

**COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
FILE NO. DWM-160048
AGENCY INTEREST # 998**

IN THE MATTER OF: Advanced Disposal Services Blue Ridge Landfill, Inc.
 2700 Winchester Road
 Irvine, KY 40336
 Permit # SW030004

RESPONSES TO COMMENTS ON PROPOSED AGREED ORDER

On October 21, 2016, the Energy and Environment Cabinet (“Cabinet”) issued a press release and a notice soliciting comments on a proposed agreed order (“Agreed Order”) between it and Advanced Disposal Services Blue Ridge Landfill, Inc. (“Blue Ridge Landfill”). The proposed Agreed Order contains provisions reciting facts, remedial actions, and penalty payments. After a thirty-one (31) day comment period, the Cabinet received five sets of comments on the Agreed Order. The Cabinet organized the comments into common categories and is responding to each category below.

1. **COMMENT 1:** All five comments addressed the civil penalty, with four commenters suggesting specific or greater penalties with the other commenter recommending that the penalty be sufficient to remove financial incentive garnered from the alleged violation. One commenter made recommendations using factors set forth in NREPC v. Maggard (“Maggard Factors”). Multiple comments related to requiring a penalty in addition to Supplemental Environmental Projects (“SEP”) payments, which were understood to be requests for higher penalty. Multiple comments also addressed the interpretation of stipulated penalty provisions.

RESPONSE 1: The Maggard Factors are a guide established by the Office of Administrative Hearings (OAH) for a hearing officer to establish a penalty following an administrative hearing. The Maggard Factors have no direct application to negotiated penalties, except to the extent the Cabinet considers the Maggard Factors when preparing for negotiations. The Cabinet also considers the burden it would bear in demonstrating the factors, the costs associated with a hearing, and the resultant delay in remedial actions from holding a hearing.

In this Agreed Order, the SEP payment in paragraph 27(b) and the cost of radiation monitors required in paragraph 27(a) exceed the revenue Blue Ridge Landfill generated by accepting the unpermitted TENORM wastes. As such, the proposed penalty and offsetting SEPs removed any financial benefit from accepting the unpermitted waste, without accounting for the additional costs already borne by the landfill responding to the Notice of Violations (“NOV”), and the likely future costs associated complying with the remedial measures in the Agreed Order.

The Cabinet concurs with the statement in one of the comments that “the focus of EEC’s enforcement needs to be on ensuring that the landfill designs and completes” protective remedial measures. As it relates to that, seeking additional penalty through a hearing which will result in

further remedial delay and does not guarantee a favorable outcome for a higher penalty, does not advance that focus on the remedial outcome.

The Cabinet acknowledges the comments regarding the stipulated penalty for Blue Ridge Landfill accepting unpermitted waste in the future. The language of the Agreed Order adequately addresses those concerns.

2. **COMMENT 2:** Multiple commenters suggested that the eventual requirements of the Corrective Action Plan (“CAP”) be incorporated into the permit. Several comments included specific recommendations regarding what should be included into the permit. At least one comment recommended all portions of the CAP be made part of the permit and one commenter suggested the county host agreement be included in permit conditions.

RESPONSE 2: The Agreed Order does not prohibit the Cabinet from requiring certain aspects of any proposed CAP to become permit conditions as part of approving the CAP. Either removal or long-term management in-place of the TENORM would require modifications to the existing permit. Long term effectiveness of any remedy will, by definition, include long term responsibility consistent with KRS Chapter 224. The permit modification and review process set forth in 401 KAR Chapter 47 allows the Cabinet and the public to consider appropriate requirements tailored to implement and enforce any proposed long term remedial measures of the CAP as permit conditions.

The landfill will be proposing a CAP. Until the CAP is submitted the Cabinet cannot comment on the specifics of how the permit may be modified under an in-place long-term management remedy. The Agreed Order gives the Cabinet discretion to determine what portions of the CAP should be incorporated into the permit.

Paragraph 19(c) of the Agreed Order requires a plan for detecting and preventing unpermitted TENORM wastes in the future, and that this plan be included in the permit. Further, to offset penalty, the portion of SEPs that allow installation of radiation monitors already requires that the Blue Ridge monitors be included in the permit as part of the plan to detect and prevent unpermitted waste. Likewise, para 27(a)(iii) already contemplates the need for quality assurance and quality control (“QA/QC”) of the radiation monitors by requiring the monitors to be “maintained, calibrated, and quality control is performed consistent with manufacturer specifications.” This language was written so that manufacturer specifications and recommendations regarding QA/QC and maintenance would be considered as part of the condition.

The county host agreement is a separate legal contract wholly distinct from the permit. Its terms are enforceable by the host county in courts of that jurisdiction and often deal with matters outside the regulatory scope of the Cabinet. As such, including those terms in the permit would not be appropriate.

3. **COMMENT 3:** Multiple commenters made comments or suggestions regarding potential reporting requirements for radiation monitors, including recommendations that reports be provided directly to the local government and commenting citizen groups.

RESPONSE 3: The Cabinet notes the comments and recommendations regarding potential radiation monitor reporting requirements, their duration, their contents and their availability to the public. Specific reporting requirements should be appropriately incorporated into the plan to detect and prevent future unpermitted TENORM wastes that will be required as part of the CAP. The public will have additional opportunity to comment on those specifics as part of determining community acceptance once a CAP is submitted.

Any reporting requirements imposed as part of the CAP and permit are subject to inspection through Kentucky's Open Records Act. The Cabinet takes no position with regard to any reporting requirement owed to other parties negotiated as part of any host agreement or resolution to other legal action.

4. **COMMENT 4:** The Cabinet received several comments discussing specific recommendations for the Corrective Action Plan (CAP), Cabinet review of the CAP, and CAP provisions of the Agreed Order, which are separately addressed below in responses 5, 6, and 7.
5. **COMMENT 5:** One commenter indicated paragraph 19(a) should be revised to include the phrase "be the most protective". Another commenter suggested specific closure cap requirements. Still another comment inquired what analytical tools would be utilized by the landfill and how the Cabinet would analyze those tools.

RESPONSE 5: Under the Agreed Order, the formulation of the CAP is the responsibility of Blue Ridge Landfill. Until the CAP is submitted the Cabinet cannot comment on the specifics of what that plan entails or how the permit would be modified. Blue Ridge Landfill will determine what appropriate assessment tools and models to propose as part of the CAP.

It is the responsibility of the Cabinet, in consultation with the Cabinet for Health and Family Services ("CHFS"), to review the CAP to evaluate whether the remedies proposed meet the criteria listed in the Agreed Order and to determine if any of the proposed remedies are acceptable. When evaluating the CAP, the Cabinet and CHFS will avail themselves to the necessary resources to ensure the proposed CAP is appropriate and protective of human health and the environment.

In its review of the CAP, the Cabinet will consider protection of human health and the environment to be threshold criteria. If the proposed remedy does not meet this threshold criteria, it will not be approved by the Cabinet. The ability to implement, long-term effectiveness, short term effectiveness, and compliance with applicable state laws and regulations will be weighed in the Cabinet's consideration of the remedies proposed by Blue Ridge Landfill.

6. **COMMENT 6:** All five commenters made comments regarding the meaning of "community acceptance". Multiple comments suggested allowing the public to be given reasonable opportunity to provide comments. Suggestions included making each non-final iteration of a CAP be subject to notice and comment, any final CAP or any Amended CAP subject to notice and comment, and allowing a sixty (60) day comment period.

RESPONSE 6: The Agreed Order does not prohibit the Cabinet from soliciting public comments on the CAP, and the Agreed Order requires the Cabinet to consider "community acceptance" of the CAP when deciding whether or not to approve it. The Cabinet interprets "community acceptance" to

involve a notice and comment period of the CAP. The language of the Agreed Order appropriately allows the Cabinet to seek input from the community and weigh that input against other factors as part of its determination. At the appropriate time the Cabinet will seek public comment on the CAP, either simultaneous with its initial review or after the plan has been resubmitted in response to Cabinet comments. The technical aspects of the CAP will determine what is a reasonable length of time for a comment period.

The Cabinet agrees that substantive and technical changes proposed in any Amended CAP may be appropriate for public comment, and where necessary, will provide the public an opportunity to comment thereon. Not every amendment to a CAP will be substantive or technical in nature. Often, such amendment requests deal with deadlines that may not be met for reasons unrelated to the protectiveness of the remedy, such as inclement weather. Allowing comment on such minor changes provides little, if any benefit, and may serve to cause unnecessary delay.

All plans submitted to the Cabinet for review are themselves public records subject to inspection. Nothing in the Agreed Order prevents interested individuals or organizations from requesting records, reviewing the publicly available records on the public website, and sending unsolicited comments to the Cabinet on preliminary or proposed amended versions of the CAP prior to the Cabinet making a determination.

7. **COMMENT 7:** One comment requested the Cabinet include the commenter on every communication between the Cabinet and the landfill.

RESPONSE 7: Neither Kentucky Open Records Act or KRS 224 require the Cabinet to include the public in every preliminary communication, written or otherwise, between the Cabinet and a responsible party. This is standard operating procedure under the Open Records Act in order to manage the volume of activity that the agency conducts with the thousands of activities that the agency deals with each day. Such a requirement in this Agreed Order would hinder the iterative process that is involved in dealing with technically complex response actions and would be unnecessarily burdensome and unworkably slow.

Final communications, including cover letters, formal responses, and notices of deficiency are already open records available to the public for review. The Cabinet is maintaining final communications on a publicly available website.

8. **COMMENT 8:** Multiple comments discussed the appropriateness of including “cost” as factor the Cabinet will consider in approving any CAP that does not remove the waste.

RESPONSE 8: The factors listed in paragraphs 19(a) and (b) are only necessary for a CAP that does not propose removing the waste. Blue Ridge Landfill has not yet submitted a CAP for review. Those factors are listed in 401 KAR 100:030 and are commonly considered in similar types of federal remedial response activities required by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The Agreed Order imposes no specific weight to any of the factors listed in paragraphs 19(a) and (b). The ability to implement, long-term effectiveness and short term effectiveness will be weighed in the Cabinet’s deliberations on remedies proposed by Blue Ridge Landfill.

9. **COMMENT 9:** Multiple comments made specific suggestions for the SEPs. Some comments suggested the penalty or SEP funds be dedicated to long term care and monitoring of the facility. Another commenter suggested to use the funds provided to the school to establish an environmental education course. Other comments related to the specific types of monitoring equipment that will be purchased.

RESPONSE 9: The Cabinet interprets the comments seeking SEPs in addition to penalty as requests for higher penalty. The Cabinet has responded to comments with respect to penalty amounts in Response 1 above.

The Cabinet recognizes that the CAP may require permit amendments or changes to financial assurance mechanisms associated with its long term implementation. Due to the statutory constraints on the Cabinet with respect to the final disposition of any penalty payments received, however, such changes in financial assurance should be considered part of remedial measures rather than penalty. Likewise, since potential long term care funds would be associated with the requirements for final closure and monitoring of the landfill, they likely constitute items already within the regulatory authority of the Cabinet and are not appropriately characterized as SEPs.

The Cabinet has referred Blue Ridge Landfill to CHFS for guidance on the appropriate type of monitoring equipment that should be purchased. The Cabinet has conferred with the landfill, and agrees that the establishment of an Environmental Studies course at the Estill County High School, if the school system so desires, would be an appropriate use for the SEP payment. The SEP language in the Agreed Order has been changed accordingly.

10. **COMMENT 10:** Multiple commenters questioned the reliability or credibility of the Dose and Risk Assessment Report already conducted by Blue Ridge Landfill in response to the NOV.

RESPONSE 10: Radiation safety and health are the primary responsibility of the Cabinet for Health and Family Services, and CHFS is independent of the company that generated the report. Therefore, the Cabinet will rely on the technical and programmatic expertise and input that CHFS has provided, and will continue to provide moving forward related to radiation safety and health. CHFS reviewed the radiation assessment report solely based on its technical merits and completeness and will do the same on the draft CAP.

11. **COMMENT 11:** One comment recommended inserting a provision dealing with filter sock/surface hot spot that Blue Ridge Landfill remediated pursuant a plan approved by CHFS earlier this year.

RESPONSE 11: A filter sock was found on the surface of the landfill during one of the multiple inspections. After a records review, Blue Ridge Landfill identified the waste as having been generated in Kentucky. Blue Ridge worked with CHFS to remediate and dispose of the waste in an out of state landfill permitted to accept this material. While the Cabinet was kept informed of the remedial efforts, all actions related to the filter sock/hot spot identified on the surface of the landfill occurred under the regulatory purview of CHFS, and therefore is not appropriate to include in the Agreed Order.

12. **COMMENT 12:** One comment recommended replacing “Blue Ridge relied” with “Blue Ridge asserts it that relied . . .” in paragraph 6 to better clarify what the Cabinet’s position is.

RESPONSE 12: The Cabinet agrees with the comment for both paragraphs 6 and 7, and Blue Ridge Landfill has agreed to the revision in the Agreed Order.

13. **COMMENT 13:** Some comments indicated a few commenters were not clear as to the scope of the violations being resolved.

RESPONSE 13: Paragraph 4 of the Agreed Order recites facts that were determined during the investigation and defines “BES Waste” to include the 47 loads recited in the NOV as well as other shipments “from other generators in Ohio.” The Agreed Order resolves all issues related to those BES Wastes, which the Cabinet determined to be 92 total loads at this time. Paragraph 13 of the Agreed Order refers to agency documents that initiated enforcement action, but that document did not conclude the investigation. After review of records maintained by Blue Ridge Landfill, which were turned over to the Cabinet following the issuance of the NOV, both the Cabinet and Blue Ridge Landfill uncovered additional loads associated with the disposal of unpermitted TENORM waste. As such, the Cabinet asserts that there is no ambiguity about what unpermitted disposal is being resolved.

14. **COMMENT 14:** Some comments suggested specific medical monitoring requirements for both landfill workers and others be imposed upon the Blue Ridge Landfill.

RESPONSE 14: At this time the Cabinet has no information indicating that radioactive particulate matter was transported and deposited beyond the working face of the landfill. Blue Ridge Landfill is responsible for compliance with the Occupational Safety and Health Act (“OSHA”) and any other health and safety requirements that may apply to their employees. OSHA requirements that may apply to Blue Ridge Landfill fall outside this Cabinet’s jurisdiction and are under the purview of the Labor Cabinet.

15. **COMMENT 15:** One commenter requested information regarding the specific methodologies, analyses, and analytical techniques utilized during the radiation surveys and sampling at the landfill and school. Another comment suggested paragraph 11 of the Agreed Order include specific levels of radionuclides detected, and levels that are acceptable under state and federal law.

RESPONSE 15: Records related to the numerous surveys and sampling conducted on the school grounds and landfill are available on the Cabinet’s publically available website, as well as by request from CHFS. The specific sampling event referenced in paragraph 11 was conducted at the request of Estill County Schools by the school’s contractor, and compared sampling results against levels established by 10 CFR 20, Appendix B, Table 2 incorporated by reference in 902 KAR 100:019, Section 11. CHFS reviewed all monitoring and sampling data, and agreed that none of the results exceeded regulatory limits. The Cabinet reasonably relies on CHFS’s expertise in analyzing and interpreting those results.

16. **COMMENT 16:** There were several comments and questions regarding other matters, including, but not limited to, questions related to the difference between NORM and TENORM, questions related to another landfill, questions related to instate and out of state sources, the differences in types of oil and gas waste, and potential new regulations.

RESPONSE 16: In general, several of these comments were not specifically related to the Blue Ridge Landfill or the Agreed Order.

Kentucky Revised Statute Chapter 224 defines oil and gas related wastes as “special waste”. Special waste is a category of waste that can be legally disposed in municipal contained solid waste landfills within the Commonwealth. As noted above in the response to a comment regarding the “filter sock/hot spot”, the Cabinet is aware that Blue Ridge Landfill received at least one shipment of these types of special wastes from in-state sources. Records related to the “filter sock/hot spot” have previously been made available to the public. The Cabinet, while reviewing manifests, did not seek to identify all in-state sources of TENORM. Information within the Cabinet’s possession regarding the specific radioactive characteristics of the “filter sock/hot spot”, Fairmont Brine Wastes, and other oil and gas wastes known to have been disposed of at the Blue Ridge Landfill is publicly available on the Cabinet’s website. Information within the control of CHFS can be requested from that agency.

Several of the comments have been the subject of the public meetings of the Oil and Gas Work Group, which has been collectively working to establish parameters for the management and disposal of TENORM waste related to oil and gas drilling and production. The Cabinet and CHFS anticipate both statutory and regulatory amendments to reflect the technical and programmatic issues identified by the Oil and Gas Work Group. These amendments are geared specifically to address the management and disposal of TENORM waste generated in Kentucky. There are no plans to reverse Kentucky’s disposal prohibition for TENORM wastes generated outside of Kentucky from sources not already allowed under the Midwest Regional Compact.