lease agreement with landowners and the decommissioning plan” is either superfluous to or inconsistent with the provision in KRS 278.706(2)(m). May also lead to conflict with Section 1(3)(j) or (h) and ignores that the statutes specifically provides for accommodating landowner requests “at the end of the MEGF’s useful life ... that are in addition to the minimum requirements set for in this paragraph and in addition to any other requirements specified in the lease with the landowner.” KRS278.706(2)(m)6. Subparts 2 and 3 should be omitted or their specification of procedure when an owner-operator denies or grants an affected landowner’s request for special accommodation should be in their own subsection. IF procedures for landowner requests and their consideration and documentation are set out in the regulation, it should be clarified whether notice of such request and their outcome is to be given to the Cabinet and to any applicable county or municipal government.
 - (b) Response: The administrative body has amended the regulation to address concerns regarding redundancies in the statute and regulation in relation to Section 1(3)(h) and KRS 278.706(2)(m)6.
- (4) Subject Matter: Section 4 of 401 KAR 103:020.
- (a) Comment: Amanda Stallings – The first sentence should give Cabinet discretion (“may”) to draw on the bond, rather than require it (“will”) in the case of abandonment or failure to complete decommissioning obligations. The relationship between the first and second sentences should be clarified. What happens if more than one party successfully makes a claim on the bond? The proposed regulation also refers both to “decommissioning bond” and “approved financial assurance”; if no distinction is intended, the same term should be used.
 - (b) Response: The administrative body amended the regulation to be in accordance with KRS 224.10-285. In the case where more than one party makes a successful claim on

the bond, they will be held liable for the decommissioning obligations in relation to their portion of financial assurance awarded. Additionally, the term “decommissioning bond” was removed from the regulation and amended to refer to approved financial assurance.

- (5) Subject Matter: Owner-operator, person who controls or owns right to control, construction certificate holder clarification.
 - (a) Comment: Tom Fitzgerald – As noted in the discussion of 103:010, the construction certificate holder is at all times responsible for all rights and obligations under the construction certificate. Additionally, ownership, control, or right to control the MEGF has been transferred from the construction certificate holder, that new entity in addition to the construction certificate holder, becomes liable for completion of the decommissioning plan and posting of the bond. The term “owner-operator” is not used in the discussion of responsibility for the certificate compliance nor for the decommissioning plan and bonds but instead used to only refer to who bears responsibility in KRS 278.710(10) for removal of replaced and discarded solar panels. The term should not be used when referring to responsibilities for decommissioning plan and bond, and for certificate compliance, matters.
 - (b) Response: The administrative body has amended the administrative regulation to use terms identified in the statute when referring to responsible parties. Additionally, the administrative regulation was amended to ensure at least one party is always responsible for rights and obligations under the construction certificate beyond decommissioning and bond requirements. The term “owner-operator” was removed from the regulation to provide clarity of responsibility in accordance with statutes.
- (6) Subject Matter: Concerns of ambiguity regarding “minimal requirements” of decommissioning plan.
 - (a) Comment: Tom Fitzgerald – Section 1(3) uses the term “minimally” as a modifier for what is required. The term should be removed since it introduces unnecessary ambiguity. If the Cabinet intends that all of the requirements listed be met, it should provide that the plan shall provide that. Additionally, the regulation listing of decommissioning plan requirements should fully incorporate the requirements for decommissioning established in the statute and assure that any additional mitigation measures imposed by the Board in connection with issuance of the construction certificate are also complied with.
 - (b) Response: The administrative body has amended the administrative regulation to remove the term “minimally” with intent to remove unnecessary ambiguity. 401 KAR 103:020(1) addresses the commentor’s concerns of mitigation measures outlined in KRS 278.704 through KRS 278.710. It should be noted that, any application condition that requires approval of transfer of control of a MEGF after construction is complete, shall be void and unenforceable in accordance with KRS 278.710(6).
- (7) Subject Matter: Typographical errors.
 - (a) Comment: Tom Fitzgerald – The proposed regulations need to be carefully reviewed for typographical errors. The proposed regulation suffers from the same problems in the necessity, function, and conformity section as identified in other regulations.

- (b) Response: The proposed regulations were extensively reviewed for typographical errors, addressing concerns and those caught by the Legislative Research Commission's submission of suggested substitutes.
- (8) Subject Matter: List of invasive species.
- (a) Comment: Evan Vaughan – Page 2, line 15, the requirements for native seed mixes and avoidance of invasive species is vague. The commenter requests that the Energy and Environment Cabinet provide or reference a specific list of prohibited “invasive species” to aid companies in compliance with this requirement.
- (b) Response: This is common practice when addressing vegetation screening. The Cabinet provides a [list of invasive species](#) on the Energy and Environment Cabinet website but will not amend the regulation to include a list that is subject to change in regulation.
- (9) Subject Matter: MEGF Annual Report or Decommissioning Plan Update Form.
- (a) Comment: Evan Vaughan – It is unclear if the decommissioning plan and the decommissioning cost estimate are intended to be a part of the annual report or if they should be submitted alongside the annual report at least once every five (5) years. The commentator recommends updates to the decommissioning plan and decommissioning cost estimate only be required once every five (5) years. Furthermore, they recommend the “MEGF Annual Report” be reduced to an every five (5) year reporting requirement. Year-to-year operations and maintenance activities on a solar project are low impact and low risk, primarily consisting of vegetative maintenance. The commentator encourages that Cabinet to seek other opportunities to reduce regulatory burden and lower proposed administrative fees through more reasonable reporting intervals for monitoring solar projects which are largely passive. Lower fees will contribute to lower overall cost of electricity and greater benefits to landowners/local communities.
- (b) Response: The MEGF Annual Report or Decommissioning Plan Update Form are not to be submitted in conjunction with each other annually. The statute implements that decommissioning plan and decommissioning cost estimate updates are only required to be updated at least once every five (5) years. However, the annual reporting requirement is a mechanism to assist the cabinet with monitoring and enforcement responsibilities pursuant to KRS 278.710(7), while lowering the MEGF annual fee and potentially lowering cabinet's costs associated with monitoring and enforcement obligations under KRS 278.710. KRS 278.710(10) requires that removed or discarded solar panels be removed from the site within 90 days of completion of work. While these facilities may be seen as largely passive, if statute requires the removal of discarded panels from site, the cabinet could be potentially be required to inspect the facilities once every 90 days to ensure compliance.
- (10) Subject Matter: Form incorporated by reference, DWM 4657.
- (a) Comment: Tyler Shields – Typographical errors throughout forms, including use of terms not in statute, for example PSC rather than Board.
- (b) Response: The administrative body has reviewed the forms incorporated by reference and amended to use terms in accordance with statute and this chapter.

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 1

Section 1

Line 19

After "Decommissioning Plan. The", insert the following:

construction certificate holder

Delete "owner-operator"

Page 2

Section 1

Line 1

After "outlined in KRS", insert the following:

278.706 and

Delete "278.704 through"

Page 2

Section 1(3)

Line 7

Delete "minimally"

Page 2

Section 1(3)(c)

Lines 12-13

After "decommissioning will be", insert the following:

implemented

Delete "initiated"

After "will be made", insert the following:

to the Cabinet, affected landowners, and local county or municipality in regard to implementation

Delete "intent to start"

After "decommissioning process", insert the following:

, pursuant to 401 KAR 103:010(1)

Page 2

Section 1(3)(d)

Line 14

After "(d) The", insert the following:

estimated

Page 2

Section 1(3)(h)

Lines 20-6 of Page 3

After “any affected landowner”, insert the following:

, pursuant to KRS 278.706(2)(m)6

Delete “1. Incorporate the accommodations as requirements into the lease agreement with landowners and the decommissioning plan; or

2. Deny the request to accommodate and submit a detailed correspondence to the landowner, county or municipal government, and cabinet.

3. The owner-operator or person who controls or owns the right to control shall provide the landowner, county or municipal government, and cabinet with a timeline of any agreed upon accommodated request from the landowner or county or municipal government in accordance with paragraph (h) of this subsection.”

Page 3

Section 1(3)(j)

Line 21

After “was installed”, insert the following:

, unless otherwise requested by the landowner; and

Page 3

Section 1(3)

Line 22

After “the landowner; and”, insert the following:

(k) Incorporate the requirements of paragraphs (a) through (j) into the applicant’s or construction certificate holder’s leases with landowners.

Page 4

Section (2)(5)

Lines 21-22

After “the cabinet, the”, insert the following:

construction certificate holder

Delete “owner-operator”

Page 5

Section 3(1)

Line 4

After “(1) The”, insert the following:

construction certificate holder

Delete “applicants, owner-operators”

Page 5

Section 4

Line 21

After “KRS 224.10-100, the cabinet”, insert the following:

may

Delete “will”

After “draw upon the”, insert the following:

financial assurance

Delete “decommissioning bond”

Page 6

Section 5(1)

Line 3

After “4657”, insert the following:

January 2024

Delete “July 2023”