

SUGGESTED SUBSTITUTE – TO AMENDED AFTER COMMENTS VERSION

Final Version: 03/07/24 at 1:56 p.m.

**ENERGY AND ENVIRONMENT CABINET
Department for Environmental Protection
Division of Waste Management**

401 KAR 103:030. Financial requirements.

RELATES TO: KRS 224.10-100, 224.10-285, 224.43-345, 224.99-010, 278.700 - 278.716

STATUTORY AUTHORITY: KRS 224.10-100(28), 224.10-100(30), (31), 224.10-285, ~~[224.43-345,]~~ 278.710(3) ~~–[,(4),]~~ (5), (7) - (10)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100(28) authorizes the cabinet to promulgate administrative regulations not inconsistent with the provisions of law administered by the cabinet. KRS 224.10-285(2) requires the Energy and Environment Cabinet to establish monitoring and enforcement requirements for the obligation established[set for] in KRS 278.710(3) through[,(4),] (5) and[;] (7) through (10) and 224.10-100(30) and (31). KRS 224.10-100(30) requires the Energy and Environment Cabinet to monitor and enforce compliance of a merchant electric generating entity to which a construction certificate has been issued and has generated pursuant to obligations established[set forth] in KRS 278.710(3) through[,(4),] (5) and[;] (7) through (10). KRS 224.10.100(31) authorizes the cabinet to draw upon the financial assurance for which it is named as a beneficiary and decommission a merchant generating facility in accordance with its approved decommissioning plan. This administrative regulation establishes procedures to administer the financial assurance mechanisms for the decommissioning responsibilities of merchant electric generating facilities.

Section 1. Applicability. The financial assurance criteria and requirements established in this administrative regulation shall apply to all applicants, construction certificate holders[owner-operators], or person who controls or owns the right to control a merchant electric generating facility, except as established[stated] in KRS 278.706 and 278.710.

Section 2. Financial Assurance Criteria.

(1) Applicants, construction certificate holders[owners-operators], or person who controls or owns the right to control a merchant electric generating facility shall:

(a) Ensure that the financial assurance mechanism shall be[mechanisms is] sufficient to cover the costs of decommissioning pursuant to KRS 278.706;

(b) ~~[Ensure the financial assurance mechanisms be available no later than thirty (30) days after the issuance of a cabinet demand letter.]~~

~~[(c)] [Complete and notarize a revised financial assurance mechanism form, in accordance with Section 3 of this administrative regulation, for the revised financial assurance mechanism; and]~~

~~[(d)]~~ Ensure that the coverage of the financial assurance mechanism shall[does] not lapse, in accordance with KRS 278.710(4); and[;]

~~(c)[(e)]~~ Meet the requirements pursuant to KRS 278.706 and 278.710.

(2) The applicant, construction certificate holder[owner-operator], or person who controls or owns the right to control a merchant generating facility shall complete[execute] and submit a notarized MEGF Performance Agreement, form DWM 4651, for decommissioning, as established in Section 3 of this administrative regulation, with one (1) or more of the financial mechanisms established in Section 3 of this administrative regulation. ~~[-that satisfy the following criteria:]~~

~~[(a)] [The amount of the financial assurance provided by a single surety provider shall not exceed the limits of the most current United States Department of the Treasury's Circular 570.]~~

~~[(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.]~~

(3) ~~[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, 278.710, and this administrative regulation.]~~

~~[(4)] Any applicant, construction certificate holder~~**[Applicants, owners-operators]**, or person who controls or owns the right to control a merchant electric generating facility who ~~fails~~**[fail]** to meet the requirements established in this section, KRS 278.706, and ~~[KRS]278.710~~ may be ~~issued~~**[subject to]** penalties, **which shall be as** established in KRS 224.99-010.

Section 3. Financial Assurance Mechanisms. The mechanisms used to demonstrate financial assurance in accordance with this administrative regulation shall ensure that the funds **are sufficient**~~[necessary]~~ to meet the costs of decommissioning the merchant generating facility upon the expiration of its useful life.

(1) 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.

(2) Before the cabinet approves a~~[an updated or replacement]~~ financial assurance mechanism, the **applicant or construction certificate holder**~~[successor]~~ shall:

(a) Complete and **submit a notarized MEGF**~~[notarize a]~~ Performance Agreement, **form DWM 4651**~~[of decommissioning pursuant to paragraph (c) of this section]~~; **and**

(b) Post at least one (1) of the following financial assurance mechanisms pursuant to KRS 278.706**(2)(m)5**:

1. A surety bond as established in subsection ~~(3)~~**(2)** of this section;

2. An escrow agreement as established in subsection ~~(4)~~**(3)** of this section; or

3. Other similar security pursuant to KRS 278.706.

~~[(c)] [A performance agreement, guaranteeing performance of decommissioning to allowable limits, shall be completed, and notarized on MEGF Performance Agreement Form, DWM 4651.]~~
~~(3)[(2)] A surety bond shall be completed and notarized on MEGF Surety Bond Form, DWM 4653. [The requirements contained in the surety bond are incorporated in this administrative regulation by reference.]~~

~~(4)[(3)] An escrow agreement shall:~~

~~(a) Be completed on MEGF Escrow Agreement Form, DWM 4654; and [The requirements contained in the escrow agreement are incorporated in this administrative regulation by reference.]~~

~~(b) If a certificate of deposit is used in conjunction with the escrow agreement, [it shall] be made payable to the financial institution as the escrow agent.~~

~~(5)[(4)] Other financial assurance as established~~[specified]~~ in KRS 278.706 and 278.710.~~

~~(6)[(5)] The applicant, construction certificate holder~~[owner-operator]~~, or person who controls or owns the right to control a merchant electric generating facility by establishing more than one (1) financial mechanism shall be limited to ~~[the following]~~:~~

~~(a) Surety bonds;~~

~~(b) Escrow agreements;~~

~~(c) Other financial assurance, pursuant to subsection ~~(5)[(4)]~~ of this section; and.~~

~~(d) A combination of mechanisms established in this administrative regulation, rather than each single mechanism, that shall provide financial assurance for an amount at least equal to the financial assurance requirements established in KRS 278.706.~~

~~**(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 that the financial assurance mechanism shall be available no later than thirty (30) days after issuance of the demand letter.**~~

Section 4. Release of Financial Assurance.

(1) Financial assurance mechanisms posted to assure the proper decommissioning of the MEGF shall be released by the cabinet ~~if~~~~[when]~~ the construction certificate holder~~[owner-operator]~~, or person who controls or owns the right to control the MEGF demonstrates to the satisfaction of the cabinet that all decommissioning requirements pursuant to the decommissioning plan are complete in conformance with KRS 278.706 ~~and~~~~[,]~~ 278.710~~[,]~~ and 401 KAR 103:020.

(2) To demonstrate that all decommissioning requirements have been satisfied, the construction certificate holder~~[owner-operator]~~, or person who controls or owns the right to control the MEGF shall submit an assessment report certifying the facility is fully decommissioned pursuant to subsection (1) of this section.

Section 5. Incorporated by Reference.

(1) The following material is incorporated by reference:

(a) "MEGF Performance Agreement" Form, DWM 4651, January 2024~~[September 2023]~~;

(b) "MEGF Surety Bond" Form, DWM 4653, **January 2024**~~[September 2023]~~; and

(c) "MEGF Escrow Agreement" Form, DWM 4654, **January 2024**~~[September 2023]~~.

(2) This material may be inspected, copies, or obtained, subject to applicable copyright law, at Division of Waste Management, 300 Sower Boulevard, 2nd floor, Frankfort, Kentucky 40601, Monday through Friday, 8:00 a.m. to 5:00 p.m., from the Web site at eec.ky.gov/environmental-protection/waste.

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