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November 30, 2024

Tyler Shields  
Division of Waste Management  
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Dear Mr. Shields:

These comments are submitted pursuant to KRS Chapter 13A and in response to the publication of proposed administrative regulation amendments to 401 KAR 47:110 and 401 KAR 48:320.

These comments are submitted by and on behalf of the membership of the Kentucky Resources Council, Inc, (KRC) a non-profit corporation incorporated in the Commonwealth of Kentucky and dedicated to prudent use and conservation of the environment of the Commonwealth. KRC provides legal, technical, and strategic assistance without charge to individuals, community organizations, and local governments on a range of environmental and energy issues, including solid waste management.

The comments that follow refer to both 401 KAR 47:110 and 401 KAR 48:320, except where specifically noted.

### Introduction

The Energy and Environment Cabinet is a “creature of statute,” and as such must find warrant for its actions in the authorizing statutes. In this instance, the solid waste regulations of the Cabinet are promulgated pursuant to authority derived from KRS Chapter 224, and such authority is likewise constrained by that statute.

KRC opposes the proposed regulatory amendments for several independent reasons. First, there is no authority in KRS Chapter 224 that allows for an abbreviated “registered permit-by-rule” for issuance of less than one-acre or less than two-acre construction or demolition debris (CDD) landfills. KRS 224.40-120 establishes minimum standards for permitting “off-site” CDD landfills but does not require or authorize the Cabinet to review or approve either a less than one-acre CDD landfill, or to expand it to less than two-acres, under a “registration” process that fails to require a permit application containing sufficient information to allow a reasoned determination of compliance with applicable environmental standards.

Proposed 401 KAR 47:110 should be revised to eliminate the use of a “registration” for any waste disposal activities purported to be authorized in that regulation, including less than one (or two) acre CDD landfills, and to instead require a **permit** be applied for to engage in any waste disposal activities. For CDD landfills of less than one (or two) acres, the regulation should require a permit application containing all of the information that is current required for greater than one-acre CDD landfills **except** where KRS 224.40-120 has specifically provided a different standard for location, design, construction, or operation.

In KRS 224.40-120, the General Assembly specifically addressed the category of solid waste disposal facilities known as “construction or demolition waste landfills,” by prescribing requirements for “allowing off-site disposal of construction or demolition waste at sites initially no larger than one acre” and the “[r]equirements for increase of size of site to no more than two acres.”

KRS 224.40-120 provides that:

(1) The cabinet shall permit the off-site disposal of construction or demolition waste at a site initially no larger than one (1) acre if, **as a minimum**, the following conditions are imposed:

(a) The applicant shall provide a written certification that a copy of the application has been delivered to the governing body of

the solid waste management area and that disposal of construction and demolition waste at the proposed site will not violate local land use regulations;

(b) Disposal shall only occur during daylight hours in accordance with a posted schedule that will allow inspection by local or state officials;

(c) The applicant shall erect on the site a sign clearly indicating that the site is permitted for disposal of construction and demolition debris only, and the operating hours shall appear on the sign along with the applicant's permit number;

(d) The cabinet shall establish a schedule for closing and covering the site, including provisions for intermediate cover when flammable waste is involved;

(e) Notwithstanding any other provision of law, the applicant shall not allow the disposal of tires in a waste disposal facility regulated by this section; and

(f) The cabinet shall require the applicant to post a bond in the amount of ten thousand dollars (\$10,000) to ensure compliance with the conditions of the permit.

(2) Upon request of the applicant, the cabinet may increase the size of a construction or demolition waste site permitted under subsection (1) of this section to a total of no more than two (2) acres if the applicant:

(a) Is compliant with all permit requirements for the currently permitted construction or demolition waste disposal site; and

(b) Complies with the requirements of subsection (1) of this section with regard to the additional permitted waste site area, including posting an additional bond with the cabinet in the

amount of ten thousand dollars (\$10,000) to ensure compliance with the conditions of the permit for the newly permitted area.

(3) The cabinet may waive the requirement of subsection (1)(b) of this section, that the hours of operation shall be posted, and the requirements of subsection (1)(c) and (d) of this section, if the cabinet determines that the area of land to be affected, the limited duration of the disposal operation, or the materials to be disposed of do not require imposition of these standards to assure the safety of the public.

(4) This section shall not apply to beneficial reuse of industrial solid waste.

KRS 224.40-120.

It is apparent from a reading of the statute that certain permitting and operating conditions have been set by statute, and that the agency's ability to modify or waive those requirements has been circumscribed.

For example, the CDD landfills falling under the acreage limits of the statute must:

- Provide a certification to local government of compliance with zoning requirements, and a copy of the application;
- Operating hours are limited to daylight and are required to be posted,
- Signage and its contents are prescribed;
- A schedule for closure and cover is required, including intermediate cover where flammable wastes are involved;
- Waste tire acceptance is prohibited; and
- The bond required is \$10,000.

The statute allows for up to doubling the size of the CDD landfill under certain conditions, and also allows the Cabinet to waive certain of the requirements under certain conditions.

It is equally apparent from a reading of the statute that these statutory requirements are **minimum** conditions, and in no fashion restrict the Cabinet from imposing such **other** conditions as are deemed necessary to assure that the purposes of KRS Chapter 224 with respect to management of solid wastes are fully satisfied.

This much is clear from KRS 224.40-120(1), which provides that “[t]he cabinet shall permit the off-site disposal of construction or demolition waste at a site initially no larger than one (1) acre if, **as a minimum**, the following conditions are imposed[.]” KRS 224.40-120(1)(Emphasis added). The decision of the Cabinet to forego requiring some CDD landfills, accepting the same type of waste as all other CDD landfills, to be able to escape proper advance review of design, to be able to avoid liners, leachate collection, groundwater and surface water monitoring, and other applicable requirements for CDD landfills *simply because of the acreage involved*, is irrational and arbitrary, since the acreage of the CDD landfill has no relationship to the ability of CDD waste to leach constituents of concern into the environment.

Nothing in KRS Chapter 224 empowers or justifies the Cabinet’s decision to decline application of the technical standards for CDD Landfills to a subset of such landfills based solely on the acreage, so that a CDD landfill of .99 acres (or 1.99 acres) is able to avoid permitting and application of the 401 KAR 48 technical standards that it would otherwise be required to address were the landfill .1 acre larger.

The Cabinet is requested to provide specific affirmative consideration to the questions:

- a. By what authority the Cabinet exempts CDD landfills of less than one acre (or less than two acres) from the technical standards of 401 KAR Chapter 48, and
- b. On what technical basis, including any published literature or data collected by or for the Cabinet, does the Cabinet justify the decision not to require less than one-acre (and potentially less than two-acre) CDD landfills to engage in the same permit review, to provide the same information, and to

adhere to the same design, construction, and operation standards as a CDD landfill of 1+ or 2+ acres.

With respect to the requirement in 401 KAR 47.110 that an off-site CDD landfill of less than one (and possibly less than two) acres file a “registration” rather than obtain a full permit, nothing in KRS 224.40-120, or elsewhere in KRS Chapter 224, empowers the Cabinet to require “registration” rather than a permit application, not to issue a “registered permit by rule” rather than a permit.

KRS 224.40-100 provides that “[n]o person shall transport to or dispose of waste at any site or facility other than a site or facility for which a permit for waste disposal has been issued by the cabinet.”

The authority and obligation of the Cabinet with respect to issuance of solid waste disposal permits is found at KRS 224.10-100(19), which provides that:

[i]n addition to any other powers and duties vested in it by law, the cabinet shall have the authority, power, **and duty** to:

\* \* \*

(19) Issue, continue in effect, revoke, modify, suspend, or deny under such conditions as the cabinet may prescribe and require that applications be accompanied by plans, specifications, and other information the cabinet deems necessary for the following permits:...

(c) Permits for the establishment or construction and the operation or maintenance of waste disposal sites and facilities[.]

KRS 224.10-100(19)(c).

KRS 224.10-100 imposes a **duty** to issue permits for solid waste disposal sites and facilities, not “registrations” in lieu of permits, and not permits “by rule” rather than by individual application.<sup>1</sup>

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<sup>1</sup> While not directed implicated by these regulatory amendments, the Cabinet’s allowance of a “permit by rule” for on-site disposal in CDD

The Cabinet proposes to amend 401 KAR 47:110 Section 1(1) to require that the registration be denied if the “registration fails to demonstrate compliance with the requirements established in 401 KAR Chapters 47 and 48.”

In addition to eliminating all waste disposal sites and facilities from 401 KAR 47:110 and instead requiring a permit application for establishment, construction, and operation of all CDD landfills (regardless of acreage), the proposed amendment must clarify *what* must be done to “demonstrate compliance with the requirements established in 401 KAR Chapters 47 and 48.” By that proposed language, does the Cabinet intend that a registrant demonstrate that it will meet **all** of the technical standards of 401 KAR Chapter 48 that are applicable to CDD landfills? Does the Cabinet intend that the registrant be required to demonstrate compliance with 401 KAR 47:030 during the “registration” process?

Finally, the lack of reference in 401 KAR 47:110 to the standards of 401 KAR 47:030 is of concern. While 401 KAR 30:031 establishes the environmental performance standards generally applicable to all waste sites and facilities, 401 KAR 47:030 establishes the minimum environmental standards “which with all solid waste sites or facilities shall comply.” CDD landfills of any acreage are solid waste sites or facilities, and the regulation governing less than one (two)-acre CDD landfills must acknowledge and direct compliance with 401 KAR 47:030 in addition to 401 KAR 30:031, and must require that the permit incorporate sufficient requirements to allow for such a

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landfills, without regard to the acreage of the CDD landfill, and without adherence to any of the technical standards of 401 KAR 48, is quintessentially arbitrary. There is nothing in the relative location of the CDD landfill (i.e. on site or off site) that has any rational bearing on the potential for environmental harm from that landfill due to the lack of any liner or leachate collection system. KRS 224.40-120 prescribes certain minimum conditions for off-site CDD landfills of less than one (two) acres, but in no fashion authorizes the agency to bypass the mandate that disposal of solid waste occur under a permit, nor authorizes the blanket “permitting by rule” of on-site CDD disposal landfills.

demonstration of compliance in the operation of the landfill once approved.

With respect to the proposed amendments to 401 KAR 48:320, the prior comments concerning the use of a “registration” rather than a permit, apply here as well. Additionally, the failure to reference compliance with 401 KAR 47:030 in addition to 401 KAR 30:031, must be addressed.

The limitation of the liner and leachate collection system requirements to those CDD landfills located within a “wellhead protection area” should be eliminated, since the liner and leachate collection systems required of all other CDD landfills by 401 KAR 48:060 should be equally applicable to less than one/two-acre off-site CDD landfills, (and to on-site CDD landfills).

KRS 224.10-100 imposes a duty on the Cabinet to “[i]ssue, continue in effect, revoke, modify, suspend, or deny under such conditions as the cabinet may prescribe and require that applications be accompanied by plans, specifications, and other information the cabinet deems necessary” for solid waste disposal sites and facilities. The Cabinet is requested to explain in detail why it is that the plans, specifications, and information required of CDD landfills in 401 KAR 48:060 have been deemed by the agency not to be “necessary” for less than one (two)-acre off-site CDD landfills.

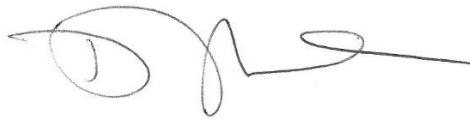
Finally, the Cabinet is requested to provide specific affirmative consideration to, and to explain in detail, the scientific and technical basis for the decision to forego imposition of the 401 KAR 48:060 technical standards on CDD landfills of less than one-acre (or two-acre or less in some cases), while requiring liner, leachate collection, and monitoring requirements to CDD landfills accepting the *same types of waste*, to landfills of .1 acres greater in horizontal extent than those allowed to be constructed and operated without adherence to the technical standards. Commenters request specific citation to any technical literature, field studies, or other documentation supporting the judgment that the risks of surface or groundwater contamination that underlie the requirements for liners, leachate collection, and groundwater monitoring, are non-existent (or measurably less) where



the CDD landfill is .99 or 1.99 acres in size. Absent such documentation and justification grounded in sound science, the full range of 401 KAR 48:060 technical design, construction, and operation requirements should attach to **all** CDD landfills (greater and lesser than one/two acres, on-site and off-site.)

Thank you in advance for your consideration of these comments.

Cordially,

A handwritten signature in black ink, appearing to read 'Tom FitzGerald', with a long horizontal stroke extending to the right.

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