

ENERGY AND ENVIRONMENT CABINET
Department for Environmental Protection
Division of Waste Management
(Amended After Comments)

401 KAR 103:010. Notification and transfer procedures for merchant electric generating facilities.

RELATES TO: KRS 224.10-100, 224.10-285, 224.43-345, 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 requires the Energy and Environment Cabinet to establish monitoring and enforcement requirements for the obligation set for in KRS 278.710(3), (4), (5), (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 set forth in KRS 278.710(3), (4), (5), (7) through (10). This administrative regulation establishes procedures for requirements concerning notifications, transfers of ownership, annual fees, and reporting.

Section 1. Notification Procedures. ~~[An applicant or person who has received]~~A construction certificate ~~holder of~~ a merchant electric generating facility shall:

- (1) File with the cabinet MEGF Construction-Operating Notification Form, DWM 4658, on or prior to the date upon which:
 - (a) Construction commences;
 - (b) Generation of electricity for sale begins;
 - (c) Permanent cessation of electric generation;
 - (d) Start of decommissioning plan implementation; and
 - (e) Facility ceases construction or generation for thirty (30) consecutive days after the MEGF commencement of construction.
- (2) A MEGF that received a construction certificate prior to June 29, 2023, shall be subject to requirements of subsection one (1) of this section. The notice shall be submitted no later than ten (10) days after these administrative regulations take effect.
- (3) Provide all filings pursuant to Section 3 of KRS 278.710.

Section 2. Ownership Transfer Procedures.

- (1) The applicant and construction certificate holder or person who controls or owns the right to control the MEGF~~[existing owner operator]~~ shall file the MEGF Notice of Ownership Transfer Form, DW4652, including all required attachments, to provide notice to the cabinet of any pending or final transaction pursuant to KRS 278.710(3)(d) no later than ten (10) days prior to completing the transaction.
- (2) Pursuant to KRS 278.710, upon transfer or sale of ownership, control, or the right to control the MEGF, a successor shall submit an updated or revised copy of the decommissioning plan, if applicable, pursuant to KRS 278.710(8).
- (3) Transfer pursuant to KRS 278.710 shall not cause a lapse in financial assurance for the approved decommissioning plan.
 - (a) If the existing financial assurance previously filed with the cabinet pursuant to KRS 278.710 will continue to secure the approved decommissioning plan after transfer occurs, the ~~[applicant and]~~successor and construction certificate holder or person who controls or owns the right to control the MEGF shall jointly execute a

certification of financial assurance denoted on the form in subsection (1) of this section; or

(b) Tender a proposed replacement financial assurance pursuant to 401 KAR 103:030, the existing financial assurance.

(4) A check, money order, or electronic funds transfer for annual fees in accordance with Section 4 of this administrative regulation, made payable to the Kentucky State Treasurer.

(5)

(a) The **construction certificate holder**~~owner-operator~~ shall remain responsible **for obligations** pursuant to the **construction certificate and** decommissioning plan until the cabinet deems that ~~both~~ the ~~owner-operators and successors~~ MEGF Notice of Ownership Transfer Form, DW4652, including all required attachments, submitted pursuant to subsections (1) and (2) of this section are complete and any replacement financial assurance is deemed adequate to cover decommissioning cost.

(b) The cabinet shall have sixty (60) days to review and accept all submissions required of this section.

(c)

1. If the cabinet determines that any submissions required of this section are deficient, **pursuant to KRS 278.710(3), (4), and (7)**, it shall send the **applicant and construction certificate holder**~~owner-operator and successor~~ a written notice describing the deficiencies and stating the transfer is not accepted as complete, pursuant to KRS 278.710(5); and

2. The **applicant and construction certificate holder**~~owner-operator and successor~~ shall have thirty (30) calendar days from the date the cabinet issues a written deficiency to respond with information that will cure the deficiency. Failure to respond to the notice of deficiency shall be grounds for the cabinet to withhold the **existing**~~original~~ financial assurance until the deficiency is addressed and accepted by the cabinet.

3. The timetable specified in paragraph (b) of this subsection shall toll from the date the cabinet issues a written notice of deficiency pursuant to subparagraph 1. of this paragraph until the **applicant and construction certificate holder**~~owner-operator and successor~~ submit a response required by subparagraph 2. of this paragraph.

Section 3. Decommissioning Notification.

(1) Upon permanent cessation of the generation of electricity, the **construction certificate holder, or**~~owner-operator,~~ person who controls or owns the right to control the MEGF shall file MEGF Construction-Operating Notification Form, DWM 4658, notifying the cabinet within thirty (30) days of cessation. This notification shall serve as the start date for decommissioning to begin.

(2) Pursuant to **KRS 224.10-285(1)**~~401 KAR 30:020(2)~~, unless a written request is submitted to the cabinet, failure to fully implement the decommissioning plan within eighteen (18) months will be considered abandonment.

Section 4. Annual Fee.

(1) Fees collected pursuant to this section shall be used for administrative, compliance, and enforcement purposes specified in this Chapter and in KRS 224.10-285.

(2) The cabinet will provide the **construction certificate holder or person who controls or owns the right to control the MEGF**~~applicant~~ with the MEGF Annual Fee Form, DWM 4656.

(a) **The construction certificate holder or person who controls or owns the right to control the MEGF shall submit a fee amount of \$6,000 no later than May 31 of each year for each MEGF in operation or decommissioning status.** ~~Based on the manufacturer's nameplate-rated capacity in the approved construction~~

~~certificate, the annual fee is established pursuant to the table in paragraph (b) of this subsection.}}~~

(b)

{MEGF Generating Capacity}	{Annual Fee}
{≥10 MW up to and including 75 MW}	 {\$4,000}
{>75 MW up to and including 150 MW}	 {\$8,000}
{>150 MW}	 {\$12,000}

~~{(e)}~~ If the construction certificate holder~~{owner-operator}~~ or person who controls or owns the right to control fails to submit the annual fee required, may be subject to civil penalties pursuant to KRS 224.99-010~~(16)~~.

~~(3) {The owner-operator, or person who controls or owns the right to control the MEGF shall submit the annual fee no later than May 31 of each year for each MEGF in operation or decommissioning status.}~~

~~{(4)}~~

(a) The construction certificate holder~~{applicant, owner-operator}~~, or person who controls or owns the right to control the MEGF may request an extension to the annual fee deadline.

(b) The extension request shall be in writing stating the reasons therefore, and shall be received by the Solid Waste Branch of the Division of Waste Management ten (10) days prior to the deadline.

(c) If granted, the extension shall not exceed thirty (30) days.

Section 5. Reports. The construction certificate holder~~{owner-operator}~~ or person who controls or owns the right to control the MEGF shall submit an annual report for a recordkeeping and reporting system. The annual report shall meet the following requirements:

(1) The MEGF shall submit to the cabinet, no later than the first anniversary of commencement of construction and every year thereafter no later than May 31. The report shall be submitted with the Merchant Electric Generating Facility Annual Report or Decommissioning Plan Update Form, DWM 4657, including all required attachments, and shall contain the following:

(a) Description of construction activities during the year;

(b) Description of compliance with mitigation measures;

(c) Description of operation maintenance activities;

(d) The date and quantity of system components taken out of service;

(e) The date of when and where system components disposed or recycled; and

(f) The quantity of system components disposed or recycled.

(2) The annual report shall be certified by the construction certificate holder~~{owner-operator}~~, ensuring the MEGF is in compliance with all mitigation measures and requirements outlined in the construction certificate and decommissioning plan.

(3) The construction certificate holder~~{owner-operator}~~ or person who controls or owns the right to control the MEGF shall retain records of all required monitoring information, mitigation measures, copies of site assessment reports and annual reports, and records of all data used to complete the application for the construction certificate and decommissioning plan updates, for a period of at least three (3) years from the date of the sample, measurement, report, certification, or application. This period may be extended by request of the cabinet at any time.

(4) The construction certificate holder~~{owner-operator}~~ or person who controls or owns the right to control the MEGF shall keep records of the source, approved disposal

location, and quantity of any release of a hazardous substance, pollutant or contaminant, or a waste that is listed or characterized as hazardous pursuant to KRS 224.1-400 and **401 KAR** Chapter 39. These records shall be available for cabinet inspection.

(5) **Failure by a construction certificate holder** ~~{Owners-operators,}~~ or **person who controls** ~~{persons who control}~~ or own the right to control a merchant electric generating facility, ~~{who fail}~~ to meet the requirements established in this administrative regulation may be subject to penalties established in KRS 224.99-010(**16**).

Section 6. Incorporation by Reference.

(1) The following material is incorporated by reference:

(a) "MEGF Construction-Operating Notification" Form, DWM 4658, **January 2024;** ~~{September 2023.}~~

(b) "MEGF Notice of Ownership Transfer" Form, DW4652, **January 2024;** ~~{September 2023.}~~

(c) "MEGF Annual Report or Decommissioning Plan Update" Form, DWM 4657, **January 2024** ~~{September 2023};~~ and

(d) "MEGF Annual Fee" Form, DWM 4656, **January 2024** ~~{September 2023}.~~

(2) This material may be inspected, copied, 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.

JOHN LYONS, Deputy Secretary

For REBECCA GOODMAN, Secretary

APPROVED BY AGENCY: February 15, 2024

FILED WITH LRC: February 15, 2024 at noon

CONTACT PERSON: Tyler Shields, Environmental Control Supervisor, Department for Environmental Protection, Division of Waste Management, 300 Sower Boulevard, Frankfort, Kentucky 40601, phone (502) 782-5325, fax (502) 564-4245, email Tyler.Shields@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Tyler Shields

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This administrative regulation establishes procedures to monitor and enforce the decommissioning of Merchant Electric Generating Facilities (MEGF) including notifications for construction, generation of electricity, permanent cessation of generation of electricity, decommissioning implementation, and cessation of construction or generation beyond thirty (30) days, transfers of ownership, annual fee requirements, and reporting requirements.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to establish the procedures to monitor and enforce responsibilities over a qualified MEGF pursuant to KRS 224.10-285.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

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 requires the establishment of the procedures to monitor and enforce requirements obligations set forth in 278.710(3), (4), (5), (7) through (10) and KRS 224.10-100(30) and (31).

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This administrative regulation establishes notification procedures, procedures to monitor and enforce mitigation measures approved in a construction certificate, as well as the decommissioning of a MEGF pursuant to KRS 278.710. This regulation establishes an annual fee, pursuant to KRS 224.10-285.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

The proposed amendments address concerns received during the public comment period, relating to annual fees, clarification of responsible parties and ownership transfer procedures, and typographical errors within forms incorporated by reference.

(b) The necessity of the amendment to this administrative regulation:

The proposed amendments are necessary to address concerns received during the public comment period.

(c) How the amendment conforms to the content of the authorizing statutes:

The proposed amendments provide clarification for transfers and obligations of merchant electric generating facilities, who are under the authority of the cabinet, pursuant to KRS 278.710. The proposed amendments relating to the structure of an annual fee are in conformance with KRS 224.10-285.

(d) How the amendment will assist in the effective administration of the statutes:

The proposed amendments will assist the cabinet in performing obligations pursuant to KRS 278.710.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

This administrative regulation will affect applicants, construction certificate holders, and successors of merchant electric generating facilities. There are thirty-eight (38) filed cases for MEGF construction certificates issued by the Kentucky state Board on Electric Generation and Transmission Siting (board) at the time of drafting, three (3) of which are currently under construction. Each MEGF that is or has been approved will be required to adhere to the requirements established in this regulation. As of February 1, 2024, nineteen (19) counties or local municipal governments have established ordinances for decommissioning and financial assurance requirements. Pursuant to KRS 278.718, these local ordinances shall have primacy over KRS 278.704 through 278.708.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

Entities will have to submit the forms incorporated for notification, transfer, and reporting procedures. Entities are required to submit an annual fee to defray cabinet costs of administering the program, pursuant to KRS 224.10-285.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

This regulation establishes an annual fee that each MEGF will be charged in order to defray cabinet costs of monitoring and enforcement responsibilities, pursuant to KRS 224.10-285. The annual fee for each facility will be \$6,000.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

Entities will not accrue benefits as a result of compliance with this administrative regulation. Compliance with this regulation ensures the facility can continue to operate under statute.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

The agency will not incur any additional costs for the implementation of this administrative regulation initially. As these facilities are constructed and begin to generate electricity for sale, the cabinet will incur costs of administering the program. The cabinet estimates the annual program cost to be \$163,300 given that all thirty-eight (38) MEGF construction certificate cases filed at the time of drafting, are constructed, and begin generating electricity for sale.

(b) On a continuing basis:

The agency will incur additional program administration costs as more merchant electric generating facilities are constructed and begin to generate electricity for sale.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

Implementation and enforcement of this administrative regulation would be achieved by the merchant electric generating facility monitoring and enforcement fund established in KRS 224.10-285. It should be noted that this fund consists of fees collected from the annual fee requirement within this administrative regulation, as well

as monies collected pursuant to enforcement actions taken by the cabinet in the course of performing its monitoring and enforcement responsibilities.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

The proposed amendment lowers the annual fee from a tiered structure to a flat \$6,000 annual fee. The annual fee established in this administrative regulation is necessary to defray the costs of the cabinet's monitoring and enforcement responsibilities for merchant electric generating facilities, pursuant to KRS 224.10-285.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

This administrative regulation establishes a \$6,000 annual fee that each MEGF will be charged upon generation of electricity pursuant to KRS 224.10-285. Each facility must pay the annual fee no later than May 31 of each year.

(9) TIERING: Is tiering applied?

No, this administrative regulation was amended to establish an annual fee that each MEGF will be charged in order to defray cabinet costs of monitoring and enforcement responsibilities, pursuant to KRS 278.710. The annual fee for each facility will be \$6,000.

FEDERAL MANDATE ANALYSIS COMPARISON

(1) Federal statute or regulation constituting the federal mandate.

Not applicable.

(2) State compliance standards.

KRS 224.10-100, KRS 224.10-285, KRS 224.43-345, and KRS 278.700 through 278.716

(3) Minimum or uniform standards contained in the federal mandate.

Not applicable.

(4) Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate?

This administrative regulation imposes stricter requirements as there is no federal mandate for the decommissioning of merchant electric generating facilities.

(5) Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.

HB-4 mandated the cabinet to promulgate administrative regulations for the monitoring and enforcement requirements for the obligations set forth in KRS 278.710(3), (4), (5), (7), (8), (9), and (10) and KRS 224.10-100(30) and (31).

FISCAL NOTE

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

This administrative regulation will impact state or local governments that have, own, or operate a merchant electric generating facility in their jurisdiction, as well as the Energy and Environment Cabinet and Public Service Commission.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 224.10-100(28), 224.-10-100(30), 224.10-285, 224.43-345, 278.710(3), (4), (5), (7) through (10).

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

The cabinet will implement an annual fee of \$6,000 pursuant to KRS 224.10-285 to defray cabinet costs for monitoring and enforcement responsibilities. If all thirty-eight (38) of the MEGF construction certificate cases filed at the time of drafting are constructed and generating electricity within the first year of this administrative regulation taking effect, revenues generated from annual fees are estimated to total \$228,000. Pursuant to KRS 278.710, the cabinet does not obtain authority over these facilities until the facility is constructed and generating electricity. Therefore, the cabinet cannot receive the annual fee until the facility is generating electricity. With no timetable of if or when all facilities will be constructed and generating electricity it is challenging to estimate the total amount of revenue generated by the program in the first year.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

The cabinet will implement an annual fee of \$6,000 pursuant to KRS 224.10-285 to defray cabinet costs for monitoring and enforcement responsibilities. If all thirty-eight (38) of the MEGF construction certificate cases filed at the time of drafting are constructed and generating electricity, revenues generated from annual fees are estimated to total \$228,000. Pursuant to KRS 278.710, the cabinet does not obtain authority over these facilities until the facility is constructed and generating electricity. Therefore, the cabinet cannot receive the annual fee until the facility is generating electricity. With no timetable of if all facilities will be constructed and generating electricity it is challenging to estimate the total amount of revenue generated by the program.

(c) How much will it cost to administer this program for the first year?

The cost to administer the program for the thirty-eight (38) MEGF construction certificate cases filed at the time of drafting, is estimated to total \$163,300 annually. The cabinet's estimation was determined by the resources required to implement and administer the program, pursuant to KRS 278.710. At the time of drafting this regulation, only three (3) of the thirty-eight (38) projects were under construction.

Pursuant to KRS 278.710, the cabinet does not obtain authority over these facilities until the facility is constructed and generating electricity. Therefore, the cabinet cannot receive the annual fee until the facility is generating electricity. With no timetable of when these facilities will be constructed and begin generating electricity it is challenging to estimate the total costs in the first year of the program.

(d) How much will it cost to administer this program for subsequent years?

The cost to administer the program for the thirty-eight (38) MEGF construction certificate cases filed at the time of drafting, is estimated to total \$163,300 annually. The cabinet's estimation was determined by the resources required to implement and administer the program, pursuant to KRS 278.710. Pursuant to KRS 278.710, the cabinet does not obtain authority over these facilities until the facility is constructed and generating electricity. Therefore, the cabinet cannot receive the annual fee until the facility is generating electricity. With no timetable of when these facilities will be constructed and begin generating electricity it is challenging to estimate the total costs for subsequent years of the program.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):If all thirty-eight (38) of the MEGF construction certificate cases filed at the time of drafting, are constructed, and begin generating electricity, revenues generated from annual fees are estimated to total \$228,000. Pursuant to KRS 278.710, the cabinet does not obtain authority over these facilities until the facility is constructed and generating electricity. Therefore, the cabinet cannot receive the annual fee until the facility is generating electricity. With no timetable of if or when all facilities will be constructed and generating electricity it is challenging to estimate the total amount of revenue generated by the program on a yearly basis.

Expenditures (+/-):Assuming all thirty-eight (38) MEGF construction certificate cases filed at the time of drafting, are constructed, and begin generating electric for sale, pursuant to cabinet obligations within KRS 278.710, the cabinet estimates the cost of administering the program to be \$163,300.

Other Explanation:

(4) Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.

(a) How much cost savings will this administrative regulation generate for the regulated entities for the first year?

The proposed administrative regulation will not generate cost savings for any regulated entities in the first year.

(b) How much cost savings will this administrative regulation generate for the regulated entities for subsequent years?

The proposed administrative regulation will not generate cost savings for any regulated entities in subsequent years.

(c) How much will it cost the regulated entities for the first year?

Any MEGF that is generating electricity in the first year that this administrative regulation becomes effective will be subject to the annual fee of \$6,000, pursuant to KRS 224.10-285.

(d) How much will it cost the regulated entities for subsequent years?

Any MEGF that is generating electricity in subsequent years will be subject to the annual fee of \$6,000, pursuant to KRS 224.10-285.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Cost Savings (+/-): There are no known cost savings.

Expenditures (+/-): Entities expenditures associated with this regulation are estimated to be \$6,000 annually.

Other Explanation:

This administrative regulation establishes an annual fee to defray the costs of the cabinet's monitoring and enforcement responsibilities to each MEGF, pursuant to KRS 224.10-285.

(5) Explain whether this administrative regulation will have a major economic impact, as defined below.

"Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)]: This proposed administrative regulation will not have a major economic impact.