

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

401 KAR 103:030. Financial requirements.

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). 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 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 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 the financial assurance 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 the coverage of the financial assurance mechanism 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 execute and submit a performance agreement 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 fail to meet the requirements established in this section, KRS 278.706, and ~~{KRS}~~278.710 may be subject to penalties 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 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. 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 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.

(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 the financial assurance mechanism 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, 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.

JOHN LYONS, Deputy Secretary
For REBECCA GOODMAN, Secretary

APPROVED BY AGENCY: February 15, 2024

FILED WITH LRC: February 15, 2024 at noon

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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 for the financial assurance of MEGFs, including applicability, criteria, mechanisms of financial assurance, and conditions on which financial assurance will be released.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to establish the procedures for assuring entities provide adequate financial assurance to decommission the MEGF upon the end of its useful life.

(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 procedures to ensure MEGFs have adequate financial assurance for decommissioning responsibilities, pursuant to requirements set for in KRS 278.710.

(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 provide clarity for financial assurance criteria and mechanisms, terms used referencing financial assurance, and obligations and requirements for financial assurance liability.

(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 clarify financial assurance criteria and mechanisms, and address liability for financial assurance obligations pursuant to KRS 278.706, 278.710, and 224.10-100(30) and (31).

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

The proposed amendments will assist the cabinet with review of financial assurance (bonding) requirements, 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). 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 comply with procedures within this administrative regulation for a MEGF that is constructed and operating within a city or county that has not established financial assurance requirements. Entities will have to submit the new forms incorporated in this administrative regulation, as well as provide copies of financial assurance, pursuant to KRS 278.710.

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

This administrative regulation has financial assurance costs pursuant to KRS 278.706 and 278.710, equaling, at a minimum, the cost of decommissioning the facility.

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

Benefits to compliance with this administrative regulation include the release of the financial assurance upon completion of the decommissioning plan.

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

(a) Initially:

The agency will incur programmatic costs pursuant to cabinet obligations within KRS 278.710.

(b) On a continuing basis:

The agency will incur programmatic costs pursuant to cabinet obligations within KRS 278.710.

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

The merchant electric generating facility monitoring and enforcement fund. Implementation and enforcement of this administrative regulation would be achieved by the annual fee payment provided by MEGFs, in addition to potential penalties collected under KRS 224.99-010.

(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:

No increase in fees or funding is necessary to implement this administrative regulation.

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

This administrative regulation does not establish any fees but does establish procedures for financial assurance mechanisms for the costs of decommissioning the facility.

(9) TIERING: Is tiering applied?

No tiering is applied to this administrative regulation. There is no driving need to tier the applicability, criteria, or the potential financial mechanisms described in this administrative regulation.

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 own or operate a merchant electric generating facility as well as the Division of Waste Management. Local governments who have not established financial assurance requirements for MEGFs within their ordinance(s) will be held to standards and requirements within this administrative regulation.

(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, KRS 224.10-285, KRS 278.706 and KRS 278.710

(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?

This administrative regulation will not generate revenue for state or local governments 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?

This administrative regulation will not generate revenue for state or local government for subsequent years.

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

The cost to administer the program the thirty-eight (38) filed MEGF construction certificate cases 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) filed MEGF construction certificate cases 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 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 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 are constructed and generate electric for sale, pursuant to responsibilities and requirements within KRS 278.710, the cabinet estimates the cost of administering the program to be \$163,300.

Other Explanation:

n/a

(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?

This administrative regulation will present a financial assurance cost to the regulated entity, at a minimum, equal to the cost of decommissioning the facility.

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

There is potential for the cost of financial assurance to rise or decline in subsequent years, depending on modifications to the facility, equipment, or decommissioning plans. As technology within the industry advances, advancements could potentially raise, or lower costs required for financial assurance. Inflation could also cause financial assurance costs to rise or decline in subsequent years.

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

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

Expenditures (+/-):There is no known effect on current expenditures.

Other Explanation:

This administrative regulation establishes financial assurance procedures for the decommissioning of MEGFs. The cost of the financial assurance shall, at a minimum, equal the cost of decommissioning the facility. The financial assurance can change over the life of the facility, depending on modifications to the facility, equipment, or

decommissioning plans. KRS 278.706 establishes how decommissioning costs are calculated.

(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.