

STATEMENT OF CONSIDERATION RELATING TO
401 KAR 102:020
Amended After Comments

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

- I.** A public hearing on 401 KAR 102:020 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
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: Requirements by Applicant for Institutional Controls and Remedial Actions**

(a) **Comment: Karen Thompson, Smith Management Group; Chad A. Harpole, Kentucky Chamber of Commerce**

Section 1 (6) requires information about institutional controls, remedial actions etc. in place, proposed or planned by the applicant (which is reasonable) or any responsible party (which information may not be available to the applicant). This requirement should be modified to require only that information available to the applicant. As proposed, 401 KAR 102:020 Section 1(6) requires that the property management plan contain “a description of the methods employed and data collected to ensure that the property use shall not interfere with the remediation of the release as required by the cabinet; increase the impacts of the release on human health and the environment; or expose the public and environment to unacceptable harm.” KRS 224.1-415(2) provides that where the requirements of the Brownfields Redevelopment Program are otherwise met, an owner “shall not be liable for performing characterization, correcting the effects of the release on the environment, or performing corrective action.” Please confirm that consistent with quoted statutory language, 401 KAR 102:020 Section 1(6) does not require characterization of a release and that an applicant shall not otherwise be required to characterize or correct a release in order to receive a Notice of Eligibility or a Notice of Concurrence under 401 KAR Chapter 102

(b) **Response:**

In an effort to clarify, the Division recommends the following amendment: Section 1(6) insert “known” after “A description of all” so that it reads “A description of all **known** engineering control....”

KRS 224.1-415 requires the Cabinet to find that an application is complete or incomplete (KRS 224.1-415(2)(a)) and to concur that the use of the property by the applicant is protective and will not preclude cleanup by a responsible party (KRS 224.1-415(2)(b) and KRS 224.1-415(2)(c)). If the Cabinet finds that the application is complete and concurs with the Property Management Plan, the Cabinet is required to issue a Notification of Concurrence stating that the applicant is not responsible for performing characterization, correcting the effects of the release on the environment, or performing corrective action for releases governed by KRS 224.1-400 and KRS 224.1-405. To address the comment, Section 1(6) does not require an applicant to meet the requirements of performing characterization, correcting the effects of the release on the environment, or performing corrective action for releases governed by KRS 224.1-400 and KRS 224.1-405.

The applicant who has the Notification of Concurrence would be responsible for performing characterization, correcting the effects of the release on the environment, or

performing corrective action for releases governed by KRS 224.1-400 and KRS 224.1-405 should they cause a release on the property subsequent to the Notification of Concurrence.

As stated above, KRS 224.1-415(2)(b) requires the applicant with a Notification of Concurrence to use the property in a manner protective of the public. In other words, an applicant is required to manage the potential for causing harm to human health or the environment that could be caused by their use of the property. Depending on how a property may be used, the applicant may be required to gather environmental information and to implement protective measures to ensure the property use is protective. These activities would not be required because the applicant is responsible pursuant to KRS 224.1-400 or KRS 224.1-405, but would be required to meet the requirements of KRS 224.1-415(2)(b). Section 1(6) therefore acknowledges that in some situations an applicant may propose certain actions to support safe reuse of a property. Such proposals and the determination as to their necessity would be made on a case-by-case basis and are largely a business decision by the applicant as to how they may want to reuse a particular property.

(2) Subject Matter: Property Management Plan Addressing Known and Unknown Releases

(a) Comment: Lloyd R. “Rusty” Cress, Jr., Kentucky Association of Manufacturers

The PMP should address both known and suspected releases in order to deal with recognized potential risks.

(b) Response:

The Cabinet agrees. During stakeholder meetings related to the development of this regulation, some parties raised a concern that members of the consulting community thought it inappropriate to require an environmental professional to certify as the completeness and accuracy of work they did not conduct. As a result, the draft regulation was amended so that a consultant would not be required to certify the accuracy and completeness of information or reports (such as a Phase I) they did not gather or prepare. The Cabinet agreed with those changes and continues to believe them to be appropriate. Therefore, no changes will be made to this regulation as a result of this comment.

(3) Subject Matter: Lender’s Use of the Property Management Plan

(a) Comment: Karen Thompson, Smith Management Group

Comments that arose from meeting with the Banking industry indicated that it may be advisable to allow a lender with a security interest to benefit from its borrower’s concurrence. Lenders expressed an eagerness to benefit from the concurrence their borrowers obtain. Thus, in the event that a property with concurrence goes through foreclosure, the secured lender could qualify on an expedited basis. The foreclosing lender would perform updated all appropriate inquiry and would submit that with the appropriate certifications. The lender would not be required to pay a fee as its ownership would be for the purpose of moving the property back into commerce. Foreclosure always represents a financial losing situation. The lender will still have to shoulder the cost of a new AAI effort and development of a property management plan. If there is an additional fee for the concurrence, or a more difficult path, it is more likely the lender

will avoid foreclosure and the property will become abandoned. The fee for this concurrence will dissuade some participation.

(b) Response:

The Cabinet understands the importance of constructing a process that would effectively allow lenders to foreclose on properties for the purpose of recovering potentially lost assets and to get the properties back into productive use. Lenders foreclosing on a property would be required to comply with the certification requirements required in KRS 224.1-415. If a Property Management Plan, prepared for a buyer that will take a loan with the subject property as security, is also prepared with reliance for the mortgage holder, the Cabinet will accept that Property Management Plan as part of a complete application package. In the event of a foreclosure action on the property, the mortgage holder may operate the property pursuant to the approved plan unless there is a change in property use. It is suggested that a Property Management Plan with a mortgage holder who may seek to use this approach include a provision for owning the property in a non-operational state (“mothballing”).

Regarding the necessity to pay the fee for the certification; the Cabinet believes that the fee is reasonable and necessary to implement this program. The fee represents a small portion of the actual cost to the Cabinet to implement the program.

V. Summary of Action Taken by Promulgating Agency

401 KAR 102:020: 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 2

Section 1(6)

Line 10

After “A description of all”, insert “known”.

Page 3

Section 2

Line 5

After “Amendments to the”, capitalize the first letters of “property”, “management”, and “plan”.