

1 FINANCE AND ADMINISTRATION CABINET

2 Department of Revenue

3 (Amended After Comments)

4 103 KAR 8:160. Valuation of municipal solid waste landfill facilities.

5 RELATES TO: KRS 132.020, 132.200, 224.1-010

6 STATUTORY AUTHORITY: KRS 131.130, 132.202

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 132.202 requires the  
8 department to promulgate an administrative regulation to implement a valuation methodology for  
9 the taxation of property used as a landfill, also known as a municipal solid waste disposal facility.  
10 This administrative regulation establishes a uniform system of ad valorem valuation for a  
11 municipal solid waste disposal facility as defined in KRS 224.1-010(15).

12 Section 1. Definitions. (1) "Compaction ratio" means the ratio that expresses the  
13 relationship of the number of tons (2,000 pounds) of waste that will fill one (1) cubic yard of  
14 landfill capacity. For example, a compaction ratio of 0.60 means that sixty (60) percent of one (1)  
15 ton (1,200 pounds) of waste can be compacted into one cubic yard of landfill capacity.

16 (2) "Cover materials" means soil or other suitable material that is spread and compacted  
17 on the top and side slopes of disposed waste in order to control disease vectors, gases, erosion,  
18 fires, and infiltration of precipitation or run-on; support vegetation; provide trafficability; or assure  
19 an aesthetic appearance.

20 (3) "Department" means Department of Revenue, Finance and Administration Cabinet,

1 Commonwealth of Kentucky.

2 (4) "Discount rate" means a pre-tax percentage rate used to discount the annual royalty  
3 income over the projected remaining economic life of the landfill to a present value. ~~[The~~  
4 ~~discount rate shall be seventeen (17) percent unless the landfill operator or the department~~  
5 ~~establishes a higher or lower discount rate based upon applicable market factors and the~~  
6 ~~applicable facts and circumstances attributable to the landfill.]~~

7 (5) "Effective tipping fee" means the average net dollar amount collected per ton for  
8 depositing waste into the landfill being assessed not including surcharges, host fees, and related  
9 taxes.

10 (6) "Landfill" means a municipal solid waste disposal facility as defined by KRS  
11 224.1-010(15) but does not include construction and demolition debris (CDD) landfills of less than  
12 one (1) acre.

13 (7) "Landfill valuation method" means a discounted cash flow, also known as yield  
14 capitalization, which is a valuation methodology used to determine the fair cash value of a  
15 landfill's real property.

16 (8) "Other landfill income" means the five (5) year average of income generated by a  
17 landfill from sources other than effective tipping fees, net of applicable expenses.

18 (9) "Present value" means the sum of the discounted projected annual royalty income over  
19 the remaining life of the landfill. The present value formula is:

20 
$$PV = \frac{CF_1}{(1 + Y)^1} + \frac{CF_2}{(1 + Y)^2} + \frac{CF_3}{(1 + Y)^3} + \frac{CF_4}{(1 + Y)^4} + \frac{CF_5}{(1 + Y)^5} + \dots + \frac{CF_n}{(1 + Y)^n}$$

21 PV = present value of landfill

22 CF = the annual projected royalty income

23 Y = the annual pre-tax discount rate

n = the number of annual periods in the projection

1 (10) "Remaining permitted capacity" means the volume of permitted airspace remaining  
2 for the placement of waste materials.

3 (11) "Reversionary value" means the potential future market value of a landfill after all  
4 post-closure regulatory requirements, including a required minimum post-closure monitoring  
5 period of at least thirty (30) years, have been fulfilled by the owner or operator.

6 (12) "Royalty income" means that portion of effective tipping fees and other landfill  
7 income that would be paid pursuant to a presumed comparable market lease agreement by the  
8 landfill operator to the real property owner in consideration for the right to use the real property  
9 for landfill purposes.

10 (13) "Royalty rate" means a percentage rental rate to real property applied to the sum of  
11 the annual effective tipping fee revenue and other landfill income that results in the estimated  
12 royalty income for each year of the estimated remaining economic life of the landfill. ~~[The royalty  
13 rate shall be eighteen (18) percent unless the landfill operator or the department establishes  
14 a higher or lower royalty rate based upon applicable market factors and the applicable facts  
15 and circumstances attributable to the landfill.]~~

16 (14) "Tax year" means a calendar tax year.

17 (15) "Ton" means 2,000 pounds.

18 (16) "Tons of waste" means the five (5) year average of annual tons of waste received by  
19 the landfill, as determined utilizing information submitted to the Division of Waste Management  
20 for the Kentucky Department for Environmental Protection on Form DEP 7046, as incorporated  
21 by reference in 401 KAR 47:110, Section 5(1)(h)[or DEP 7046Q. When calculating the  
22 average, consideration shall be given to factors that alter the five (5) year average as an  
23 appropriate estimate].

1           (17)[(16)] "Waste" means waste as defined by KRS 224.1-010(31)(a).

2           Section 2. Landfill valuation methodology formula. (1) The department shall determine  
3 the fair cash value of a landfill's real property in compliance with the landfill valuation method  
4 established in this subsection.

5           (a) The department shall estimate the remaining permitted economic life of the landfill by  
6 dividing the estimated annual cubic yards of waste deposited into the landfill into the total  
7 remaining permitted capacity of the landfill.

8           1. The compaction ratio shall be calculated by taking the average of the five (5) most  
9 recent compaction ratios from the Solid Waste Landfill Annual Survey submitted to the Division  
10 of Waste Management for the Kentucky Department for Environmental Protection on Form DEP  
11 8059, available at <http://dep.ky.gov/formslibrary/Documents/DEP8059.doc>. Form DEP  
12 8059 is the form to be submitted by a municipal solid waste landfill permittee in conjunction  
13 with the annual survey report required by 401 KAR 47:190, Section 8. When calculating the  
14 average, consideration shall be given to factors that alter the five (5) year average as an appropriate  
15 estimate.

16           2. The remaining permitted capacity shall be as reported on the remaining airspace line  
17 item in the most recent Solid Waste Landfill Annual Survey submitted to the Division of Waste  
18 Management for the Kentucky Department for Environmental Protection on Form DEP 8059 for  
19 the landfill being assessed. The volume shall be adjusted for the capacity consumed from the date  
20 of the survey used to prepare the calculation, until the end of the tax year with no annual intake  
21 volume growth over the remaining forecasted permitted life of the landfill. Actual tons for the  
22 applicable dates shall be converted to permitted cubic yards using the compaction ratio and the  
23 result shall be subtracted from the remaining permitted capacity as presented in Form DEP 8059.

1 If cover materials are used at the landfill, the total remaining permitted capacity shall be multiplied  
2 by .85 to account for a standard reduction of remaining permitted capacity for cover materials.

3 3. The estimated annual cubic yards of waste deposited into the landfill shall be equal to  
4 the average of the annual cubic yards of waste deposited into the landfill for the five (5) tax years  
5 prior to the current tax year. The landfill operator shall report to the department the annual cubic  
6 yards of waste deposited into the landfill for the five (5) tax years prior to the current tax year by  
7 April 30 of the current tax year. **When calculating the average, consideration shall be given to**  
8 **factors that alter the five (5) year average as an appropriate estimate.**

9 4. The remaining economic life of the landfill shall be calculated as follows: remaining  
10 permitted capacity (cubic yards) divided by the estimated annual cubic yards of waste deposited  
11 equals the remaining permitted economic life of the landfill.

12 5. The landfill operator shall provide the department with copies of the annual surveys  
13 and all quarterly reports filed by the landfill operator with the Division of Waste Management  
14 pursuant to 401 KAR 47:190 during the five (5) years on or before April 30 of the current tax year  
15 and a copy of its current operating permit.

16 (b) The effective tipping fee shall be calculated by dividing landfill historical tipping fee  
17 revenue (excluding surcharges, host fees, and related taxes) collected for the five (5) most recent  
18 tax years by landfill related historical tonnage for the five (5) most recent tax years as demonstrated  
19 by the records of the landfill operator.

20 1. The landfill operator shall provide the department with its calculation of the effective  
21 tipping fees for the five (5) tax years prior to the current tax year, together with its annual operating  
22 financial statements for each tax year, that shall include tipping fee revenue, expenses for  
23 surcharges, host fees and related taxes, and other landfill income.

1           2. The department shall review the effective tipping fees calculation submitted by the  
2 landfill operator and shall estimate the forecasted effective tipping fee for the current tax year.  
3 Increases in forecasted effective tipping fees shall be determined by an indexed factor not to exceed  
4 the annual Consumer Price Index (CPI), as defined by KRS 154.30-010(11), for the year prior to  
5 the current tax year.

6           3. In estimating the annual effective tipping fee, the department shall consider any facts  
7 or circumstances that exist that may have an impact on current or future effective tipping fees.

8           (c) The department shall estimate the other landfill income for the current tax year based  
9 upon the records of the landfill operator for the five (5) tax years prior to the current tax year.

10          1. The landfill operator shall provide the department with its calculation of other landfill  
11 income for the five (5) tax years prior to the current tax year, together with its annual operating  
12 financial statements provided pursuant to this section.

13          2. The department shall review the other landfill income submitted by the landfill operator  
14 and included in the operating financial statements submitted and shall estimate other landfill  
15 income for the current tax year and any annual increase in the other landfill income.

16          3. In estimating other landfill income, the department shall consider all relevant facts or  
17 circumstances that exist that may have an impact on current or future other landfill income.

18          (d) If the landfill does not have five (5) years of operating data, due to its date of first  
19 operation being less than five (5) years prior to the current tax year, the department shall determine  
20 the landfill's compaction ratio, consumed landfill capacity, estimated annual cubic yards of waste  
21 deposited, effective tipping fees, and other landfill income as a rolling average of the number of  
22 years for which operating data exists for the landfill.

1 (e) The department shall estimate an annual royalty income for each year of the landfill's  
2 remaining economic life by the following calculation:

3  $((\text{effective tipping fee} \times \text{tons of waste}) + \text{other landfill income}) \times \text{royalty rate} - \text{general}$   
4  $\text{administrative expenses} = \text{royalty income}.$

5 (f) The department shall determine the present value of the royalty income of the landfill  
6 for all remaining years of its remaining permitted economic life by applying the discount rate to  
7 each year's royalty income as determined pursuant to paragraph (e) of this subsection.

8 **(g) The discount rate shall be twenty (20) percent unless the landfill operator or the**  
9 **department establishes a higher or lower discount rate based upon applicable market factors**  
10 **and the applicable facts and circumstances attributable to the landfill.**

11 **(h)** The present value of the royalty income for all remaining years of the landfill's  
12 remaining economic life shall be the landfill real property valuation to be used as a tax basis.

13 **(i) The royalty rate shall be fifteen (15) percent unless the landfill operator or the**  
14 **department establishes a higher or lower royalty rate based upon applicable market factors**  
15 **and the applicable facts and circumstances attributable to the landfill.**

16 **(j)[(h)]** The department shall estimate a reversionary value, if any, as of the date that all  
17 post closure regulatory monitoring requirements of federal, state, or local governments are  
18 completed. The reversionary value shall be discounted to its present worth as of January 1 of the  
19 current tax year and the resulting value shall be added to the sum of all year's present values as  
20 calculated pursuant to paragraph (f) of this subsection.

21 (2) The fair cash value of any other real property, including improvements, not already  
22 included in the valuation of the landfill through the landfill valuation method shall be assessed by  
23 the department in the same manner as real property of all other taxpayers under KRS Chapter 132.

1 (a) State and local real property taxes shall be applied to the assessed value of the other  
2 real property and shall be added to the taxes assessed on the real property value determined by the  
3 landfill valuation method.

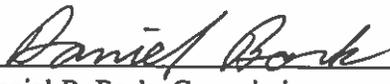
4 (b) The landfill operator shall provide the department with a summary statement of the  
5 total acreage of land owned by the landfill company, the total acreage of the permitted landfill  
6 area, and the total acreage of the active contained landfill.

7 (3) Any information required to be supplied by the landfill owner or operator in  
8 connection with this administrative regulation shall be held in strict confidence by the department  
9 unless otherwise required by law.

10 (4) The allocation of value of tangible personal property incorporated into a landfill and  
11 certified as pollution control pursuant to KRS 132.020(1)(k) shall be determined by taking the  
12 present value of landfill royalty income, as determined in subsection (1) of this section and  
13 subtracting out the value attributable to undeveloped land and the value attributable to real property  
14 structures (i.e., demonstrative and nonexclusive examples of which include maintenance buildings,  
15 perimeter fencing, etc.) not certified as pollution control. The remaining value shall constitute the  
16 value allocation attributable to certified pollution control tangible personal property incorporated  
17 into the landfill.

103 KAR 8:160

APPROVED:

  
\_\_\_\_\_  
Daniel P. Bork, Commissioner  
Department of Revenue  
Finance and Administration Cabinet

  
\_\_\_\_\_  
Date

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 103 KAR 8:160

Contact Person: Lisa Swiger  
Phone Number: (502) 564-9526  
Email: Lisa.Swiger@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes a new valuation system for municipal solid waste disposal facilities (“landfills”).

(b) The necessity of this administrative regulation: This administrative regulation was mandated by 2016 Ky. Acts Ch. 93, § 1 (to be codified as KRS 132.202), which requires the Department of Revenue to promulgate administrative regulations under KRS Chapter 13A to implement a valuation methodology for landfills.

(c) How this administrative regulation conforms to the content of the authorizing statutes: 2016 Ky. Acts, Ch. 93, § 4 removed landfills from the list of companies taxed as “public service companies” under KRS 136.120 et seq. § 1 of the Act requires the Department of Revenue to centrally assess all landfills and to bill and collect all ad valorem taxes on such facilities. This administrative regulation establishes a uniform valuation system for landfills based on a discounted cash flow model that determines the value of permitted landfill property based on the tipping fees (the fee charged per ton of waste disposed) it will earn over its remaining useful life. The regulation will establish the procedure for calculating the remaining years of economic life of a landfill—based on the information in the quarterly and annual reports permitted landfills already must file with the Kentucky Department of Waste Management—and will also establish how future tipping fees are to be estimated over the life of the landfill. It will also provide for the valuation of the real property outside the permitted landfill acreage and for the estimation of other income a landfill company may earn from activities such as the production of electricity from captured landfill gas. The definition of “landfills” excludes less-than-1-acre construction and demolition debris (“CDD”) landfills, as these facilities are generally privately-owned by construction and/or demolition companies and used to dispose of waste from their operations. Thus, most of them do not generate tipping fee revenues, which is what the landfill valuation model is based upon. These types of facilities were never subject to assessment by Revenue under the former statutory arrangement, and the legislature’s intention with regard to the revenue impact of HB 402 was to remain revenue neutral. Excluding CDD landfills from the regulation will accomplish this intention, with assessment of those properties remaining the responsibility of the local PVAs.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The valuation system for landfills under KRS 136.120(1)(a)(17) was inherently flawed by the limited scope of the property identified in that statute subject to taxation (the statute identified the entities subject to tax as “municipal solid waste disposal facilities, as defined by KRS 224.1-010(15),” whereas all other entities identified under KRS 136.120 are either

“companies” or “carriers”). This was inconsistent with the requirement under KRS 136.115 to assess the value of the franchise of companies identified in KRS 136.120, where the “franchise” represents the value of the business operation as a whole. The inconsistency between the statutes led to inconsistent and uneven assessments, which, in turn, led to annual protests of almost all landfill assessments and, eventually led to litigation over the proper valuation methodology. This regulation will establish a uniform and consistent methodology for valuing municipal solid waste landfills using a discounted cash flow analysis.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: This amendment adds a definition for “ton” (defining it as “2,000 pounds”) that was previously left out of the regulation and changes the royalty rate from 17% to 15% and the discount rate from 18% to 20%.

(b) The necessity of the amendment to this administrative regulation: This amendment was necessary to amend the original regulation as a result of comments received by the department during the public comment period in which the commenters noted that the proposed discount rate of 17% and the proposed royalty rate of 18% would not yield a reasonable approximation of the fair cash values of their facilities and that the regulation, as proposed with those rates, would result in a significant tax increase to their facilities. The amended discount rate of 20% and the amended royalty rate of 15% should alleviate the commenters’ concerns without significantly reducing expected tax revenues. The addition of the definition for “ton” alleviates any confusion as to which type of ton (e.g., long or British ton, short or U.S. ton, or metric ton) to which the regulation refers.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 132.202 directs the Department to promulgate administrative regulations under KRS Chapter 13A to implement a valuation methodology for municipal solid waste disposal facilities. This amendment sets forth the discount rate and royalty rate and the proper definition of “ton” that, under the methodology set forth in the body of the regulation, will facilitate the determination of the fair cash value of municipal landfill facilities in Kentucky.

(d) How the amendment will assist in the effective administration of the statutes: By changing the applicable discount rate and royalty rate which, under the methodology set forth in the body of the regulation, will result in more reasonable approximations of the fair cash values of municipal landfill facilities in Kentucky. This will result in fewer disagreements and fewer enforcement and litigation matters with taxpayers regarding the taxes owed on their property. Adding a definition of “ton” will eliminate any potential confusion as to which type of “ton” to which the regulations refers, thus avoiding unnecessary protest and litigation matters regarding that issue.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation will affect all permitted landfills in Kentucky. There are currently 26 landfills operating in the state.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by

either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: The municipal solid waste landfill owner will be required to file an annual return with the Department of Revenue along with copies of its permit, the annual surveys, and all quarterly reports filed by the landfill operator with the Division of Waste Management pursuant to 401 KAR 47:190 during the five years on or before April 30 of the current tax year. The landfill operator will also be required to provide the Department of Revenue with its calculation of the effective tipping fees for the five tax years prior the current tax year, together with its annual operating financial statements for each tax year which shall include tipping fee revenue, expenses for surcharges, host fees and related taxes, and other landfill income. If data for five years is not available due to the beginning date of operation being less than five years prior to the current tax year, a rolling average of the available years' data will be used.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No additional costs will be incurred by complying with the regulation. The uniform valuation methodology will provide consistency as to a landfill's assessment on a year-to-year basis.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Municipal solid waste landfill owners will now have a greater degree of certainty from year-to-year what their assessments will be, as the value calculated by the methodology is based on information and records that are readily available to them.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: The Department of Revenue will not incur additional cost as the result of this regulation.

(b) On a continuing basis: The Department of Revenue will not incur additional costs on an ongoing basis as the result of this regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The implementation and enforcement of this administrative regulation will be done with existing funds and personnel primarily through the Department of Revenue, Office of Property Valuation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No.

(9) TIERING: Is tiering applied? (Explain why or why not) Tiering is not applied. This administrative regulation establishes the uniform valuation methodology for all municipal solid waste landfills in Kentucky.

## FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 103 KAR 8:160

Contact Person: Lisa Swiger  
Phone Number: (502) 564-9526  
Email: Lisa.Swiger@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Finance and Administration Cabinet, Department of Revenue, Office of Property Valuation and counties or municipalities which may own and/or operate a municipal solid waste disposal facility ("landfill").

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 13A.100; KRS 131.130(1); KRS 132.202.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. This administrative regulation establishes a uniform valuation methodology for all landfills in Kentucky.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? No new revenues will be generated. Total revenue receipts for all landfills in Kentucky are approximately \$2.1 million (\$380,000 state, \$1.72 million local) annually, and it is anticipated that the new valuation methodology will produce revenues very near to this amount. However, it is anticipated that there may be some landfill assessments that will be lower than prior years' settlement amounts and some that will be higher than prior years' settlement amounts.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? The amount of revenues collected in future years by will be similar to the first year.

(c) How much will it cost to administer this program for the first year? No additional costs will be incurred in the first year of this regulation being in effect.

(d) How much will it cost to administer this program for subsequent years? No additional costs will be incurred in subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

STATEMENT OF CONSIDERATION RELATING TO 103 KAR 8:160  
Finance and Administration Cabinet  
Department of Revenue  
(Amended After Comments)

I. The public hearing on 103 KAR 8:160, scheduled for August 24, 2016, at 10:00 a.m. at the Capitol Annex was held, and written comments were received prior to the public comment period ending August 31, 2016.

II. The following people submitted written comments regarding this administrative regulation:

<u>Name and Title</u>	<u>Agency/Organization/Entity, Other</u>
Robert E. Lee	National Waste & Recycling Association
Daniel Bodily, Sr. Manager	Republic Services, Inc.
Mathew Black, VP of Taxes	Waste Connections, Inc.
James Thaxton, General Counsel	Rumpke of Kentucky, Inc.

III. The following people from the promulgating administrative body responded to the written comments:

Name and Title

Richard Bertelson, Staff Attorney III, Office of Legal Services for Revenue

IV. Summary of Comments and Responses

(1) Subject Matter: Royalty Rate and Discount Rate used by Department to assess fair cash values of landfill facilities.

(a) Commenters: James Thaxton, Rumpke; Mathew Black, Waste Connections; Daniel Bodily, Republic Services; and Robert Lee, National Waste & Recycling Assoc.

Comments: It is the commenter's position that the royalty rate of 18% and the discount rate of 17% in the proposed regulation do not yield a reasonable approximation of the

fair cash values of their facilities and that the regulation, as proposed, is likely to result in a significant tax increase to their landfill. The NWRA suggests a 12% royalty rate and a 20% discount rate and requests that the Department adopt these rates into the regulation. Rumpke, Republic, and Waste Connections support the 12% royalty rate and the 20% discount rate suggested by NWRA.

(b) Response: The Department of Revenue (Department) agrees to adjust the discount rate in the regulation to 20% and the royalty rate to 15% as a result of the comments received.

(2) Subject Matter: Taxation of Pollution Control Equipment at a landfill facility.

(a) Commenters: Republic Services, Waste Connections and the NWRA

Comments: To avoid the possibility of “double taxation,” the commenters ask that the Department deduct the value of the certified pollution control property from the value that the royalty method calculates before the state and local taxes are applied to the landfill value, and to subject that pollution control value to only the lower, state-only rate of \$0.15/\$100 rate under KRS 132.020(1)(k). The commenters also ask that the Department revise Section 2(1)(g) of the proposed regulation to read as follows:

Subject to the deduction of the value of tangible personal property as determined pursuant to section 2(4), the present value of the royalty income for all remaining years of the landfill's remaining economic life shall be the landfill real property valuation to be used as a tax basis.

(b) Response: The taxation of a landfill’s pollution control property as tangible personal property (TPP) and the separate taxation of the fair cash value of the landfill as determined by the methodology of 103 KAR 8:160 does not constitute double taxation, because, under the amended language of KRS 132.020 and 132.200, the pollution control property is not a component of the real property value. “To constitute ‘double taxation,’ objectionable or prohibited, the two or more taxes must be (1) imposed on the same property, (2) by the same state or government, (3) during the same taxing period, and (4) for the same purpose.” Fox v. Board for Louisville & Jefferson County Children's Home, 244 Ky. 1, 50 S.W.2d 67, 72 (1932). By its amendments to KRS 132.020 and 132.200, the legislature has mandated that the pollution control property shall not be considered a part of the real property, regardless of the fact that it is attached to the land and is buried underneath the surface level of the ground. As the pollution control property must be deemed TPP, then it cannot be real property, regardless of whether it could be classified as an “improvement” or a “fixture, because the statutory

language overrides the effect of common law principles in this situation. Thus, taxation of the pollution control property separately as TPP does not constitute “double taxation,” because, under the analysis of Fox, supra, the pollution control property is not the “same property” as the landfill property, nor are the TPP tax and the tax applied to the landfill property “for the same purpose,” nor are they applied by “the same government,” as KRS 132.200(8) prohibits local governments from applying any TPP tax to that property.

Even if the taxation of the landfill pollution control property separately from the landfill value could be deemed to be “double taxation,” it would necessarily be a permissible type of “double taxation” pursuant to the legislature’s intent. The legislature’s intent in this regard is manifest by the fact that it is excluded from taxation by the local jurisdictions under KRS 132.200(8) and it is given a special state-only rate of \$0.15/\$100 under KRS 132.020(1)(k). The long-held rule in Kentucky is that, “[a] statute will not be so construed as to embrace double taxation, unless the construction is required by its express words *or necessary implication*.” City of Newport v. Fitzer, 131 Ky. 544, 115 S.W. 742, 743 (1909). (Emphasis added). While the applicable statutes do not *expressly* state that double taxation is permissible with regard to pollution control TPP, the legislature’s treatment of the property—requiring it to be deemed TPP by the Department for so long as it is operated for its intended purpose of pollution control (and, thereby, expressly prohibiting the Department from treating it as real property for taxation purposes), giving it a local exemption, and giving it a very low state-only rate—means that, *by necessary implication*, the pollution control TPP must be subject to taxation as both TPP and as a component of the value of the landfill as calculated under the methodology of the regulation. If the legislature’s prohibition on treating the pollution control property as real property was interpreted to allow a major portion of the value of the landfill property to avoid taxation, that would create an unauthorized and unconstitutional tax exemption under Ky. Const. Sect. 170-172.

As such, the Department has concluded that no double taxation (or at least no legislatively unauthorized double taxation) results from taxing the pollution control TPP under KRS 132.020(1)(k) and from taxing the net present value of the landfill over its remaining economic life, as determined by the methodology of the proposed regulation, as separate things under separate taxing methods. Therefore, the recommended revision to the language of Section 2(1)(g), as suggested by the commenters, is declined.

V. Summary of Statement of Consideration and  
Action Taken by Promulgating Administrative Body

The public hearing on this administrative regulation was held and written comments were received. 103 KAR 8:160 was amended after the Department received comments, ideas, and suggestions. After each comment above, if the regulation was amended, such is reflected in the Department Response statement and noted below as to the location of the amendment in the regulation.

**Page 2**

**Section 1(4)**

**Lines 3 to 6**

Delete the following:

The discount rate shall be seventeen (17) percent unless the landfill operator or the department establishes a higher or lower discount rate based upon applicable market factors and the applicable facts and circumstances attributable to the landfill.

**Page 3**

**Section 1(13)**

**Lines 12-15**

Delete the following:

The royalty rate shall be eighteen (18) percent unless the landfill operator or the department establishes a higher or lower royalty rate based upon applicable market factors and the applicable facts and circumstances attributable to the landfill.

**Page 3**

**Section 1(15)**

**Line 17**

After "(15)", insert the following:

"Ton" means 2,000 pounds."

(16)

**Lines 19 to 21**

After "Form DEP 7046", insert the following:

as incorporated by reference in 401 KAR 47:110, Section 5(1)(h)

Delete the following:

or DEP 7046Q. When calculating the average, consideration shall be given to factors that alter the five (5) year average as an appropriate estimate

**Page 3**

**Section 1(16)**

**Line 22**

Before “(16)”, insert “(17)”.

Delete “(16)”.

**Page 4**

**Section 2(1)(a)1**

**Line 9**

After “8059”, insert the following:

.available at <http://dep.ky.gov/formslibrary/Documents/DEP8059.doc>. Form DEP 8059 is the form to be submitted by a municipal solid waste landfill permittee in conjunction with the annual survey report required by 401 KAR 47:190, Section 8

**Page 4**

**Section 2(1)(a)2.**

**Line 18**

After “Form”, insert “DEP”

**Page 5**

**Section 2(1)(a)3.**

**Line 2**

After “current tax year.”, insert the following:

When calculating the average, consideration shall be given to factors that alter the five (5) year average as an appropriate estimate.

**Page 5**

**Section 2(1)(b)2.**

**Line 21**

After “KRS 154.30-010”, insert “(11)”.

**Page 7**

**Section 2(1)(g)**

**Line 1**

After “(g)”, insert the following:

The discount rate shall be twenty (20) percent unless the landfill operator or the department establishes a higher or lower discount rate based upon applicable market factors and the applicable facts and circumstances attributable to the landfill.

(h)

Page 7

Section 2(1)(i)

Line 3

Before "(h)", insert the following:

(i) The royalty rate shall be fifteen (15) percent unless the landfill operator or the department establishes a higher or lower royalty rate based upon applicable market factors and the applicable facts and circumstances attributable to the landfill.

(j)

Delete "(h)".