



Nov 07, 2023

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New Regulations Proposed for Kentucky Merchant Electric Generation Facilities

Kentucky House Bill 4 (the “Act”), which passed during the 2023 Kentucky Regular Session, directed the Energy and Environment Cabinet (the “Cabinet”) to promulgate administrative regulations focused on new merchant electric generating facilities (“MEGF”). Among other things, the Act directed the Cabinet to establish monitoring and enforcement requirements and a fee structure to support these new regulatory requirements designed to cover the entire useful life of a merchant plant facility. On September 25, 2023, the Cabinet’s Division of Waste Management proposed four administrative regulations applicable to merchant plant projects in Kentucky that would impact the decommissioning and bonding of these projects, annual fees, transfers of ownership, and notification and reporting requirements.

The Cabinet has provided opportunities to comment on these proposed regulations, either in person or in writing. Written comments must be submitted by December 31, 2023, and parties interested in speaking during the public meeting on December 21 must register by December 14.

Decommissioning Plan Technical Requirements

401 KAR 103:020, as proposed, establishes procedures for decommissioning plan requirements, plan updates, and decommissioning cost estimate updates.

Under 401 KAR 103:020, Section 1(3), decommissioning plans must include, in part:

- An estimated lifespan of the facility and an estimated period of useful life for system components;
- Identification of the party responsible for decommissioning;
- A statement defining conditions upon which decommissioning will be initiated and how notice will be provided;

- Timeframe for commencement and completion of decommissioning activities;
- A revegetation plan, with native seed mixes and excluding invasive species;
- A description of any agreement with landowners regarding decommissioning; and
- Provisions describing removal of the facility and facility-owned equipment.

401 KAR 103:020, Section 2 requires decommissioning plan updates to be submitted every five years in conjunction with the facility's Annual Report or Decommissioning Plan Update Form, [DWM 4657](#). The plan update must also include an updated decommissioning plan cost estimate and any proposed mitigation measures.

401 KAR 103:020, Section 3 establishes requirements for decommissioning cost estimates provided to the Cabinet. The cost estimate must include, in part:

- A defined useful life period for the facility;
- Itemized costs for implementing, dismantling, removing, or disposing of all facility structures, systems, and components; and
- Incorporation of an estimated decommissioning cost per megawatt valuation.

Financial Assurance/Bonding

401 KAR 103:030, as proposed, establishes criteria and procedures to administer the surety/bonding mechanisms for decommissioning an MEGF. 401 KAR 103:030, Section 2(1) provides criteria for a decommissioning surety/bond. The facility will also need to complete and notarize multiple forms in connection with its decommissioning bond, including:

- Execution of a performance agreement and Performance Agreement Form [DWM 4651](#);
- Surety Bond Form [DWM 4653](#); and
- Escrow Agreement Form [DWM 4654](#).

The Cabinet will release the bond when the facility has completed, to the Cabinet's satisfaction, all of its decommissioning requirements as set out in the decommissioning plan. If the facility fails to fully implement the decommissioning plan within 18 months of either ceasing electric generation permanently or ceasing generation or construction for 30 consecutive days, the facility will be deemed abandoned, at which point the Cabinet is authorized to draw upon the bond to complete decommissioning activities.

Notification and Transfers of Ownership

401 KAR 103:010, as proposed, establishes procedures and requirements concerning notifications and transfers of ownership. 401 KAR 103:010, Section 1 requires any facility that has received a construction certificate to file with the Cabinet's Construction-Operating Notification Form [DWM 4658](#) on or prior to the date that: (1) construction commences; (2) generation of electricity for sale begins; (3) electric generation ceases permanently; (4) decommissioning plan implementation starts; and (5) the facility ceases construction or generation for 30 consecutive days after commencing construction. As currently proposed, this regulation would apply retroactively.

401 KAR 103:010, Section 2 outlines requirements for a facility's transfer of ownership. The existing owner-operator must file Notice of Ownership Transfer Form [DWM 4652](#) no later than 10 days prior to completing the transaction. The facility's successive owner must also submit an updated or revised decommissioning plan and bond along with the form. If the successive owner intends to keep the previous owner's bond in place, both entities must jointly execute a certification of final assurance.

Fees

401 KAR 103:010, Section 4 imposes an annual fee on MEGFs based on the nameplate-rated capacity of the facility as summarized below:

Generating Capacity	Annual Fee
10 MW to 75 MW	\$4,000

75 MW to 150 MW	\$8,000
> 150 MW	\$12,000

Annual Reports

401 KAR 103:010, Section 5 imposes an annual reporting requirement for MEGFs. The annual report must include the following:

- Description of construction activities during the year;
- Description of compliance with mitigation measures;
- Description of operation maintenance activities;
- The date and quantity of system components taken out of service;
- The date of when and where system components were disposed or recycled;
- Quantity of system components disposed or recycled; and
- Certification by the facility's owner-operator.

Key Dates

Interested parties have the opportunity to provide comments on the proposed merchant plant regulations. Written comments will be accepted through December 31, 2023. A public hearing will be held over Zoom on December 21, 2023, at 10:00 a.m. EST. Interested parties must register by December 14, 2023, in order to participate in the hearing. If you have questions about these regulations or would like Frost Brown Todd's assistance in preparing comments, please contact one of the authors.

At Frost Brown Todd, we pride ourselves on understanding each client's project objectives through each phase of its lifecycle, with an eye toward the evolving regulatory landscape. For more information about how these statutory and regulatory changes could impact your business, please contact the authors any attorney with our [Renewables](#) team.

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