

Statement of Consideration
Relating to 401 KAR 103:030

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

I. The public hearing on 401 KAR 103:030, 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: Typographical errors in necessity, function, and conformity section.
- (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.

(2) Subject Matter: Financial assurance obligations.

- (a) Comment: Tom Fitzgerald - The regulation needs to be revised so that the requirements for financial assurance are imposed on the parties as described and identified by the statute. The obligations of an applicant for a construction certificate with respect to financial assurance are established in KRS 278.706(2)(m)5. The decommissioning plan cannot be approved by the Board unless the plan includes within it a plan to secure a bond meeting all of the requirements established in that subsection, and KRS 278.710(3) requires that the person receiving the construction certificate (which is referred to later in the statute as the construction certificate holder) file a copy of that bond before construction commences. If ownership or control is transferred to another entity, that entity additionally becomes responsible for the adequacy of the financial assurance but the certificate holder remains responsible as well since the bond requirement is part of the approved decommissioning plan and the construction certificate holder who receives the certificate remains responsible under KRS 278.710(3)(a), regardless of whether ownership or control of the facility has been transferred to another party, unless that party has also succeeded to the construction certificate by application and approval by the Board.
- (b) Response: According to KRS 278.710(5) any person who transfers or sells ownership, control, or the right to control a merchant electric generating facility (MEGF) shall remain liable for all existing decommissioning obligations and bond requirements until the person who acquires ownership control, or the right to control the MEGF files with the Energy and Environment Cabinet the documents required by KRS 278.710(4) and they are accepted as complete by the secretary of the Cabinet. KRS 278.710(4) requires that a person who has acquired ownership, control, or the right to control a MEGF from the applicant or successor or assign shall file with the Cabinet within ten (10) days of completing the acquisition: a written consent to assume obligation set forth in the decommissioning plan as of the date the acquisition occurred; and a notice of adoption of an existing bond or other similar security previously filed pursuant to KRS 278.710(3)(a) or a replacement bond or other similar security that complies with KRS 278.706(2)(m)5. Upon the required documents under KRS 278.710(4) being accepted as complete by the secretary, the transfer of decommissioning and financial obligations is complete, and the applicant or successor is no longer liable for those obligations. However, pursuant to KRS 278.710(3)(b), the applicant or successor (the construction certificate holder) is still liable for rights and obligations under the certificate unless they have received approval from the board to transfer the construction certificate and the rights and obligations associated. The administrative body has amended this administrative regulation to correct terms for which party is reliable in relation to financial obligations, ensuring that at least one party is responsible for bonding requirements at all times and there is no lapse in coverage.

- (3) Subject Matter: Clarification of terms related to parties with financial obligations/responsibilities.
- (a) Comment: Amanda Stallings - "Applicant(s), owner(s)-operator(s), or person(s) who controls or owns the right to control": NG Renewables suggests that the term owner-operator is intended and be used instead of this unwieldy and ambiguous phrasing. Difficulties of understanding the meaning of this mixture of three categories in the proposed regulation is further complicated because the vary between singular or a mix of plural and singular.
 - (b) Response: The administrative body has amended this administrative regulation to provide clarity of which party is responsible for financial obligations during each phase of operation. Additionally, the term owner-operator and replaced with appropriate terms identified in statute to provide consistency across the regulation and 401 KAR Chapter 103.
- (4) Subject Matter: Financial assurance mechanism, decommissioning bond terminology.
- (a) Comments: Amanda Stallings - This proposed regulation never uses the defined term decommission(ing) bond. It generally uses financial assurance mechanism, but sometimes drops a word from that term, for example, referring to "financial mechanism" or "financial assurance." Reference to the general category should be consistent within and across each of the proposed regulations in chapter 103. These comments about proposed 401 KAR 103:030 use financial assurance mechanism or mechanism and assume that the current variations are typos and not intended to refer to different types of mechanisms.
 - (b) Response: The administrative body has amended this administrative regulation to provide clarity to the term financial assurance mechanism. The term decommissioning bond was removed and replaced with financial assurance or financial assurance mechanism to provide consistency across the regulation and 401 KAR Chapter 103.
- (5) Subject Matter: Criteria of financial assurance and mechanism sections.
- (a) Comment: Amanda Stallings – These sections include criteria for the financial assurance mechanisms but contain provisions that are ambiguous or inconsistent internally or with other provisions. NG Renewables suggests that the efficiency and clarity of these sections could be improved by judicious adaptation of similar provisions in the "Financial requirements and bonds" regulation for waste disposal, 401 KAR 48:310. Differences in the governing statutes, industries, and other context must be reflected in the phrasing adapted for MEGF regulations; regulations for closure and closure care of landfills may not be applicable to MEGFs nor sufficiently address what is necessary for MEGF financial assurance mechanisms or procedures.
 - (b) Response: The administrative body amended this administrative regulation to address concerns of language used for cancellation or lapse in financial coverage, citing appropriate statutory requirements for MEGFs. Additionally, this administrative regulation was amended to provide clarity of procedures for cancellation or lapse in financial coverage.

- (6) Subject Matter: Clarification of financial criteria and mechanisms.
- (a) Comment: Amanda Stallings – The lead-in for this subsection indicates that this is about requirements on the MEGF owner-operator and that the lettered parts are criteria to be satisfied by the required financial assurance mechanism(s). Only part (a) is mechanism criterion, whereas (b) through (d) relate to Cabinet review activities. Cross-reference in parts (b) and (d) should be checked and updated. As worded, this would impose unnecessary work on the Cabinet if the notice of “impending cancellation or lapse” was due. It is unclear how the requirements in Section 2(3) are to be “[p]ursuant to Section 3 of this administrative regulation,” or whether that phrasing should be omitted as superfluous. Furthermore, it appears that Sections 2(2) and 2(3) are to apply to all financial assurance mechanisms covering decommissioning, not just those which are updated or replacements for an initial mechanism or those offered by a successor and thus the initial reference to Section 3, may be unduly limiting. Finally, the non-parallel wording of subparts (3)(b)(1) and (2) creates ambiguity and the possibility of situations in which approval of a submitted mechanism is to be both granted and denied or neither granted nor denied or in which no guidance as to approval or denial is given. Consistent with the general lead-in, and contrasting with subsection (1), subsection (5) refers to the owner-operator rather than a proposed successor. The language should be clarified whether Section 3 is intended to govern only updated or replacement mechanisms obtained by successors or to financial assurance mechanisms generally.
- (b) Response: The administrative body has amended this administrative regulation to provide clarity of mechanism criteria, appropriate cross referencing, and address cabinet procedures for reviewing financial assurance mechanisms.
- (7) Subject Matter: Forms incorporated by reference, DWM 4651, 4653, and 4654.
- (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 2
Section 1
Line 2

After “applicants,” insert the following:
construction certificate holder
Delete “owner-operators”.

Page 2

Section 2(1)

Line 5

After "Applicants," insert the following:

construction certificate holder

Delete "owner-operators".

Page 2

Section 2(1)(b)

Lines 9-10

Delete "Ensure the financial assurance mechanisms be available no later than thirty (30) days after the issuance of a cabinet demand letter."

Page 2

Section 2(1)(c)

Lines 11-14

Delete "Complete and notarize a revised financial assurance mechanism form, in accordance with Section 3 of this administrative regulation, for the revised financial assurance mechanism; (d)"

Page 2

Section 2(1)(d)

Line 15

Delete "." following KRS 278.710(4)

After "KRS 278.710(4)", insert the following:

; and

Page 2

Section 2(1)(e)

Line 16

Delete "(e)".

Page 2

Section 2(2)

Line 17

After "The applicant," insert the following:

construction certificate holder

Delete "owner-operator".

Page 2

Section 2(2)(a)

Line 22

Delete "(a)".

Page 3

Section 2(2)(b)-(d)

Lines 1-9

Delete "(b) Upon receiving notice from the surety of the impending cancellation or lapse of the financial assurance mechanism, the cabinet shall seek agreement of any landowners who have not previously agreed pursuant so paragraph (c) below to make a demand on the financial assurance mechanism.

(c) The cabinet may seek agreement of the landowners to allow it to make a demand on the bond prior to receiving notice of impending cancelation or lapse.

(d) A landowner's agreement to allow the cabinet to make a demand on a bond pursuant to clause a. of this subparagraph may only be revoked in writing bearing a notarized signature of the landowner."

Page 3

Section 2(3)

Lines 10-19

Delete "Pursuant to Section 3 of this administrative regulation, financial assurance mechanism shall be:(a) Submitted; (b) Reviewed; and

1. Approved by the cabinet if the applicant, owner-operator, or person who controls or owns the right to control a merchant electric generating facility is in compliance with the requirements of this administrative regulation; or

2. Denied by the cabinet if the updated or replacing financial assurance mechanism does not meet the requirements stated KRS 278.706, KRS 278.710, and this administrative regulation. (4)"

After "(3)", insert the following:

Any

After "Applicant,", insert the following:

construction certificate holder

Delete "owner-operators".

Page 4

Section 3(1)

Line 5

After "(1)", insert the following:

A financial assurance mechanism shall be:

(a) Submitted;

(b) Reviewed; and

1. Approved by the cabinet if the applicant, construction certificate holder, or person who controls or owns the right to control a merchant electric generating facility is in compliance with the requirements of KRS 278.706 and 278.710 and this administrative regulation; or

2. Denied by the cabinet if the financial assurance mechanism does not meet the requirements established in KRS 278.706 and 278.710 and this administrative regulation.

Page 4

Section 3(1)

Lines 5-6

After "(2) Before the cabinet approves", insert the following:

a

Delete "an updated or replacement".

After "mechanism, the", insert the following:

applicant or construction certificate holder

Delete "successor".

Page 4

Section 3(1)(a)

Lines 7-8

After "Complete and", insert the following:

submit a notarized MEGF

Delete "notarize a".

After "Performance Agreement", insert the following:

, form DWM 4651

Delete "of decommissioning pursuant to paragraph (c) of this section".

After ":", insert the following:

and

Page 4

Section 3(1)(b)

Lines 9-10

After "278.706", insert the following:

(2)(m)5

Page 4

Section 3(1)(b)1.

Line 11

After "in subsection ("", insert the following:

3

Delete "2".

Page 4

Section 3(1)(b)2.

After "in subsection ("", insert the following:

4

Delete "3".

Page 4

Section 3(1)(c)

Lines 14-16

Delete "(c) A performance agreement, guaranteeing performance of decommissioning to allowable limits, shall be completed, and notarized on MEGF Performance Agreement Form, DWM 4651."

Page 4

Section 3(2)

Line 17

After "(", insert the following:

3

Delete "2".

Page 4

Section 3(3)

Line 21

After "(", insert the following:

4

Delete "3".

Page 5

Section 3(4)

Line 6

After "(", insert the following:

5

Delete "4".

Page 5

Section 3(5)

Line 7

After "(", insert the following:

6

Delete "5".

After "The applicant," insert the following:

construction certificate holder

Delete "owner-operator".

Page 5

Section 3(5)(c)

Line 12

After "to subsection ("", insert the following:

5

Delete "4".

Page 5
Section 3
Line 15

After "KRS 278.706.", insert the following:

(7) If the cabinet receives notice from the financial guarantor of the impending cancellation or lapse of the financial assurance mechanism, the cabinet may seek agreement of any landowners who have not previously agreed pursuant to subsection (8) of this section, to make a demand on the financial assurance mechanism. A landowner's agreement to allow the cabinet to make a demand on a financial assurance mechanism shall only be revoked with a notarized signature of the landowner.

(8) Pursuant to KRS 224.10-100(31), the cabinet may seek an agreement with the landowner to allow the cabinet to make a demand on the financial assurance mechanism prior to receiving notice of impending cancellation. If the cabinet makes a demand on the financial assurance mechanism, the construction certificate holder or person who controls or owns the right to control the facility shall ensure the financial assurance mechanism be available no later than thirty (30) days after issuance of the demand letter.

Page 5
Section 4(1)
Line 18

After "released by the cabinet", insert the following:

if

Delete "when".

After "the", insert the following:

construction certificate holder

Delete "owner-operator".

Page 5
Section 4(2)
Line 23

After "been satisfied, the", insert the following:

construction certificate holder

Delete "owner-operator".

Page 6
Section 5(1)(a)
Line 5

After "4651", insert the following:

January 2024

Delete "July 2023"

Page 6
Section 5(1)(b)
Line 6

After "4653", insert the following:

January 2024

Delete "July 2023"

Page 6

Section 5(1)(c)

Line 7

After "4654", insert the following:

January 2024

Delete "July 2023"