

STATEMENT OF CONSIDERATION RELATING TO
401 KAR 102:005
Not Amended After Comments

Energy and Environment Cabinet
Department for Environmental Protection
Division of Waste Management

- I.** A public hearing on 401 KAR 102:005 was held on October 23, 2013 at 10:00 a.m. in Conference Room 301 D at 300 Fair Oaks Lane, Frankfort, Kentucky, 40601. The following people were in attendance:

<u>Name and Title</u>	<u>Affiliation</u>
Jennifer Cave	Bingham Greenebaum Doll
Herb Petitjean	Division of Compliance Assistance
Jim Kirby	Division of Waste Management
Virginia Baker-Gorley	Office of the General Counsel-EEC
Brenda Crabtree	Division of Waste Management
Elizabeth Shelby	Division of Waste Management
Danielle Crosman	Division of Compliance Assistance
Larry Taylor	Department for Environmental Protection
John G. Horne, II	Dinsmore and Shohl, LLP

There were no comments made or provided at the public hearing.

- II.** The following people submitted written comments:

<u>Name and Title</u>	<u>Affiliation</u>
Lloyd R. "Rusty" Cress, Jr.	Kentucky Association of Manufacturers
Tyler Campbell, Legislative Liaison	Kentucky League of Cities
Chad A. Harpole, VP, Government Affairs	Kentucky Chamber of Commerce
Karen Thompson	Smith Management Group

- III.** The following people responded to comments:

<u>Name and Title</u>	<u>Affiliation</u>
R. Bruce Scott, Commissioner	Department for Environmental Protection
Aaron Keatley, Deputy Commissioner	Department for Environmental Protection
Anthony Hatton, Director	Division of Waste Management
Timothy Hubbard, Assistant Director	Division of Waste Management

Shawn Cecil, Environmental Scientist IV Department for Environmental Protection
Larry Hughes, Superfund Branch Manager Division of Waste Management
Virginia Baker-Gorley, Attorney Supervisor Office of the General Counsel
Louanna Aldridge, Supervisor, PPA Division of Waste Management

IV. Summary of Comments and Responses

(1) Subject Matter: General Comments Supporting the Division in the Promulgation of Brownfield Regulations

(a) Comment: Lloyd R. “Rusty” Cress, Jr., Kentucky Association of Manufacturers; Tyler Campbell, Kentucky League of Cities; Chad A. Harpole, Kentucky Chamber of Commerce

The Division’s approach with respect to the Brownfields program is appreciated and supported. The Division’s process of seeking substantial stakeholder input is commended.

(b) Response:

The Division appreciates the active stakeholder participation in the regulatory development process. The result of the collaborative process will be regulations that best serve the Commonwealth, are protective of the human health and the environment, and are beneficial to the economy in that they serve those who choose to participate in the program.

(2) Subject Matter: Qualification as a Bona Fide Prospective Purchaser

(a) Comment: Chad A. Harpole, Kentucky Chamber of Commerce

The Kentucky Chamber requests confirmation that the Cabinet considers any person that has been issued a Notice of Concurrence pursuant to KRS 224.1-415 and 401 KAR Chapter 102 to qualify as a bona fide prospective purchaser as that term is used at 42 U.S.C. § 9607(r)(1).

(b) Response:

The bona fide prospective purchaser (BFPP) defense as adopted in KRS 224.1-400(25) is an affirmative defense and can only be validated at the time that it is used in response to an assertion of liability by the Cabinet or a federal agency. Therefore, the Cabinet cannot notify in writing that a person is a BFPP. This specific limitation inherent to the BFPP program was a primary driver in the development of KRS 224.1-415.

(3) Subject Matter: Definition request for “Person Who is Potentially Liable”

(a) Comment: Chad A. Harpole, Kentucky Chamber of Commerce

The Kentucky Chamber requests that a definition of “person who is potentially liable” as that term is used at KRS 224.1-415(2)(a)6 be added at 401 KAR 102:005. The Chamber requests that said definition include provisions recognizing that, for purposes of this program, a current or previous property owner that meets the requirements of the Brownfields Redevelopment Program is not a “person potentially liable” and that, as a result, persons or entities affiliated with that current or previous owner through lease, access or other contractual arrangements would be considered to meet the “no affiliation with a person who is potentially liable” requirement stated under KRS 224.1-415.

(b) Response:

The Cabinet acknowledges the commenters comment, but no change will be made to the regulation. The Cabinet will review each application on a case-by-case basis and determine based on the information provided whether the current or previous property owner is potentially liable.

(4) Subject Matter: Releases That Would be Eligible for the Program

(a) Comment: Chad A. Harpole, Kentucky Chamber of Commerce

The definition of “release” provided at paragraph 10 of proposed 401 KAR 102:005 excludes releases of petroleum or petroleum product from a “petroleum storage tank.” In 2012, concurrent with the amendments to KRS 224.1-415 that authorize the proposed 401 KAR Chapter 102, the Kentucky General Assembly also amended KRS 224.60-135 to provide that “a property owner who is not also the petroleum storage tank owner or operator shall have no obligation to perform corrective action for a release into the environment from a petroleum storage tank.” Please confirm that application for a Notice of Eligibility or Notice of Concurrence under 401 KAR Chapter 102 is not necessary for releases of petroleum or petroleum product from a “petroleum storage tank” and that instead, property owner liability for such releases would be governed by KRS 224.60-135 as amended in 2012. Please also confirm that “petroleum storage tank” for purposes of determining whether liability for a release may be limited under KRS 224.60-135 or 401 KAR Chapter 102 is defined solely as set forth at KRS 224.60-115(16) and KRS 224.60-100(1) without further limitation (for example, the date the petroleum storage tank was removed). The Chamber suggests adding a definition for “petroleum storage tank” at 401 KAR 102:005 in order to clarify this issue.

(b) Response:

The Cabinet acknowledges the commenters comment, but no change will be made to the definition of “petroleum storage tank” as it is set forth in the regulation. KRS 224.60-135 states that “A property owner who is not also the petroleum storage tank owner or operator shall have no obligation to perform corrective action for a release into the environment from a petroleum storage tank”. KRS 224.60-138 states “the cabinet shall approve the corrective action or closure and issue a notice to the owner or operator that no further action is required to address the petroleum contamination. This notice shall indicate the property is not subject to any additional actions under KRS 224.1-400 or 224.01-405”. Therefore, a person who purchases a property and does not assume ownership of the petroleum storage tanks, or a person who purchases a property that has received a notice that no further action is required under KRS 224.60 does not need to apply for a Notice of Eligibility or Notification of Concurrence because the liability protections are addressed in KRS 224.60 in relation to the underground storage tank. A release from an underground storage tank subject to regulation under KRS 224.60 that has received a notice that no further action is required under KRS 224.60 is not subject to any additional actions under KRS 224.1-400 or 224.1-405 for the release from the underground storage tank.

V. Summary of Action Taken by Promulgating Agency

401 KAR 102:005: The Cabinet considered the public comments and is not making further amendments at this time.