

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

401 KAR 103:020. Decommissioning standards.

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 decommissioning plan technical requirements, decommissioning plan updates, decommissioning cost estimate updates, and cases of abandonment.

Section 1. Technical Requirements of Decommissioning Plan. The construction certificate holder~~owner-operator,~~ or person who controls or owns right to control any MEGF are subject to decommissioning requirements and mitigation measures outlined in KRS 278.706 and 278.704 through 278.710.

- (1) This plan shall be certified by an independent professional engineer prior to submission to the cabinet.
- (2) Unless otherwise stated in an accommodation contained within a lease agreement with the affected landowner, the decommissioning plan shall be designed to return the land to a substantially similar state as it was prior to the commencement of construction.
- (3) Decommissioning plans filed with the cabinet shall ~~minimally~~ meet the following technical requirements:
 - (a) Provide an estimated lifespan of the MEGF, including an estimated period of useful life for system components;
 - (b) Identify the party responsible for decommissioning;
 - (c) Define conditions upon which decommissioning will be implemented~~initiated~~, including a statement defining how notification will be made to the cabinet, affected landowners, and local county or municipality in regard to implementation of~~intent to start~~ the decommissioning process, pursuant to 401 KAR 103:010(1);
 - (d) The estimated timeframe for commencement and completion of decommissioning activities;
 - (e) Include a revegetation plan, with native seed mixes, excluding any invasive species;
 - (f) Cost itemization of all estimated costs that factor into decommissioning the MEGF;
 - (g) Include the financial assurance mechanisms, in accordance with KRS 278.706 and 401 KAR 103:030;
 - (h) Describe any agreement with landowners regarding decommissioning, including any special accommodations made to any affected landowner, pursuant to KRS 278.706(2)(m)6.

~~{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.}~~

(i) Removal of any MEGF owned equipment and facilities, including:

1. Structures;
2. Fencing;
3. Roads;
4. Foundations or pads;
5. Erosion, sediment, and water control measures;
6. Modules or solar panels;
7. Racks;
8. Cables or wires;
9. Conduit;
10. Inverters; and
11. Transformers.

(j) Remove any underground components and foundations of above-ground facilities. Underground components and facilities under this paragraph shall be removed to a depth of three (3) feet below the surface grade of the land in or on which the component was installed, unless otherwise requested by the landowner; and

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

Section 2. Decommissioning Plan Updates.

(1) Pursuant to KRS 278.710 all MEGFs shall submit an updated decommissioning plan at least once every five (5) years. Decommissioning plan updates shall be submitted no later than 180 days prior to the fifth anniversary of the commencement of generation of electricity unless permission for a later date has been granted in writing by the cabinet. The cabinet may, at any time, request updated information necessary for reevaluating the decommissioning plan updates. Requests for updates shall include:

- (a) Additional construction of equipment or facilities;
- (b) Removal of equipment or facilities; or
- (c) Changes in the facilities estimated decommissioning costs.

(2) Decommissioning plan updates shall:

- (a) Be submitted in conjunction with a notarized MEGF Annual Report or Decommissioning Plan Update Form, DWM 4657, including all required attachments;
- (b) Include an updated estimation of decommissioning costs in accordance with Section 3 of this administrative regulation and 401 KAR 103:030; and
- (c) Include any proposed measures to mitigate adverse impacts pursuant to KRS 278.710.

(3) Any engineering evaluation procured by the cabinet or at the cabinet's request and referred to the secretary to inform a final decision shall be considered preliminary, confidential, and not open for public inspection until after final action by the secretary.

(4) Decommissioning plan updates that require new construction will be subject to standards in KRS 278.704 through 278.714.

(5) Upon review and approval of the updated decommissioning plan by the cabinet, the construction certificate holder~~{owner-operator}~~, or person who controls or owns the right to control the MEGF shall file with the cabinet an updated copy of the decommissioning bond or other similar security, in accordance with 401 KAR 103:030,

to reflect changes to the estimated cost of effectuating the decommissioning plan or to the net present value or the net salvage value of the facility or its components.

Section 3. Decommissioning Cost Estimates.

- (1) The construction certificate holder~~[applicant, owner-operator]~~, or person who controls or owns the right to control a merchant electric generating facility shall have a detailed, written estimate, in current US dollar, of the cost to decommission the MEGF in accordance with KRS 278.706 and 278.710.
- (2) The estimated cost shall equal the cost of completing the decommissioning plan of the MEGF at the end of the useful life pursuant to the approved decommissioning plan. The cost estimate shall include:
 - (a) Itemized costs for implementing, dismantling, removing, or disposing of all structures, systems, components, and requirements described in section 1 of this administrative regulation;
 - (b) Incorporate an estimated decommissioning cost per megawatt valuation;
 - (c) Be recalculated at least once every five (5) years to accommodate for inflation or depreciation;
 - (d) Include a defined useful life period of the MEGF; and
 - (e) Be certified by an independent, licensed engineer pursuant to KRS 278.706.

Section 4. Abandonment. In the event of abandonment or failure to complete decommissioning obligations by the responsible party, pursuant to KRS 224.10-100, the cabinet ~~may~~will draw upon the financial assurance~~[decommissioning bond]~~ and implement the decommissioning plan. Pursuant to KRS 278.706, if any party makes a successful claim on the approved financial assurance, that party shall be responsible for the requirements set forth in the decommissioning plan.

Section 5. Incorporation by Reference.

- (1) "MEGF Annual Report or Decommissioning Plan Update" Form, DWM 4657, January 2024~~[September 2023]~~, is incorporated by reference.
- (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 to monitor and enforce the cabinet's responsibilities for merchant electric generating facilities including technical requirements of a decommissioning plan, decommissioning plan updates, decommissioning cost estimates, and abandonment of a MEGF.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to establish procedures of decommissioning a MEGF site, as well as decommissioning update requirements pursuant to KRS 278.710.

(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 monitor and enforce decommissioning plans, updates, and abandonment of a MEGF 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 regarding liability of facility ownership and decommissioning obligations, term clarification, ambiguous or superfluous language, typographical errors, decommissioning plan requirements, and statutory conformity pursuant to KRS 278.706 and 278.710.

(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 address request to clarify intent of terminology used, lack of clarity for decommissioning plan requirements, obligations, and liability pursuant to KRS 278.706 and 278.710.

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

The proposed amendments provide clarity for cabinet requirements pursuant to cabinet obligations within KRS 278.710. Additionally, the proposed amendments clarify terminology in accordance with statute, and address decommissioning liability to ensure responsible parties are held to obligations within the construction certificate and 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. At the time of drafting there are thirty-eight (38) MEGF construction certificates cases filed, which are 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 pursuant to KRS 278.710 and 224.10-285. 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 that control or own right to control MEGFs within cities/counties that have not established decommissioning requirements will be held to requirements within this administrative regulation. Entities will have to submit the forms incorporated for updates to a decommissioning plan.

(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 will not have a cost for the entities identified.

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

The entities identified will not accrue benefits as a result to compliance to these administrative regulations. (5) Provide an estimate of how much it will cost to implement this administrative regulation:

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

(a) Initially:

The agency will incur additional costs for the implementation of this administrative regulation as MEGFs are constructed and begin generating electricity for sale, at which point the cabinet obtains authority pursuant to KRS 278.710.

(b) On a continuing basis:

The agency will incur additional costs for the implementation of this administrative regulation as MEGFs are constructed and begin generating electricity for sale, at which point the cabinet obtains authority pursuant to KRS 278.710.

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

Funding is provided by the merchant electric generating facility monitoring and enforcement fund, pursuant to KRS 224.10-285. 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 updating the costs of decommissioning the facility.

(9) TIERING: Is tiering applied?

No tiering is not applied to this administrative regulation. There is no driving force to tier the decommissioning plan requirements, updates, or cost estimates within 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, KRS 224.99-010.

(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 control a merchant electric generating facility as well as the Division of Waste Management. Local governments who have not established decommissioning requirements for MEGFs within their jurisdiction 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(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?

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) 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 and 224.10-285. 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 and KRS 224.10-285. As more facilities are constructed and begin generating power, additional programmatic costs will be incurred by the cabinet. 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:

There is no 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?

There is no known cost to the regulated entities in the first year.

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

There is no known cost to the regulated entities 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 procedures for technical requirements of a decommissioning plan, updates to the decommissioning plan, and estimating decommissioning costs. Potential costs for the entity include the cabinet's hiring of an independent engineer for the review of decommissioning plan updates, pursuant to KRS 224.10-285(4).

(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.