

**COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
OFFICE OF ADMINISTRATIVE HEARINGS
CASE NO.:**

CONCERNED CITIZENS OF ESTILL COUNTY, INC.

PETITIONERS,

V.

ENERGY AND ENVIRONMENT CABINET

RESPONDENT.

**SERVE: Charles G. Snavelly, Secretary
Energy and Environment Cabinet
300 Sower Blvd.
Frankfort, KY 40601**

PETITION FOR HEARING AND REVIEW

Petitioners, Concerned Citizens of Estill County, Inc. (“CCEC”) by and through counsel and pursuant to KRS 224.10-420 file this petition for review of the Energy and Environment Cabinet’s (“EEC”) May 9, 2018 determination to accept the Corrective Action Plan submitted by Advanced Disposal Services’ Blue Ridge Landfill (“BRL”). In support of this Petition, CCEC states as follows:

1. This action is brought pursuant to KRS 224.10-420 seeking review of EEC’s approval of the Corrective Action Plan (“CAP”) submitted by BRL.
2. Petitioner, CCEC, is a non-profit Kentucky membership corporation incorporated under the laws of the Commonwealth of Kentucky and organized on June 13, 2016 with its principal office at 1548 Wisemantown Road, Irvine, Kentucky.
3. CCEC members reside in or work in Estill County and are persons with an interest that is adversely affected by the approval of the CAP. CCEC members

include, but are not limited to, Tom Bonny of Irvine, Kentucky. CCEC members and CCEC are persons “aggrieved” within the meaning of KRS 224.10-420.

4. CCEC was formed specifically in response to the illegal dumping of nearly 1500 tons of radioactive waste in the municipal landfill in Irvine, Kentucky that occurred in 2015 and 2016.
5. At all times relevant to this Petition, BRL operated the landfill.
6. EEC is an executive branch agency of the Commonwealth of Kentucky created by KRS Chapter 224.
7. CCEC and its members are persons “not previously heard in connection with the issuance of any order or the making of any final determination arising under this chapter” as those terms are used in KRS 224.10-420(2).
8. The right to demand a hearing is limited to a period of thirty (30) days after actual notice or when the petitioner could reasonably have had such notice.
9. This petition for review is timely filed, inasmuch as the EEC determination to approve the CAP occurred on May 9, 2018.
10. Among other statutory duties imposed on EEC pursuant to KRS Chapter 224, under KRS Chapter 224, Subchapter 43, EEC is charged with the duty of providing for the management of solid waste in Kentucky “in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment.” KRS 224.43-010(1).

11. Additionally, KRS 224.1-400 imposes requirements on both the responsible party and the EEC regarding the remediation of releases to the environment intended to assure protection of human health and the environment.
12. The party responsible for a release of a hazardous substance, pollutant, or contaminant into the environment as occurred here is obligated to take action pursuant to KRS 224.1-400(18) and (19) to characterize the extent of the release and to correct the effect of the release on the environment, demonstrating that “the remedy is protective of human health, safety, and the environment,” considering a number of factors outlined in KRS 224.1-400(21).
13. Additionally, the EEC is constrained to make a final determination approving a proposed plan to determine the effect of the release on the environment and to take actions necessary to correct the effects of the release, only where the applicant has “demonstrate[d] to the cabinet that the remedy is protective of human health, safety, and the environment[.]” KRS 224.1-400 Sections (21), (22).
14. A determination of the Cabinet approving a CAP submitted pursuant to KRS 224.1-400 approving a plan in contravention of the standards of KRS 224.1-400 and the requirements of 401 KAR 100:030 is arbitrary, capricious, and inconsistent with law.
15. From July 2015 through late 2015 or early 2016, BRL illegally received and land-disposed of multiple loads of radioactive waste from hydraulic fracturing operations in West Virginia, Ohio, and Pennsylvania.

16. The Central Midwest Compact Commission statute, KRS 211.859, and the Regional Management Plan adopted by the Compact Commissioners, prohibit the importation and acceptance of low-level radioactive waste generated outside of the Compact boundaries into Kentucky from any state other than Illinois. The shipment and acceptance of naturally occurring radioactive material violated the prohibition contained in the Compact and the Regional Management Plan.
17. Once radioactive waste was accepted at and disposed of in the landfill, the facility was no longer simply a solid waste site or facility, but became subject to the Compact Commission statute and management plan, and the regulations of the Cabinet for Health and Family Services. The development and approval of the CAP, and determination of the appropriate risk end-points for short-term and long-term risk, should have actively involved the Radiation Control Branch, and the determination of “acceptability” should have been constrained by the modeled exposure assumptions underlying the imposition of 200 pCi/g of Ra-226 and Ra-228.
18. According to the Agreed Order entered into in DWM 160048, each shipment was accompanied by a Profile Sheet falsely indicating that the shipment did not contain radioactive waste as defined by state and federal regulation.
19. None of the shipments received contained any type of report of the levels of radionuclide activity in the shipment.
20. EEC definitively learned of BRL’s receipt of the illegal shipments of radioactive waste in late January 2016.

21. Based on information and belief, by that time, most, if not all, of the radioactive material had been buried under multiple loads of municipal solid waste.
22. No core drilling or other direct sampling was done to determine the radionuclide activity of the waste shipments that had been illegally received.
23. On March 8, 2016, the Cabinet issued BRL a Notice of Violation of (a) 401 KAR 47:190 §8(1)(b); (b) KRS 224.1-400(18); (c) 401 KAR 47:120 §1(1); and (d) 401 KAR 47:190 §8(5).
24. From March 8, 2016 to October 21, 2016 EEC and BRL engaged in extensive negotiations regarding the landfill's violations.
25. Those negotiations resulted in an Agreed Order that was released for public comment on October 21, 2016.
26. The Agreed Order required, *inter alia*, that BRL develop a Corrective Action Plan (CAP) consistent with the remediation requirements set forth in 401 KAR 100:030.
27. The Agreed Order also required that EEC consider community acceptance of any proposed remedy before approving the CAP.
28. The Agreed Order was executed and finalized on January 3, 2017.
29. From that date until November 17, 2017, BRL and EEC negotiated the requirements of the CAP.
30. The proposed final CAP was released for public comment on January 11, 2018.
31. The proposed final CAP considered two alternatives under KRS 224.1-400 for remediation of the illegally disposed of radioactive waste. It does not appear of record that consistency with the requirements of KRS 211.859 nor of the

- regulations of the Cabinet for Family and Health Services regarding land disposal of radioactive material were adequately considered in determining the appropriate remedy.
32. The first alternative, closure in place, would allow BRL to leave the radioactive material in the landfill subject to certain conditions.
 33. The second alternative, excavate and redispense, would require BRL to excavate the material from the landfill and transport the material to a landfill designed to handle radioactive waste.
 34. BRL's CAP sought approval of remedial Alternative 1 on the basis that the long-term risks of Alternative 1 were acceptable while the short-term risks of Alternative 2 were not.
 35. EEC received over 40 comments from the public on BRL's CAP.
 36. Nearly all commenters favored Alternative 2 over Alternative 1.
 37. On February 12, 2018, CCEC filed with EEC comments on the proposed CAP.
 38. CCEC's comments stated emphatically that the group did not accept BRL's closure-in-place proposal, and made several arguments to support its position that removal of the radioactive material was necessary to protect public health and welfare.
 39. Despite the overwhelming assertion of the public's disapproval of BRL's chosen remedy, on May 9, 2018, EEC, by letter to BRL, announced its final determination that "either alternative would likely meet the regulatory standards of long-term protectiveness, but agrees that the CAP's preferred alternative

provides the greatest short-term protectiveness to human health and the environment.”

40. CCEC’s members are specifically injured and “aggrieved,” within the meaning of KRS 224.10-420(2), by EEC’s decision to allow the radioactive waste to remain in place at the landfill because of the unknown and uncertain effects on community members’ health and the environment for generations to come.
41. KRS 224.10-420 requires a petitioner to present allegations that the “order or final determination is contrary to law or fact and is injurious to him,” and “alleging the grounds and reasons therefor[.]”
42. The May 9, 2018 EEC approval of the BRL CAP constitutes a final determination reviewable under KRS 224.10-420.
43. The remainder of this petition for review provides those allegations required by KRS 224.10-420(2).
44. A hearing is demanded on such allegations that the agency has acted in a manner that it arbitrary, capricious, and is contrary to law and fact.

COUNT ONE

45. EEC’s acceptance of BRL’s preferred alternative amounts to a determination that the radioactive waste can be safely contained in BRL’s landfill so as to meet the standards of KRS 224.1-400.
46. The CAP bases its conclusions on the RAC 2017 Final Report’s estimate that the total weighted average radium concentration in the waste illegally dumped in the landfill is over 900 pCi/g.

47. In response to these instances of illegal dumping of radioactive waste, the Kentucky General Assembly passed KRS 211.893, which directed EEC and the Cabinet for Health and Family Services “to revise existing regulations in order to ensure the proper management of oil- and gas-related waste containing NORM.”
48. On December 7, 2017, EEC and the Cabinet for Health and Family Services adopted new regulation that states, “[t]he disposal of TENORM waste with an activity concentration greater than 200 pCi/g of combined Ra-226 and Ra-228 in a landfill in Kentucky shall be prohibited.” 902 KAR 100:180 §6(6).
49. The concurrence of the EEC with the conclusion that any concentration of combined Ra-226 and Ra-228 in excess of 200 pCi/g is prohibited as a matter of public health, represents the agency judgment that concentrations in excess of that value, even with enhanced liner and closure requirements, are inadequate to protect public health, safety and the environment.
50. In light of this, the EEC’s conclusion that the radioactive material with a presumed total weighted radium concentration of greater than 900 pCi/g can safely remain in the landfill, when the agency just last year determined that activity concentrations of greater than 200 pCi/g must be prohibited from all Kentucky landfills in order to protect public health and the environment, is arbitrary and capricious and is supported neither in law or in fact.

COUNT TWO

51. EEC accepted and affirmed the CAP’s conclusion that the long-term effects of leaving the radioactive waste in place are “acceptable.”

52. EEC failed to develop actual and sufficient data to characterize the levels of radionuclide activity in the loads of radioactive waste that were transported from two sources and disposed of at the landfill.
53. Instead, it appears based on available information that only a few loads of the Fairmont Brine wastes were analyzed and that no information was provided in such analysis concerning verification and validation of the data. EEC accepted waste characterizations that were extrapolated from scant and, at times, questionable data.
54. EEC's reliance on that data and acceptance of the CAP's conclusion that the long-term effects of allowing the material to remain in place are acceptable is contrary to law and fact, inasmuch as valid analysis of the relative risks associated with removal and burial in place cannot be made in the absence of adequate and valid characterization of the actual waste disposed of in the facility. The responsible party has a statutory obligation to adequately characterize the extent of the release, and no defensible comparative analysis of remedies can be made absent adequate characterization of the waste.

COUNT THREE

55. EEC accepted and affirmed the CAP's conclusion that the short-term risks of removing the radioactive material exceeded Kentucky's target cancer risk level.
56. The CAP's analysis of risks associated with removal of the radioactive waste failed to properly account for required safety precautions that would be undertaken with proper waste removal and redisposal. Both the CAP and EEC appear to have assumed that the removal activity would occur using landfill

workers. In fact, the handling, transfer, and disposal of the waste would have to occur under license from the Cabinet for Health and Family Services, by trained and properly equipped and protected workers.

57. Because of the failure to consider that proper removal protocols would be employed, the CAP overestimates the short-term risks of removal of the radioactive waste to workers and the public.
58. The EEC's acceptance of the CAP's conclusion regarding the short-term risks of removal is therefore arbitrary and capricious and contrary to law and fact.

COUNT FOUR

59. EEC's acceptance of BRL's CAP is conditioned on BRL's agreement to modify its permit to require radionuclide monitoring during the landfill's 30-year post closure period, which would extend at least until the mid-2060s.
60. The half-lives of the radionuclides of concern in the buried waste extend far beyond that time period; with the half-life of Ra-226 at an estimated 1500-1600 years.
61. Absent adequate characterization of the waste and of the interaction over time between the waste and landfill leachate, the potential fate and transport of the illegally disposed of wastes cannot be adequately modeled, and EEC's imposition of an arbitrary cut-off date for groundwater monitoring, and failure to extend the post-closure monitoring requirements in a manner consonant with the potential for groundwater contamination is arbitrary and capricious and is not supported in law or fact.

COUNT FIVE

62. EEC failed to require any type of financial assurances from BRL for corrective action in the event the radioactive material mobilized and threatened the health and safety of current or future residents of the area or threatened the environment.
63. In light of the significant temporal gulf between the proposed termination of closure care responsibility, and that time when the disposed-of waste will no longer present a nascent risk to human health and the environment, EEC's failure to require such financial assurances and to extend the closure care responsibilities in a manner consistent with the CHFS regulations governing active maintenance custodial care, institutional controls is arbitrary and capricious and is not supported in law or fact.

COUNT SIX

64. Numerical Paragraph 19 of the Agreed Order between the EEC and BRL required "a remediation plan in accordance with KRS 224.1-400 and 401 KARA 100.030 with adequate analytical or modeling data to demonstrate the proposed remedy will be protective of human health and the environment."
65. Approval of a remediation plan lacking analytical data of sufficient scope and quality to allow for modeling of risks, is arbitrary, capricious, and inconsistent with the Agreed Order under which the plan was developed, submitted, reviewed, and approved.

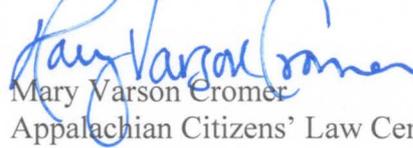
RELIEF REQUESTED

66. That this Petition for Hearing and Review be granted.
67. That a hearing be held on EEC's determination to accept BRL's CAP.

68. That the Hearing Officer's Finding of Facts and Conclusions of Law be issued finding that EEC's acceptance of BRL's CAP was contrary to law and fact.

69. That Petitioner be granted any further relief to which it is entitled.

Respectfully submitted,



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