KyPSC Case No. 2018-00156
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VERIFICATION

STATE OF OHIO)
) **SS:**
COUNTY OF HAMILTON)

The undersigned, Tammy Jett, Principal Environmental Specialist, being duly sworn, deposes and says that she has personal knowledge of the matters set forth in the foregoing data requests and that the answers contained therein are true and correct to the best of her knowledge, information and belief.

Tammy Jett

Tammy Jett, Affiant

Subscribed and sworn to before me by Tammy Jett on this 17th day of SEPT., 2018.

E. Minna Rolfes

NOTARY PUBLIC

My Commission Expires: July 8, 2022

NOTARY PUBLIC STATE OF OHIO

E. MINNA ROLFES-ADKINS
Notary Public, State of Ohio
My Commission Expires
July 8, 2022

VERIFICATION

STATE OF OHIO)
)
COUNTY OF HAMILTON)

SS:

The undersigned, Adam Deller, Engineer III, being duly sworn, deposes and says that he has personal knowledge of the matters set forth in the foregoing data requests and that the answers contained therein are true and correct to the best of his knowledge, information and belief.

Adam Deller, Affiant

Subscribed and sworn to before me by Adam Deller on this 14th day of September, 2018.

NOTARY PUBLIC

ADELE M. FRISCH
Notary Public, State of Ohio
My Commission Expires 01-05-2019

My Commission Expires: 1/5/2019

Duke Energy Kentucky
Case No. 2018-00156
Staff Second Set Data Requests
Date Received: August 31, 2018

STAFF-DR-02-001

REQUEST:

Refer to Duke Kentucky's response to the Attorney General's Initial Data Requests, Item 1.

a. Regarding a state CCR rule program for Kentucky, provide the status and the anticipated time frame in which the "participating state" status will be achieved by Kentucky, if known to Duke Kentucky.

b. Provide the support for the statement that "there is no reason to believe the State would relax any requirements which would reduce construction or O&M costs related to the West Landfill Cell 2."

c. Provide in detail Duke Kentucky's belief that a "no migration" cannot be successfully demonstrated at East Bend and explain what the requirements of a successful "no migration" demonstration would entail.

d. Provide in detail which parts of the CCR Rule are still subject to the April 2019 "cease receipt and begin closure" date requirement.

RESPONSE:

a. Regarding the status of a state coal combustion residuals (CCR) rule program for Kentucky, it is Duke Energy Kentucky's understanding that the Kentucky Department of Environmental Protection (KDEP) is currently drafting regulations that will eventually be part of their submission the U.S. Environmental Protection Agency

(U.S. EPA) to obtain "participating state" status for the implementation of the CCR rule. The anticipated timeframe in which the participating state status will be achieved by Kentucky is a difficult to pinpoint because of the many steps needed to obtain approval from the U.S. EPA. The first step is for Kentucky to finish drafting the rule proposal. It is anticipated, but in no way guaranteed, that this will be completed by the end of 2018. The proposal would then be published in the Kentucky Administrative Register for comment. Generally, it takes about four (4) months for a non-controversial rule proposal to go through the comment period. If the proposal makes it through the comment period with little controversy and minimal comment, it would then go to the General Assembly for Committee review possibly in early 2019. Assuming there is no issues or major changes during Committee review, under a "best case" scenario, the rule may become effective, at a state level, by March 2019. Once the rule is effective at a state level, Kentucky can pursue presenting a package to U.S. EPA under the WIIN Act to apply for participating state status. It is unknown to Duke Energy Kentucky how quickly Kentucky will be able to submit an application to the U.S. EPA. Based on the pace at which U.S. EPA has been reviewing applications for participating state status, it is likely that, once Kentucky submits an application, it will take a minimum of six (6) months to a year before an approval would be granted. The U.S. EPA, thus far, has been publishing their approval for comment before the approval becomes final. Assuming U.S. EPA has no issues with Kentucky's application and there are no substantive comments on the U.S. EPA's approval of the application, Duke Energy Kentucky anticipates Kentucky to obtain participating state status no earlier than end of 2019 or first quarter 2020. Those timeframes assume no issues at any phase of the process and quick approval by the U.S.

EPA, all of which seem unlikely. Please note that the Chapter 46 rule, mentioned in the answer to "b" below, will be used as part of Kentucky's application for participating state status.

b. The support for the statement that "there is no reason to believe the State would relax any requirements which would reduce construction or O&M costs related to the West Landfill Cell 2" is as follows. Duke Kentucky is providing the following background in order to assist with a more clear answer to this question.

Background

On May 5, 2017, a new Kentucky regulation, 401 KAR 46 (Chapter 46), providing standards for the disposal of CCR in CCR units became effective. These regulations were intended to replace Kentucky's current state regulations, 401 KAR 45 (Chapter 45) for coal ash (CCR) impoundments and CCR landfills and were promulgated through the Kentucky Energy and Environment Cabinet (EEC), KDEP, Division of Waste Management (DWM). The Chapter 46 rules essentially aligned with the federal CCR rules and also put in place a permit by rule program for CCR impoundments and landfills.

Kentucky's Chapter 46 rule was challenged in a Civil Action filed on May 3, 2017. On January 31, 2018, the Franklin Circuit Court issued a Summary Judgement in response to the filing stating, "the Court finds and declares, pursuant to KRS 418.040 and CR 57, that the Cabinet's adoption of the 401 KAR 46:120, to the extent that it establishes a "permit by rule" with no prior approval by the Cabinet, is arbitrary and capricious, and thus void and unenforceable under Section 2 of the Kentucky Constitution." This ruling, among other conclusions in the Summary Judgement,

effectively stalled the Chapter 46 rules. (See attached Opinion and Order as Staff DR-02-01 Attachment 1). On February 26, 2018, the Franklin Circuit Court issued an Order granting a Motion for Clarification and amending the January 31, 2018 Opinion and Order (See attached Order as Staff DR-02-01 Attachment 2). This clarification has allowed the KDEP, DWM to begin working towards revisions to the Chapter 46 rules that would create a permitting program and other revisions that are agreeable to the Court and the Plaintiff in the case.

Current State

Since the time of the January 31, 2018, Franklin Circuit Court clarification, the EEC and KDEP have been in communication with stakeholders, including utilities and interested environmental parties, regarding potential Chapter 46 revisions. During discussions regarding the Chapter 46 revisions, KDEP has been clear that they intend to keep the CCR rule structure, in general, in Chapter 46, and they intend to increase the oversite and review of the groundwater portion of the rule, at a minimum. As requested by the Court, additional permitting will be added to the Chapter 46 rule during the revision period. According to what stakeholders are being told, KDEP will use the more stringent, revised Chapter 46 rule as part of their application to U.S. EPA to become the "administrator" of the CCR rule in Kentucky.

Finally, there is nothing in the record to indicate that the U.S. EPA is approving any state programs for CCR rule oversight that include relaxing the standards in the CCR rule or providing any cost savings for constructing or operating landfills. While the WIIN Act provides the ability for a state to oversee the CCR rule program, if approved by the U.S. EPA, and provide some variance from that program, the only state program

approved thus far has essentially been an exact recitation of the federal CCR rule. The WIIN Act's implied "flexibility" thus far appears to be "implied" rather than an actual reality. It is possible that Kentucky, in their process to revise the Chapter 46 rules and become a participating state, could merge the state groundwater-monitoring program with the required CCR groundwater-monitoring program. This could provide some cost savings by cutting groundwater-sampling events from four events a year to two events a year. At this time, that has not been done for Duke Energy Kentucky's East Bend facility.

c. The following section provides detail regarding Duke Energy Kentucky's belief that a "no migration" cannot be successfully demonstrated at East Bend and an explanation of what the requirements of a successful "no migration" demonstration would entail.

The U.S. EPA details the requirements for the "no migration" demonstration in the July 30, 2018 Federal Register in revision section 257.90 (g). This is the applicability section for the groundwater portion of the CCR rules. To fully understand why Duke Energy Kentucky cannot be successful as the "no migration" demonstration, one must look at the requirements of that section. The requirements are as follows:

> (g) *Suspension of groundwater monitoring requirements.* (1) The Participating State Director or U.S. EPA where U.S. EPA is the permitting authority may suspend the groundwater monitoring requirements under §§ 257.90 through 257.95 for a CCR unit for a period of up to ten years, if the owner or operator provides written documentation that, based on the characteristics of the site in which the CCR unit is located, there **is no potential for migration** of any of the constituents listed in appendices III and IV to this part from that CCR unit to the

uppermost aquifer **during the active life of the CCR unit and the post-closure care period.** This demonstration must be certified by a qualified professional engineer and approved by the Participating State Director or EPA where EPA is the permitting authority, **and must be based upon**:

(i) Site-specific field collected measurements, sampling, and analysis of physical, chemical, and biological processes affecting contaminant fate and transport, including at a minimum, the information necessary to evaluate or interpret the effects of the following properties or processes on contaminant fate and transport:

(A) Aquifer Characteristics, including hydraulic conductivity, hydraulic gradient, effective porosity, aquifer thickness, degree of saturation, stratigraphy, degree of fracturing and secondary porosity of soils and bedrock, aquifer heterogeneity, groundwater discharge, and groundwater recharge areas;

(B) Waste Characteristics, including quantity, type, and origin;

(C) Climatic Conditions, including annual precipitation, leachate generation estimates, and effects on leachate quality;

(D) Leachate Characteristics, including leachate composition, solubility, density, the presence of immiscible constituents, Eh, and pH; and

(E) Engineered Controls, including liners, cover systems, and aquifer controls (*e.g.,* lowering the water table). These must be evaluated under design and failure conditions to estimate their long-term residual performance.

(ii) Contaminant fate and transport predictions that maximize contaminant migration and consider impacts on human health and the environment.

There is no practical way for Duke Kentucky to meet all the above requirements of the rule to demonstrate that the during the active life of any of the CCR units at East Bend AND during the entire post closure period that there is no potential for any of the constituents listed in appendices III and IV of the CCR rule to migrate to the uppermost aquifer. The aquifer characteristics alone, as listed in (A) above, at this site make it extremely difficult, if not impossible, to demonstrate or argue that there is "no potential" for "any" of the CCR rule listed constituents. The way the rule is written to include "no potential" essentially ever during the life of the CCR unit or in post closure exclude East Bend and most any other utility site that is not located in a place such as Arizona. In addition, CCR groundwater monitoring at this site has shown migration of some of the CCR rule appendix III constituents to the uppermost aquifer. That alone makes it impossible to demonstrate the "no potential" for migration.

d. The following parts of the CCR Rule are still subject to the April 2019 "cease receipt and begin closure" date requirement:

LOCATION RESTRICTIONS

§ 257.61 Wetlands.

(a) New CCR landfills, existing and new CCR surface impoundments, and all lateral expansions of CCR units must not be located in wetlands, as defined in § 232.2 of this chapter, unless the owner or operator demonstrates by the dates specified in paragraph (c) of this section that the CCR unit meets the requirements of paragraphs (a)(1) through (5) of this section.

§ 257.62 Fault areas.

(a) New CCR landfills, existing and new CCR surface impoundments, and all lateral expansions of CCR units must not be located within 60 meters (200 feet) of the outermost damage zone of a fault that has had displacement in Holocene time unless the owner or operator demonstrates by the dates specified in paragraph (c) of this section that an alternative setback distance of less than 60 meters (200 feet) will prevent damage to the structural integrity of the CCR unit.

§ 257.63 Seismic Impact Zones

(a) New CCR landfills, existing and new CCR surface impoundments, and all lateral expansions of CCR units must not be located in seismic impact zones unless the owner or operator demonstrates by the dates specified in paragraph (c) of this section that all structural components including liners, leachate collection and removal systems, and surface water control systems, are designed to resist the maximum horizontal acceleration in lithified earth material for the site.

§ 257.64 Unstable Areas.

(a) An existing or new CCR landfill, existing or new CCR surface impoundment, or any lateral expansion of a CCR unit must not be located in an unstable area unless the owner or operator demonstrates by the dates specified in paragraph (d) of this section that recognized and generally accepted good engineering practices have been incorporated into the design of the CCR unit to ensure that the integrity of the structural components of the CCR unit will not be disrupted.

PERSON RESPONSIBLE: Tammy Jett

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 17-CI-00474

KELLEY LEACH **PLAINTIFF**

v. **OPINION AND ORDER**

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET;
CHARLES SNAVELY, In His Official Capacity
As Secretary of the Energy and the Environment Cabinet;
and LOUISVILLE GAS AND ELECTRIC COMPANY, INC. **DEFENDANTS**

This matter is before the Court on the parties' Cross-Motions for Summary Judgment. On May 3, 2017, Plaintiff filed a Complaint and Petition for Declaration of Rights against Defendants Commonwealth of Kentucky, Energy and Environment Cabinet ("EEC") and Charles Snavely in his official capacity as Secretary (collectively, the "Cabinet") and Louisville Gas and Electric Company ("LG&E"). In the Complaint and Petition, Plaintiff challenged certain newly-promulgated Cabinet regulations at 401 KAR Chapter 45 and 401 KAR Chapter 46 that incorporate regulations promulgated by the U.S. Environmental Protection Agency ("EPA") for disposal of coal combustion residuals ("CCR") generated by Kentucky coal-fired electric utility plants. In a Partial Settlement Agreement and Agreed Upon Briefing Schedule entered by the Court on May 31, 2017, the parties agreed to submit Cross-Motions for Summary Judgment to the Court on the issues raised in the Complaint and Petition. Both parties have fully briefed the merits of the case, and all parties were represented at a hearing held January 11, 2018. At the hearing, the Court granted the parties leave to supplement the record with any memorandum of law regarding issues relating to KRS 350.270 and thereafter took the matter under submission. The

Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment and **OVERRULES** Defendants' Motions for Summary Judgment for reasons explained in full below.

I. BACKGROUND

A. Background on Coal Combustion Residuals

1. Disposal of Coal Combustion Residuals from Coal-Fired Power Plants

Most electricity in the United States is produced by steam-powered generators fueled by burning coal, natural gas, or petroleum.[1] As relevant to this case, when coal is burned as part of the electricity-generation process, the waste that remains after combustion is referred to as "coal combustion residuals" or "CCR."[2] CCR may be disposed of in surface impoundments or landfills or recycled/reused in lieu of disposal (referred to as a "beneficial use").[3] Of the CCR that is disposed of in surface impoundments or landfills, eighty percent (80%) is disposed of on-site (i.e., at the same general location where it is produced).[4] Historically, surface impoundments (sometimes referred to as "ash ponds" or "slurry ponds"), in which CCR is mixed with liquid and contained in a natural topographic depression, excavated or diked area, have been the prevalent method of on-site CCR disposal.[5] CCR landfills, which broadly encompass most forms of dry disposal of CCR, have also been utilized for on-site disposal.[6] In 2012, CCR disposal occurred at 735 active on-site surface impoundments and 310 active on-site landfills in the United States.[7] Similarly, of the fifty-eight (58) CCR disposal facilities in Kentucky, forty-six (46) are surface

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1 *See* United States Energy Information Administration, *Electricity Explained: Electricity in the United States* (May 10, 2017), https://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states.

2 *See* 401 KAR 46:101(1); 440 CFR § 257.53. Specific wastes generated from this type of coal combustion are fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. 401 KAR 46:101(1); 440 CFR § 257.53.

3 *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,303 (April 17, 2015).

4 *See id.*

5 *See id.*; *see also* 440 CFR § 257.53.

6 *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. at 21,303.

7 *See id.*

impoundments and twelve (12) are landfills.[8] CCR, when disposed of safely or properly reused, poses little threat to the environment. However, because CCR includes constituents such as arsenic and selenium, which are otherwise classified as hazardous wastes, improper disposal of CCR can pose a great threat to public health and the environment.

2. The EPA's Assessment of CCR Disposal After Tennessee Surface Impoundment Disaster

The EPA began an assessment of CCR disposal, specifically surface impoundment disposal, after a catastrophic surface impoundment dike failure at the Tennessee Valley Authority's ("TVA") Kingston Fossil Plant on December 22, 2008, which released over one billion gallons of "coal ash slurry" and impacted a 300-acre area.[9] In 2010, the EPA estimated the direct costs to clean up the damage from the TVA Kingston incident were $3 billion.[10] A root-cause analysis report developed for TVA established that the dike failed because it was expanded by successive vertical additions, to a point where a thin, weak layer of coal combustion fly ash on which it had been founded failed by sliding.[11] Upon touring the site soon after the spill occurred, Tennessee Governor Philip Bredesen acknowledged that the Tennessee Department of Environment and Conservation may have relied too much on TVA's inspections and engineering studies about the surface impoundment, rather than its own oversight, prior to the spill.[12]

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8 *See* ARRS Hr'g, Feb. 10, 2017 46:30–47:02 (Testimony of Dep. Sec. Scott).

9 *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. at 21,313.

10 Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule, 75 Fed. Reg. 35128, 35150 (June 21, 2010).

11 *See id.*

12 Pam Sohn, *Tennessee: Early Warnings on Ash Pond Leaks*, CHATTANOOGA TIMES FREE PRESS, January 5, 2009, http://www.timesfreepress.com/news/news/story/2009/jan/05/tennessee-early-warnings-ash-pond-leaks/202428/.

The TVA Kingston spill prompted the EPA to assess coal ash surface impoundments and gather information from facilities managing coal ash nationwide.[13] Based on this assessment, in 2010, the EPA proposed the first-ever federal regulations on CCR disposal. The EPA amended the proposed regulations based on comments from various stakeholders and the regulations became final on April 17, 2015 (hereinafter referred to as "the EPA's CCR regulations").

Significantly, the EPA's CCR regulations, working in concert with other EPA rules,[14] will eliminate the use of CCR surface impoundments in Kentucky and nationally.[15] As a result, the volume of CCR waste being disposed of in landfills will increase dramatically. Operators of coal-fired power plants that produce CCR will be predominately relying only on landfills for the disposal of CCR.[16] Accordingly, due to the vast increase in the volume of CCR waste disposed of in landfills as a result of these new federal standards, the significance of this rulemaking to the protection of the health and welfare of the Commonwealth of Kentucky has significantly increased.

B. Plaintiff's Challenge to the Cabinet's Regulations Addressing CCR in Kentucky

1. The Cabinet's Adoption of the EPA's CCR Regulations

Once the EPA's CCR regulations became final, the Cabinet began the process of promulgating regulations to address CCR disposal in Kentucky (hereinafter, "the Cabinet's CCR regulations" or "the challenged regulations").[17] In creating its CCR regulations, the Cabinet

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13 Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule, 75 Fed. Reg.at 35,132.

14 Specifically, the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 78 Fed. Reg. 34432 (June 7, 2013) will also cause the phase out of surface impoundments.

15 *See* ARRS Hr'g, Mar. 6, 2017 28:32–29:37 (Testimony of Dep. Sec. Scott).

16 *See id.* ("[U]tilities that choose to continue to operate coal-fired power plants . . . will have to go into a dry ash handling system.").

17 On October 11, 2016, the Cabinet filed a proposed version of the challenged regulations with the Legislative Research Commission. Publication in the Administrative Register of Kentucky, noticing the regulations for public hearing and comment, occurred on November 1, 2016 and the public hearing was held on November 22, 2016. The Cabinet filed its Statement of Consideration and response to comments with the Legislative Research Commission on January 13, 2017. The Administrative Regulation Review Subcommittee held hearings on the Cabinet's CCR regulations on February 10, 2017 and March 6, 2017. The Administrative Regulation Review Subcommittee approved the regulations and they became effective on May 5, 2017.

amended two regulations in 401 KAR Chapter 45 (401 KAR 45:010 and 401 KAR 45:060) and created three new regulations in 401 KAR Chapter 46 (401 KAR 46:101, 401 KAR 46:110, and 401 KAR 46:120).[18] The key amendment[19] to 401 KAR Chapter 45, found in 401 KAR 45:010 Section 1(16)(b), carves out CCR from the other "special wastes" regulated in Chapter 45 and specifies that, instead, CCR will be addressed under new rules in 401 KAR Chapter 46.[20]

Within 401 KAR Chapter 46, 401 KAR 46:101 and 46:110 expressly adopt substantial portions of the EPA's CCR regulations, including thirty-one (31) of the thirty-six (36) provisions set forth in 40 C.F.R. Part 257.[21] 401 KAR 46:101 generally adopts the relevant EPA definitions relating to CCR found in 40 C.F.R. 257.53. Similarly, 401 KAR 46:110 adopts rules relating to each of the key subjects identified in the EPA's CCR regulations (i.e., location restrictions; design criteria; operating criteria; groundwater monitoring and corrective action; closure and post-closure care; and recordkeeping and notification). Each of the ten (10) sections found in 401 KAR 46:110 includes at least one (1) cross-reference to a provision found in the EPA's CCR regulations.

The third regulation that the Cabinet created in 401 KAR Chapter 46 is fundamentally different from 401 KAR 46:101 and 46:110. That is, 401 KAR 46:120, entitled "Coal combustion

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18 401 KAR 4:070, which adopts certain portions of the EPA's CCR regulations relating to for CCR surface impoundments, was added as a new regulation contemporaneously. However, Plaintiff has not challenged this regulation.

19 In another amendment within Chapter 45, 401 KAR 45:060 Section 1(4), (6) and (7) were amended to (1) delete language addressing permit-by-rule for surface mine impoundments and disposal of CCR in active mining operations and (2) amend language addressing beneficial reuse of CCR in active or abandoned underground or surface coal mines. Plaintiff has challenged the amendment of this regulation in the Complaint; however, these amendments will not be discussed in detail in this Opinion.

20 The newly-added regulations are the only regulations included in Chapter 46. Two regulations previously included in Chapter 46 (401 KAR 46:060 and 401 KAR 46:070) dealt with the Waste Tire Trust Fund Loan Program and were recodified in 2015.

21 Of the five provisions in the EPA's CCR regulations that are not adopted in 401 KAR Chapter 46, four are adopted separately in 401 KAR 4:070 (40 C.F.R. 257.73-74 and 40 C.F.R. 257.82-83), and another regulation is located in the Chapter of the Kentucky Administrative regulations addressing Water Resources and is not at issue in this case. Only one provision in the EPA's CCR regulations, 40 C.F.R. 257.107, does not appear to have been adopted by either 401 KAR 46:110 Section 10 or 401 KAR 4:070 Section 6; however, the language regarding adoption of 40 C.F.R. 257.107 is unclear.

residuals (CCR) program," does not contain cross-references to the EPA's CCR regulations or any other federal regulations. Instead, this provision sets forth the state requirements for acquiring "CCR permits" for the disposal and beneficial use of CCR in Kentucky. Defendants have acknowledged that the changes to the advance permitting rules for operating a CCR landfill found in 401 KAR 46:120 were not mandated by the EPA's CCR regulations.[22]

2. Plaintiff's Challenges to the Cabinet's CCR Regulations

In the Complaint, Plaintiff raises several challenges to the validity of the Cabinet's CCR regulations. Critically, Count IV of the Complaint asserts that the Cabinet failed to provide a justification for elimination of the advance permitting process for CCR landfills and, as such, acted arbitrarily and in violation of Section 2 of the Kentucky Constitution.

Prior to promulgation of the Cabinet's CCR regulations, CCR landfills were regulated under 401 KAR Chapter 45. Under these rules, disposal in CCR landfills was subject to advance permit application requirements[23] set forth in the Form DEP 7094A, Application for a Special Waste Landfill Permit, which is a twenty-six (26) page form requiring fifty (50) attachments. In addition to the advance permitting requirements themselves, 401 KAR Chapter 45 sets forth extensive "public information procedures," which require giving the public notice and opportunity to comment upon constructing a new landfill, conducting a horizontal expansion of an existing landfill, or in certain other circumstances.[24]

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22 *See* Def. EEC's Resp. to Pl.'s Mot. for Summ. J. 19 (explaining that "[t]he Cabinet never claimed that the Federal CCR Rule mandates changes to the type of permits required necessary [sic] to operate a CCR landfill"; "the Cabinet's permitting program [in 401 KAR 46:120] is purely a matter of state law"); Def. LG&E's Mem. in Supp. of Summ. J. 29 n.33 (noting that 401 KAR 46:120 was adopted pursuant to "independent authority under state law").

23 Unless the disposal fit into one of the six (6) categories for which an owner or operator of a special waste disposal facility was deemed to have a permit without filing an application or registration with the Cabinet. *See* 401 KAR 45:060 Section 1.

24 *See* 401 KAR 45:050.

However, under the new rules in 401 KAR 46:120, these requirements are virtually eliminated for CCR landfills. Instead of the twenty-six (26) page Form DEP 7094A, an owner or operator of a CCR landfill is required to complete a Form DWM 4600, Registered Permit-by-Rule for CCR Facility, which is a one (1) page form that requires the registrant to list location information and attach proof that financial assurance requirements have been satisfied and public notice has been published. The Cabinet's longstanding requirement for prior technical review of the permit, as well as public information procedures, have been eliminated.

Essentially, the new regulations increase the technical requirements for permitting (to mirror the new federal regulations), but completely eliminate the longstanding state requirement for prior technical review of the permits, along with any meaningful public notice and opportunity to be heard regarding permit applications. The new regulations allow the utility companies to open CCR landfills without any prior review or technical approval of the plans by the state, and without any public participation in the permitting process.

3. Impact of the Cabinet's CCR Regulations on Plaintiff

Kelley Leach is a landowner who resides at and owns property in the immediate vicinity of property owned by LG&E on which a proposed landfill for disposal of CCR generated by LG&E's Trimble County Electric Generating Stations would be constructed (hereinafter, the "LG&E CCR landfill"). The LG&E CCR landfill was permitted pursuant to 401 KAR Chapter 45 as a "special waste" landfill, but it would be transitioned to a "registered permit-by-rule" status under 401 KAR Chapter 46:120 of the challenged regulations. Given the proximity of his residence and land to the LG&E landfill, Plaintiff asserts that he will be adversely affected if the challenged regulations become effective due to the reduced agency oversight and the lack of public participation in the regulation of CCR. These changes, and the virtual elimination of state

oversight in the design and construction of CCR landfills, has an adverse impact on Plaintiff's ability to use and enjoy the land and water resources in the vicinity of his property. In short, the changes made by the Cabinet—namely, eliminating state oversight and public participation—increases the risk of environmental contamination in the watershed of his property.

II. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[25] In order for summary judgment to be proper, the movant must demonstrate that the adverse party cannot prevail under any circumstances.[26]

III. DISCUSSION

An agency will have acted arbitrarily in violation of Section 2 of the Kentucky Constitution when it takes an action in excess of its statutory authority, fails to afford a party procedural due process, or makes a determination not supported by substantial evidence.[27] In the present case, the primary focus within this test is whether there is substantial evidence in the record to support the Cabinet's abandonment of advance permitting in the challenged regulations.[28]

"Substantial evidence" means evidence that is sufficient to induce conviction in the minds of reasonable people.[29] If substantial evidence in the record supports the agency's findings, a court

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25 CR 56.03.

26 *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (citing *Kaze v. Compton, Ky.*, 283 S.W.2d 204 (1955)).

27 *See K & P Grocery, Inc. v. Commonwealth*, 103 S.W.3d 701, 703–04 (Ky. App. 2002) (citing *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (1994)).

28 Although Plaintiff does argue in Counts I and II of the Complaint that the Cabinet has exceeded its statutory authority to promulgate the challenged regulations, those Counts will not be the focus of this Opinion. With regard to the procedural due process requirement, Plaintiff does not allege that the Cabinet failed to satisfy this requirement.

29 *Smith v. Teachers' Ret. Sys. of Ky.*, 515 S.W.3d 672, 675 (Ky. App. 2017) (citing *McManus v. Ky. Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003)).).

must defer those findings, even though some evidence may exist to the contrary.[30] On the other hand, a decision not supported by substantial evidence is arbitrary and violates Section 2 of the Kentucky Constitution.[31] In *Kentucky Milk Marketing and Antimonopoly Commission v. The Kroger Company*, 691 S.W.2d 893 (Ky. 1985), the Supreme Court articulated a similar standard for Section 2 based on limiting "unsubstantial" reasons for the exercise of governmental authority:

> Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary. No board or officer vested with governmental authority may exercise it arbitrarily. If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of the persons adversely affected.[32]

In order for "substantial evidence" to exist in this case, there must be evidence in the administrative record that a reasonable person would find to be supportive of the agency's decision to abandon advance permitting for CCR landfills as part of its adoption of the EPA's CCR regulations. The Cabinet must demonstrate a rational basis for its changes eliminating state oversight and public participation in the permitting process.

A. The Cabinet Cannot Rely on the Administrative Record Created by the EPA When It Promulgated the Federal CCR Regulations to Create Substantial Evidence

Defendants argue that substantial evidence exists as a matter of law because the General Assembly has provided that the Cabinet "may" adopt CCR regulations "consistent with the Resource Conservation and Recovery Act [RCRA] . . . and regulations issued pursuant thereto . . ." as well as "consider" and "incorporate, where appropriate" certain guidance promulgated at the

30 *See id.* (citations omitted).
31 *See id.* (citations omitted).
32 691 S.W.2d at 899 (citations omitted).

federal level.[33] They argue that, under *Commonwealth v. Hamilton*, 411 S.W.3d 741 (Ky. 2013), where the Cabinet is adopting federal standards pursuant to express statutory direction to do so, it has no obligation to establish its own factual record. In *Hamilton*, criminal defendants argued that the Cabinet for Health and Family Services ("CHFS") unlawfully reclassified a narcotic from a Schedule V to Schedule III drug because the administrative record was insufficient to justify the rescheduling. The Supreme Court held that because the relevant statute authorized the agency to "similarly control" narcotics in the same manner as the federal government, there was no requirement that CHFS make its own independent, technical record.[34] Under these principles, Defendants argue that where the Cabinet is authorized to adopt regulations "consistent with" federal regulations, "once notified of a change in federal law, [it] may simply adopt that federal law into its own state level regulatory program."[35]

Defendants' reliance on *Hamilton* is misplaced. As an initial matter, the statutory language in *Hamilton* is much more restrictive than the statutory language in the present case. In *Hamilton*, the relevant statute addressing adoption of federal scheduling guidance (KRS 218A.020(3)) provided,

> If any substance is designated or rescheduled as a controlled substance under the federal Controlled Substances Act, *the drug shall be considered to be controlled at the state level in the same numerical schedule corresponding to the federal schedule.*[36]

In this statute, the General Assembly has given CHFS no discretion as to what aspects of federal controlled substance scheduling it will follow; once a drug is considered to be "controlled" at the federal level, it "shall" be considered controlled at the state level. Where the Kentucky statute

33 *See* KRS 224.50-760(1)(b) and (d).
34 *Id.* at 749.
35 Def. LG&E's Mem. in Supp. of Summ. J. 27.
36 KRS 218A.020(3)(a) (emphasis added).

allows no real discretion on the issue of whether federal rules will be followed, it follows that, as the Kentucky Supreme Court held in *Hamilton*, a Kentucky administrative agency would not have to create its own administrative record on the issue of why it chose to regulate in a particular way.[37] Circumstances, as here, in which the General Assembly has provided that the Cabinet "may" adopt CCR regulations "consistent with the [RCRA] . . . and regulations issued pursuant thereto" as well as "consider" and "incorporate, where appropriate" certain guidance promulgated at the federal level are distinguishable. That is, the Cabinet was given considerable discretion with whether it would adopt federal regulations under the RCRA. The presence of such discretion means that the Cabinet must provide some corresponding explanation for a decision to adopt the EPA's CCR regulations; the "federal findings" cannot be "the Cabinet's findings" as in *Hamilton*.[38]

In addition, even if the statutory language in KRS 224.50-760(1)(b) and (d) were identical to the statute at issue in *Hamilton*, such authority would only extend to the Cabinet's CCR regulations that were promulgated as part of adopting the EPA's CCR regulations. That is, 401 KAR 46:101 and 46:110 substantially adopt nearly every provision within the EPA's CCR regulations and, in doing so, were clearly intended to "incorporate" federal standards in a manner "consistent with the [RCRA] . . . and regulations issued pursuant thereto" under KRS 224.50-760(b) and (d). However, with regard to 401 KAR 46:120, which contains the new CCR registered permit-by-rule provisions at issue in this case, there is nothing in the plain language of that regulation or the administrative record to indicate that it was adopted in an effort to incorporate the federal standards. Indeed, the Cabinet itself has acknowledged that the EPA's CCR regulations did not "mandate[] changes to the type of permits required" to operate a CCR landfill in Kentucky,

37 *See Hamilton*, 411 S.W.3d at 749.
38 *See id.*

and, as such, the new registered permit-by-rule provisions in 401 KAR 46:120 exist "purely as a matter of state law."

Finally, there is substantial support in the Preamble to the EPA's CCR regulations indicating that the EPA never intended for its CCR regulations to supplant state advance permitting programs. As an initial matter, in regulating CCR for the first time, the EPA decided to regulate CCR as a solid waste under Subtitle D of the RCRA.[39] Under Subtitle D of the RCRA, the EPA's role is merely "to establish the overall regulatory direction by providing minimum nationwide standards" and "to provide technical assistance to states."[40] Because the EPA has no oversight authority under Subtitle D, any standards it creates pursuant to it must be "self-implementing."[41] For purposes of regulating CCR, this means that the EPA's CCR regulations apply directly to the utilities, which are responsible for ensuring that their operations comply with the relevant CCR standards.[42] The EPA understood that some states had standards (e.g., with regard to permitting) that exceeded the self-implementing standards in its CCR regulations, but there was no intent to supplant these higher standards:

> EPA strongly encourages the states to adopt at least the federal minimum criteria into their regulations. EPA recognizes that some states have already adopted requirements that go beyond the minimum federal requirements; for example, some states currently impose financial assurance requirements for CCR units, and require a permit for some or all of these units. This rule will not affect these state requirements. The federal criteria promulgated today are minimum requirements and do not preclude States' from adopting more stringent requirements where they deem to be appropriate.[43]

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39 Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. at 21,310.

40 *Id.*

41 *Id.*

42 Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. at 21,311.

43 Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. at 21,430

This language from the Preamble to the EPA's CCR regulations makes it abundantly clear that the Cabinet cannot rely on the EPA's administrative record to substantiate its reasoning for eliminating advance permitting for CCR landfills because the EPA itself has stated that its CCR regulations "will not affect" state requirements such as permitting.

There is nothing in the text or history of the EPA rulemaking that supports the Cabinet's assertion that the amendments to the state regulations that eliminate Cabinet oversight of the permitting process and the regulations which provide for public notice and the opportunity to be heard are part of any federal mandate. To the contrary, it is clear from the EPA rulemaking proceeding that the EPA contemplated that the states would impose their own requirements for oversight and public participation that are separate from the technical requirements imposed by the EPA regulations.

B. The Cabinet's Administrative Record Fails to Establish Substantial Evidence to Support the Amendment and Fails to Provide a Rational Basis for Elimination of the Cabinet's Role in Reviewing and Approving CCR Landfill Permits Prior to Issuance

To the extent the Cabinet must rely on its own record for "substantial evidence," it claims that the

> regulatory record reflects that the Cabinet is no longer requiring formal permits for CCR management because of 1) the prescriptive nature of newly incorporated rules, 2) the deadlines associated with the rules, and 3) the Cabinet's ability to maintain its enforcement and inspection role while utilities implement the federal standards.[44]

However, the record in this case is devoid of support for the Cabinet's position. Accordingly, the Court finds that the record lacks "substantial evidence" to support the Cabinet's regulatory changes to eliminate prior state technical review and public notice for CCR landfills.

[44] *See* Def. EEC's Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J. 9.

In fact, the Cabinet provided a detailed, compelling, and coherent statement in support of the necessity for prior technical review and public notice for CCR landfills in its formal response to comments during the EPA rulemaking. It has provided no rational basis to deviate from the policy embodied in the prior regulation that requires technical review and public notice. The adoption of the federal regulation's technical standards in no way diminishes the need for a procedure to ensure that those technical standards are complied with and the public has notice and the opportunity to be heard.

When the EPA solicited comments on its proposed CCR regulations in 2010, Bruce Scott, then-Commissioner of the Kentucky Department for Environmental Protection ("DEP"),[45] the agency within the Cabinet responsible for CCR regulation, submitted comments on behalf of DEP. Certain of these comments identified concerns with the self-implementation aspect of the proposed CCR regulations. In fact, when the DEP identified its nine "primary" comments on EPA's proposed CCR regulations, one of those was "Independent Professional Engineer or Professional Geologist certification without state oversight." The DEP explained,

> The Commonwealth has serious concerns over allowing independent professionals to self-certify complex engineering documents without prior state review. The department urges EPA to require a Subtitle D permitting program similar to 40 CFR 239 for MSW landfills be adopted by the state before professionals may design and oversee the construction of liners and groundwater monitoring wells. This is especially important for variances and alternate designs. Kentucky believes strongly that a system of detailed technical inspection, application submittal, application review, public notice and final permit is essential to eliminate misunderstandings between the consultant, owner or operator, the department, neighbors and the general public.[46]

[45] Mr. Scott is now Deputy Secretary of the Cabinet and represented the Cabinet at two hearings before the Administrative Regulation Review Subcommittee in which the Cabinet's CCR regulations were discussed.
[46] Compl. Ex 1 at 3–4.

The DEP goes on to describe the proposed regulatory approach if the EPA adopts the federal CCR regulations under RCRA, Subtitle D (which, indeed, was the approach that was eventually taken in the EPA's CCR regulations):

> If the Subtitle D regulations are adopted, Kentucky will place the technical standards in 401 KAR 45:110 for landfills and surface impoundments. 401 KAR Chapter 45 already provides a permit application process, including technical standards, public notice and hearings. The department believes that such a framework is necessary to receive and give input from the state and public before the utilities spend a large amount of money on construction. Providing technical comments after construction is virtually worthless, and the state may be placed in a position of requesting demolition and reconstruction in the worst case, which would double or triple construction costs.[47]

The Cabinet appears to have adhered to the position it took on the EPA's proposed CCR regulations when it initiated the process of promulgating its own regulations. Unfortunately, during the course of its regulatory development, the Cabinet chose to limit its input to stakeholders from the utility industry. As noted in the Complaint, the Cabinet conducted extensive meetings with the utility industry prior to the promulgation of the challenged regulations.[48] The defendants admit these allegations, although they deny that there was anything improper about such meetings.[49] As the EEC asserts, "the Cabinet met with an informal workgroup of industry stakeholders to gauge the regulatory impact of draft regulation."[50] The record is devoid of any indication that the Cabinet, prior to the filing of the proposed regulation under KRS Chapter 13A, sought or received any input from technical, engineering, scientific, environmental, or citizens groups.

The result of the Cabinet's pre-promulgation consultation with industry stakeholders was a complete about-face regarding the Cabinet's longstanding policy that prior technical review and

47 *Id.* Ex. 1 at 20–21.
48 Comp. ¶¶ 28–29.
49 *See, e.g.*, Def. LG&E's Answer ¶¶ 28–29.
50 Def. EEC's Answer ¶ 22.

public notice are necessary. In the September 3, 2015 meeting with utility representatives, the Cabinet distributed a PowerPoint presentation entitled "Kentucky Administrative Regulations for Coal Combustion Residuals."[51] Based on the content of the presentation, the Cabinet explained, in a slide entitled "Federal Rule," that "the federal rule provides no permitting process, but is instead self-implementing."[52] On the next slide entitled "Kentucky regulations," the Cabinet went on to propose that the Kentucky regulations would be promulgated as 401 KAR 46 and "[did] not replace requirements of federal rule. Facilities comply with both programs in parallel."[53] Finally, with regard to how permitting would take place under the new regulations in Chapter 46, the Cabinet proposed that "[f]acilities will no longer be able to qualify for [permit-by-rule] for CCR" (slide entitled "Permit-by-rule for CCR").[54]

These statements demonstrate the Cabinet's intent to adopt the EPA's CCR regulations while retaining the advance permitting requirements for CCR landfills found in 401 KAR Chapter 45. Its position on requiring a "permit application process, including technical standards, public notice and hearings" was based on the belief that "such a framework is necessary to receive and give input from the state and public before the utilities spend a large amount of money on construction." Despite the Cabinet's position on the necessity of advance permitting as recently as September 2015, the challenged regulations, and 401 KAR 46:120 specifically, contain no advance permitting requirements for CCR landfills. This elimination of prior technical review by

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51 *Id.* Ex. 3. The Cabinet's decision to obtain input from the utilities, without obtaining input from other sources such as technical, engineering, scientific, or environmental organizations, has been the subject of much public debate. *See, e.g.*, Secretary Charles Snavely, *Ky. Response to Coal Ash Editorial* (Dec. 29, 2016), http://www.courier-journal.com/story/opinion/contributors/2016/12/19/ky-response-coal-ash-editorial-charles-snavely/95884988/; Erica Peterson, *Kentucky Regulators, Industry Reps Privately Rewrote Coal Ash Rules* (Jan. 17, 2017), http://wfpl.org/kentucky-regulators-industry-reps-privately-rewrote-coal-ash-rules/.

52 Compl. Ex 3 at 4.

53 *Id.* at 5.

54 *Id.* at 12.

the Cabinet and public notice is a complete reversal of a longstanding regulatory policy, and it requires a rational explanation.

The explanation offered by the Cabinet, that the changes were required by federal mandate and that the increased technical standards reduced the need for prior review and approval of permits, are clearly erroneous. As noted above, there is no federal mandate to eliminate the Cabinet's longstanding policy of requiring prior technical review and public notice for CCR landfill permits.

In addition, 401 KAR 45:050's extensive public information procedures that had previously been required for CCR landfills have been reduced to mere proof of publishing notice in a newspaper.[55] There is no regulatory provision for citizens whose property or water supply may be adversely affected to question or challenge a permit-by-rule, as opposed to the permit previously required for CCR landfills.

In addition to deviating from its prior statements on the necessity of advance permitting and public notice/hearings, the Cabinet's reasons for abandoning advance permitting are inherently unreasonable. For example, "the prescriptive nature of newly incorporated rules," does not support *abandoning* advance permitting and oversight. If anything, the only reasonable inference is that more extensive technical rules would require *additional* oversight to ensure compliance. Further, "the deadlines associated with the rules" also rings hollow insofar as demonstrating a rational basis or "substantial evidence." The *utilities* were required to comply with the EPA's implementation deadlines. Such compliance did not necessitate the Cabinet's abdication of its advance permitting and oversight function.

55 *See* 401 KAR 46:120 Section 7(3).

Finally, the Court fails to see how the Cabinet's "ability to maintain its enforcement and inspection role while utilities implement the federal standards" would be negatively impacted by retention of advance permitting and oversight. In fact, as Commissioner Scott explained to the EPA in 2010, any post-construction enforcement action that found a problem with the landfill design or construction *after the fact* would only increase the costs of remediation. Such post-construction inspection and enforcement efforts, with regard to the critical issue of technical or design flaws, are "virtually worthless," as Commissioner Scott so trenchantly pointed out in his comments on behalf of the Commonwealth to the EPA.

Furthermore, the Cabinet has argued that the new CCR regulations, mirroring the federal regulation, impose far stricter technical standards on CCR landfills. Therefore, the Cabinet argues, there is no need for prior review and approval of the technical plans for CCR landfills, even though this kind of technical oversight, and the public notice and opportunity to be heard that goes with it, was previously required for the less stringent technical standards.

The Cabinet's position is wholly inconsistent with its own longstanding policy, as explained by Commissioner Scott when the EPA commenced its rulemaking procedure. The EPA then imposed stricter technical standards, but it did not have authority to impose permitting procedures. The Cabinet adopted the EPA technical standards, but then eliminated its longstanding permitting procedures even though it had argued to the EPA that such prior technical review and public notice was necessary.

There is no rational support for eliminating prior technical review and public notice when the Cabinet increases the technical standards. It would be similar to adopting a regulation that lowers the speed limit on Interstate Highways from seventy (70) mph to fifty (50) mph, but then also prohibits the State Police from patrolling Interstate Highways or writing speeding tickets:

once there has been a car wreck, it is too late to enforce the speed limit. While the Cabinet retains inspection and enforcement authority under the permit-by-rule approach adopted by the Cabinet, the increased technical standards will be meaningless if the design or construction of the landfills is flawed. The self-policing approach taken by the Cabinet here is literally an accident waiting to happen. Moreover, it replicates the policy that resulted in the environmental disasters with the CCR slurry ponds that were permitted under the same kind of self-regulating scheme that the Cabinet now seeks to adopt for CCR landfills.

With the elimination of Cabinet technical review of design and construction, such flaws cannot be discovered until *after* the design flaw results in contamination of groundwater or some other environmental disaster. As the Cabinet itself noted during the EPA rulemaking, "**Providing technical comments after construction is virtually worthless, and the state may be placed in a position of requesting demolition and reconstruction in the worst case, which would double or triple construction costs.**"[56] The Cabinet is free to change its position, and to amend regulations to implement policy changes, but such changes must be supported by a rational basis under Kentucky law. Here, the Cabinet has provided no rational explanation to support its elimination of prior technical review and public notice for CCR landfills.

In ruling on a due process challenge to an amendment to statute, the Kentucky Supreme Court has held that "so long as the statutory amendment was rationally related to a legitimate public purpose, it would not violate due process."[57] The same standard applies to amendments to administrative regulations. Here, the Court can discern no rational relationship to a legitimate public purpose. By eliminating Cabinet review and oversight of CCR landfill permits and any

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56 Compl. Ex 1 at 20–21 (emphasis added).

57 *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009) (referring to the United States Supreme Court's holding in *United States v. Carlton*, 512 U.S. 26, 33 (1994)).

notice and opportunity to be heard by the public, the Cabinet has changed its longstanding policy in a manner that is contrary to the public interest. The amendment to the regulation serves only the short term economic interests of the utility industry, to the detriment of the public.

These amendments abdicate the Cabinet's responsibility for protection of public health and the environment in the permitting process for CCR landfills. Moreover, these amendments eliminating state oversight of CCR landfill permits, and gutting the provisions of the regulation that provided for meaningful public notice and the opportunity to be heard, were promulgated when the Cabinet's own testimony demonstrates that the volume of CCR waste disposed in landfills will increase dramatically (because of the closure of the slurry ponds under the new EPA regulations). Thus, at the very time that the need for effective oversight is dramatically increased, the Cabinet has abdicated its power and duty to conduct technical review of permit applications and to provide for public input into the permitting process.

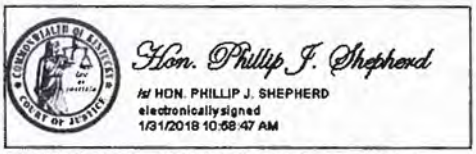
Arguably, there *is* one rational basis for the Cabinet's action: to reduce the regulatory burdens and costs on the utility industry. That policy goal, however, is wholly outside of the Cabinet's statutory powers and duties. Moreover, the goal of reducing the costs and regulatory burdens on the utility industry, in this case, is also wholly inconsistent with the Cabinet's statutory duty to protect public health and the environment, and to "provide for the prevention, abatement, and control of all water, land and air pollution." [58] Accordingly, the Court finds that there is no rational basis to support the amendments of the administrative regulation that provide for elimination of the Cabinet's permit review and oversight and for public notice and opportunity to be heard in the permit process.

[58] KRS 224.10-100(5).

IV. CONCLUSION AND SUMMARY JUDGMENT

There is no dispute in this case over the proper technical standards that should apply to CCR landfills. The dispute is whether the adoption of the technical standards now required by federal regulation justify a change in the Cabinet's longstanding requirement that CCR landfills must be subject to prior technical review and approval, along with public notice and the opportunity to be heard. For the reasons stated above, the Court finds and declares, pursuant to KRS 418.040 and CR 57, that the Cabinet's adoption of the 401 KAR 46:120, to the extent that it establishes a "permit by rule" with no prior approval by the Cabinet, is arbitrary and capricious, and thus void and unenforceable under Section 2 of the Kentucky Constitution. The Court further finds that the "permit by rule" approach to regulating CCR is inconsistent with the Cabinet's duty to "provide for the prevention, abatement and control of all water, land and air pollution" as set forth in KRS 224.1-100(5), for the reasons articulated by the Cabinet itself in its response to EPA rulemaking. The Cabinet has demonstrated no rational basis to change that position. The Court further finds and declares that the exemption of CCR landfills operated by utilities from the public notice and public participation requirements of 401 KAR 45:050 and KRS Chapter 224, is arbitrary and capricious, and thus void and unenforceable under Section 2 of the Kentucky Constitution. The Court finds that these regulatory changes adopted by the Cabinet are not supported by any rational basis or substantial evidence. Accordingly, the Court being sufficiently advised hereby **GRANTS** Plaintiff's Motion for Summary Judgment and **OVERRULES** Defendants' Motions for Summary Judgment.

This is a final and appealable order, and there is no just cause for delay. **IT IS SO ORDERED** this 31st day of January, 2018.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO.17-CI-00474
ELECTRONICALLY FILED

KELLEY LEACH PLAINTIFF

v. ORDER GRANTING MOTION FOR CLARIFICATION AND AMENDING OPINION AND ORDER

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET;

CHARLES SNAVELY, In His Official Capacity
As Secretary of the Energy and Environment Cabinet

And

LOUISVILLE GAS AND ELECTRIC COMPANY, INC. DEFENDANTS

* * *

This matter is before the Court on the Plaintiff's Motion for Clarification of Opinion and Order pursuant to CR 59.05. The Court, having considered the Motion and the Joint Response of Defendants, and being otherwise sufficiently advised hereby grants Plaintiff's Motion for Clarification of the Opinion and Order entered by this Court on January 31, 2018, as supplemented further by the additional paragraphs suggested in the Defendants' Response Memorandum, which was agreed to by the Plaintiff, and amends and reissues that *Opinion and Order* as follows:

1. On Page 21 of the *Opinion and Order,* additional paragraphs are added at the end of the *Opinion and Order* to read:

> 401 KAR 46:120, except as provided below, and the revision to 401 KAR 45:010 Section 1(16)(b) that exempted the utility coal combustion wastes from regulation as "special

wastes" under 401 KAR Chapter 45, are arbitrary and capricious, and void and unenforceable. The regulation of CCR generated by utilities as "special wastes" pursuant to 401 KAR Chapter 45, subject to prior state technical review and public participation, is reinstated.

401 KAR 46:120, Sections 4 and 5 are not found to be arbitrary and capricious, and are therefore valid and enforceable.

Further, the actions of the Defendant Cabinet approving the transition of CCR units from 401 KAR Chapter 45 to the voided "registered permit by rule" status, are themselves void and the affected facilities are restored to their prior regulatory status pursuant to 401 KAR Chapter 45. Because some facilities may have been modified after transitioning to registered permits by rule under 401 KAR 46:120 and others relied on the registered permit by rule process in planning new CCR landfill capacity, the Court recognizes that interim relief may be required and granted by the Cabinet through Agreed Orders in appropriate circumstances to existing and new landfills until permits are issued or modified under 401 KAR Chapter 45 procedures for those facilities. An Agreed Order entered pursuant to this Opinion and Order will be limited to assuring compliance with those provisions of the federal regulations, as incorporated into 401 KAR 46:110, that require approval earlier than could be provided under the procedures of 401 KAR Chapter 45. The Cabinet agrees to post an Agreed Order to its website immediately upon execution, and to concurrently provide notice to Plaintiff through counsel of the posting of any such Agreed Order.

Further, the standards governing CCR units subject to the federal CCR Rule at 40 CFR Part 257, which remain incorporated at 401 KAR 46:110, shall control in permit reviews required under 401 KAR Chapter 45 pursuant to this *Opinion and Order* for such units.

Nothing in the Court's *Opinion and Order* shall be construed as determining the validity *vel non* of permits by rule or registered permits by rule authorized by Cabinet administrative regulations other than 401 KAR 46:120.

This is a final and appealable order, and there is no just cause for delay. **IT IS SO ORDERED** this _____ day of _____, 2018.

Hon. Phillip J. Shepherd

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

Duke Energy Kentucky
Case No. 2018-00156
Staff Second Set Data Requests
Date Received: August 31, 2018

STAFF-DR-02-002

REQUEST:

Refer to Duke Kentucky's response to Commission Staff's First Request for Information (Staff's First Request), Item 1. Explain how Duke Kentucky will manage the West Landfill Cell 1 and Cell 2 footprint to limit the open footprint to 55 open acres, as required to properly form Poz-o-tec and comply with the operational permit.

RESPONSE:

Pursuant to Duke Energy Kentucky's current Special Waste landfill permit SW00800006; the active area is listed as 55 acres. Cells 1 and 2 collectively provide about 75 acres of footprint. To adhere to the permitted active area limit, the landfill operator through use of survey and other engineering controls will be limited to place waste in 55 acres of the two colletive cells. Additional acreage in Cell 2 will only be opened as active area after the equivalent amount of acreage is covered in Cell 1.

PERSON RESPONSIBLE: Adam Deller

Duke Energy Kentucky
Case No. 2018-00156
Staff Second Set Data Requests
Date Received: August 31, 2018

STAFF-DR-02-003

REQUEST:

Refer to Duke Kentucky's response to Staff's First Request, Item 5.

a. Refer to subpart b of Item 5. Explain why the fly ash transportation costs from other generating source decreased from $742,481 in 2013 to $453,075 in 2014 and from $630,413 in 2016 to $495,847 in 2017.

b. Refer to subpart c of Item 5. Provide an explanation as to why Duke Kentucky no longer receives fly ash from the generating source that did not charge any transportation cost.

RESPONSE:

a. There are several variables that factor into the total cost of fly ash transportation each year. They include East Bend Station operating runtime and outage schedules, the outside sources individual run times and outage schedules, which can all dictate the available fly ash sources. The performance of the site equipment and controls which can dictate the amount of additional fly ash needed for waste stabilization. The transportation cost from each of the sources also factors into the annual cost.

b. Duke Energy Kentucky no longer has an agreement with the generating source which did not charge a transportation cost for flyash, since this source no longer generates flyash.

PERSON RESPONSIBLE: Adam Deller