

STATEMENT OF CONSIDERATION RELATING TO
401 KAR 102:010
Amended After Comments
Energy and Environment Cabinet
Department for Environmental Protection
Division of Waste Management

- I.** A public hearing on 401 KAR 102:010 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: Application Fee Elimination or Reduction for Lenders, Cities and Other Public Entities

(a) Comment: Karen Thompson, Smith Management Group

Section 1(4) We suggest the fee be eliminated for lenders who are seeking concurrence or eligibility for a previously accepted property which is going through foreclosure. We suggest the fee be reduced or eliminated for cities, or other public entities. The fee may be a disincentive to use of this program. We suggest that the fee be refundable if the application is not approved.

(b) Response:

The Cabinet believes the fee is reasonable, appropriate and necessary to allow for the implementation of this program. Therefore, no change will be made to the application fee.

(2) Subject Matter: All Appropriate Inquiry Requirement

(a) Comment: Karen Thompson, Smith Management Group

Section 1(5)(a) – and (b)2. Federal regulations allow all appropriate inquiry (AAI) to be completed within 365 days with appropriate updates. We suggest this be mirrored in these regulations. For properties previously acquired and having performed an AAI, we suggest it is not necessary to complete another AAI. Instead, we suggest the information the state seeks can be collected and submitted without performing the AAI. We assume the state seeks information with regard to the land use from the time of the purchase to the present to concur that the owner has used the property in a manner as to not cause a spread of contamination or undue exposure to his/her workers or tenants. This could be accomplished by submitting specific documentation to this effect such as a summary of site activities both historic and current undertaken by the owner.

(b) Response:

The Cabinet will not amend the regulation related to the comment that the regulation should mirror the federal regulation. The regulations are constructed to allow for the program to apply both prospectively and retrospectively. Because it applies retrospectively there is the language related to “generally accepted practices” of the time. Also, all applicants are required to conduct and submit an AAI. For prospective property owners this requirement serves both for the certification and will be used to ensure that the methods described in the Property Management Plan are appropriate to protect the public based on the information obtained during AAI. For retrospective applicants, the AAI consistent with “generally accepted practices” is used to support the certification process. The necessity to conduct an updated and current AAI is to ensure that the Property Management Plan is based on the latest information and to therefore optimize protection of the public and workers. The Cabinet believes that the AAI process should be used in lieu of what is recommended in the comment because it is an established,

predictable and arguably a consistent process. To the extent that this process is standardized it will positively affect the Cabinets ability to provide timely review and response to submittals.

(3) Subject Matter: Discovered Releases

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

Amend Section 5 related to Discovered Releases to clarify language and make it consistent with the statute. KRS 224.1-415 does not require owners to certify that a release has occurred, it requires an owner to certify, and the Division certain conclusions regarding releases for which the owner will be exempt from characterization and CA obligations. An owner can address all known and suspected releases in it’s application and the Division can easily concur with the owner’s certifications. PMP should address known & suspected releases to deal with recognized potential risks. The Division has no reason to require that an owner provide notice simply because they discover information consistent with what the owner and DWM already suspected and considered in the PMP.

Section 5(2) should be deleted and replaced with a requirement to notify DWM and submit for approval a Property Management Plan (PMP) amendment if when they discover a previously unknown release that poses risks not described or addressed in the approved PMP. As is, it is so broad that it appears to require owners report every test result, document, rumor, and verbal communication they receive or discover related to property conditions, even if it is already addressed in PMP. That contributes nothing to the protection of human health or the environment and places unmanageable burdens on owners.

(b) Response:

The Cabinet acknowledges the comment. The Cabinet has modified the draft regulation to replace the word “certification” with “information” to clarify that an applicant does not have to certify or recertify a release for which they have already received a Notification of Concurrence.

(4) Subject Matter: Incorrect Reference

(a) Comment: Karen Thompson, Smith Management Group

Section 5(3) This section refers to a Section 3(7). We do not find that referred section. Please clarify.

(b) Response:

The Division agrees. This has been amended to reference Section 3(6).

(5) Subject Matter: Changes in Use of Property

(a) Comment: Karen Thompson, Smith Management Group

Section 6 requires that a change in use from that stated in the PMP requires written notice to the Cabinet. This requirement should be limited to a change in property use that requires a change in the PMP.

(b) Response:

The Cabinet acknowledges the comment and provides the following clarification. 401 KAR 102:020, Section 2 indicates that the applicant/property owner has the responsibility

and the discretion to determine when an amendment to a Property Management Plan is necessary based on changing conditions. The submittal of an amended Property Management Plan fulfills the requirement for providing “written notice” in 401 KAR 102:010, Section 6. Also, the Property Management Plan can be constructed in such a manner as to identify the changes in property use that may necessitate an amendment of the Property Management Plan. Therefore, no changes will be made to the regulation.

(6) Subject Matter: Incorrect Reference

(a) Comment: Karen Thompson, Smith Management Group

Section 7 refers to Section 4(2) in a way that is not logical. Please clarify which section is intended to be referred to.

(b) Response:

The Division agrees. This has been amended to reference Section 4(3).

(7) Subject Matter: Rescission or Modification of a Notice of Concurrence

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

As proposed, 401 KAR 102:010, Section 7 states that the Director of the Division of Waste Management “may” rescind or modify a Notice of Eligibility and Notice of Concurrence “if the applicant is not in compliance with Section 4(2) of this administrative regulation.” The Kentucky Chamber submits that the reference to Section 4(2) appears to be in error since Section 4(2) merely sets forth the required statements to be included by the Division in a Notice of Concurrence. To the extent this reference is not in error, the Kentucky Chamber submits this provision should be deleted for, as drafted, the provision could be read to allow the Division to revisit its Notice of Concurrence determination at any time thereby depriving the applicant of any certainty with regard to the determination. At a minimum, the Kentucky Chamber requests clarification regarding the circumstances under which rescission or modification would be authorized under this provision. To the extent this reference was intended to be to Section 5(2), the Chamber submits that any failure to comply with a notice requirement of the Brownfields Redevelopment Program should not serve as grounds to rescind a previously issued Notice of Eligibility or Concurrence. The Notice should remain valid for all releases certified in the application and not caused by the applicant.

(b) Response:

The reference to Section 4(2) was incorrect and any reference to Section 5(2) would also be incorrect. The Cabinet criterion for determining whether a Notification of Concurrence must be rescinded is found in KRS 224.1-415(3). The Cabinet may rescind a Notification of Concurrence if the applicant does not comply with their approved Property Management Plan or does not comply with the continuing requirements of KRS 224.1-415. The Cabinet is committed to safe and productive reuse of properties with contamination or perceived contamination that may complicate redevelopment. The Cabinet must also adhere to its core mission to protect human health and the environment. Therefore, the Cabinet must retain the ability to modify or rescind letters of eligibility or concurrence if necessary to achieve that mission. The authority to do so was given exclusively to the Division of Waste Management Director to help ensure that decisions are not arbitrary or capricious and to provide additional assurance to participants of the program.

V. Summary of Action Taken by Promulgating Agency

401 KAR 102:010: Comments were considered and the following changes are suggested:

Page 1

NECESSITY, FUNCTION, AND CONFORMITY

Line 10

After “KRS 224.1-415”, insert “authorizes”.
Delete “establishes”.

Page 1

NECESSITY, FUNCTION, AND CONFORMITY

Line 12

After “for a person”, insert “who”.
Delete “that”.

Page 1

NECESSITY, FUNCTION, AND CONFORMITY

Line 13

After “regulation also”, insert “establishes”.
Delete “outlines”.

Page 1

NECESSITY, FUNCTION, AND CONFORMITY

Line 15

After “for a person”, insert “who”.
Delete “that”.

Page 1

Section 1

Line 16

After “Section 1. Application”, capitalize the first letter of “procedures”.

Page 1

Section 1(1)

Line 18

After “(1) A”, insert “notarized”.
Delete “completed”.

Page 2

Section 2

Line 15

After “Section 2. Cabinet”, capitalize the first letters of “review” and “notification”.

Page 3

Section 3(3)

Line 11

After “expiration date”, insert “_”.

Page 3

Section 3(3)

Line 9

After “expiration date.”, capitalize the first letter of “upon”.

Page 3

Section 3(3)

Line 10

After “Part 312”, insert

that does not alter the cabinet’s finding or concurrence, the cabinet shall establish a new expiration date.

Page 3

Section 3(4)

Line 18

After “in accordance with”, insert “subsection (6)”.

Delete “subsections (6) and (7)”.

Page 4

Section 4(3)

Line 18

After “(3) An applicant”, insert “who”.

Delete “that”.

Page 5

Section 5(2)(b)

Line 10

After “writing that the”, insert “information”.

Delete “certification”.

Page 5

Section 5(3)

Line 14

After “accordance with Section”, insert “3(6)”.

Delete “3(7)”.

Page 6

Section 7

Line 3

After “compliance with Section”, insert “4(3)”.

Delete “4(2)”.

Page 6

Section 8

Line 8

After “be subject to”, insert “pursuant to”.
Delete “under”.

Page 6

Section 9(1)

Line 11

After “DEP 6056,”, insert “November”.
Delete “September”.

The Cabinet made technical changes to the “Brownfield Liability Relief Eligibility Form”, DEP 6056 to reflect the recodification of relative statutes. As a result, the revised date of the form also required an update.