

CHAPTER 128**(SB 2)**

AN ACT relating to environmental protection.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

Sections 1 to 12 and Sections 13, 14, 15, and 16 of this Act are intended to establish an efficient and predictable process, within the context of KRS 224.01-400 and 224.01-405, to promote voluntary cleanup and redevelopment of properties suspected of environmental contamination. This process will further the public purposes of protecting human health, safety, and the environment while stimulating economic development and job creation through the construction of new residential, commercial, and industrial facilities. Sections 1 to 12 and Sections 13, 14, 15, and 16 of this Act shall not apply to radioactive material facilities licensed under KRS 211.842 to 211.852 and the administrative regulations promulgated under these sections.

SECTION 2. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 12 of this Act:

- (1) "Hazardous substance" shall have the meaning in KRS 224.01-400(1)(a) and also include any pollutant or contaminant, as those terms are defined in KRS 224.01-400(1)(f), any hazardous substance, pollutant, or contaminant designated by the cabinet in accordance with KRS 224.01-400(2), and any hazardous substance included in KRS 224.01-400(3);*
- (2) "Petroleum" shall have the meaning set forth in KRS 224.60-115(15);*
- (3) "Petroleum storage tank" shall have the meaning set forth in KRS 224.60-115(16);*
- (4) "Property" means a tract of real property for which an application has been submitted under Section 3 of this Act;*
- (5) "Remediation" means the characterization of a release of a hazardous substance or petroleum, in accordance with KRS 224.01-400(18) for hazardous substances or KRS 224.01-405 for petroleum, and actions necessary to correct the effects of the release on the environment, as required by KRS 224.01-400 for hazardous substances, pollutants, or contaminants or KRS 224.01-405 for petroleum; and*
- (6) "Site" shall have the meaning in KRS 224.01-400(1)(c).*

SECTION 3. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) A Voluntary Environmental Remediation Program is established and shall be administered by the cabinet in accordance with Sections 1 to 12 of this Act.*
- (2) Any person may apply to enter a property in the program, unless:
 - (a) The property is part of or contains a site which is on the National Priorities List established by the United States Environmental Protection Agency;**

- (b) *The property is part of or contains a hazardous waste treatment, storage, or disposal facility for which a permit has been issued, or the site is otherwise the subject of hazardous waste closure or corrective action pursuant to KRS 224.46-520 or KRS 224.46-530;*
- (c) *The property or site is the subject of state or federal environmental enforcement action relating to the release, for which the application is submitted; or*
- (d) *The property or site presents an environmental emergency, as defined in KRS 224.01-400.*
- (3) *To apply to enter the voluntary environmental remediation program, an applicant shall:*

 - (a) *Respond accurately and completely to all questions on an application provided by the cabinet;*
 - (b) *Identify any hazardous substance and any petroleum released or believed to be released to the environment at the site and provide a characterization plan for the releases or threatened releases adequate to comply with KRS 224.01-400, KRS 224.01-405, Sections 1 to 12 of this Act, and any administrative regulations promulgated pursuant thereto;*
 - (c) *Submit a nonrefundable application fee. The fee shall be one thousand dollars (\$1,000) for properties up to three (3) acres in size. The fee for properties greater than three (3) acres but less than ten (10) acres shall be two thousand five hundred dollars (\$2,500). The fee for properties of ten (10) acres or larger shall be three thousand five hundred dollars (\$3,500). However, a political subdivision of the state, and its agencies and instrumentalities, shall be exempt from paying the fee for properties that are publicly owned; and*
 - (d) *Publish the notice of application in the newspaper of largest circulation in the county in which the site is located.*
- (4) *Fees and costs collected under Sections 1 to 12 of this Act shall be deposited in the hazardous waste management fund set out in KRS 224.46-580(13). The cabinet shall use the fees and costs to administer the voluntary environmental remediation program.*
- (5) *The cabinet shall, if requested, meet with the applicant either before or after submittal of an application to discuss the sufficiency of the application.*
- (6) *The cabinet shall notify the Department for Public Health when the cabinet receives an application with information pertaining to an actual or threatened release of a hazardous substance over which the Department for Public Health has regulatory authority.*
- (7) *When an application for entry into the voluntary environmental remediation program is filed, the applicant shall notify the chief executive of local governmental units in which the property or site that is the subject of the application is located and shall provide the chief executives with a copy of the application. Copies of the following documents shall be transmitted by the applicant, as they become available, to the local public library:*

 - (a) *Agreed order;*
 - (b) *Characterization plan;*
 - (c) *Characterization report;*
 - (d) *Corrective action plan;*

- (e) *Corrective action completion report;*
- (f) *Any notices of deficiency and any responses thereto; and*
- (g) *Covenant not to sue.*

SECTION 4. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *The cabinet shall notify an applicant for the voluntary environmental remediation program within forty-five (45) working days of receipt of the application as to whether the application is accepted or denied.*
- (2) *The cabinet shall deny an application if:*
 - (a) *The cabinet determines the property is ineligible to participate in the program under the provisions of Sections 1 to 12 of this Act;*
 - (b) *The cabinet withdraws from agreed order negotiations pursuant to the provisions of Section 5 of this Act; or*
 - (c) *The application is not complete.*
- (3) *If the cabinet denies an application, the cabinet shall notify the applicant in writing, stating the reasons for the denial. If the reason for denial is incompleteness, the cabinet shall inform the applicant of the information needed to make the application complete.*
- (4) *The applicant may submit, within ninety (90) working days of receipt of the initial denial notice, a completed or revised application without incurring an additional fee.*
- (5) *Within forty-five (45) working days of resubmittal, the cabinet shall review any revised or completed application and notify the applicant in writing of its determination to accept or deny the application. If the cabinet denies the application again for incompleteness, the cabinet shall again inform the applicant of the information needed to make the application complete. The cabinet may assess a new application fee for the resubmittal.*
- (6) *If the applicant's second revised application fails to provide the information necessary to address all the concerns of the cabinet, the applicant and the cabinet may meet to clarify the cabinet's expectations and concerns.*

SECTION 5. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *Once an application is accepted, the applicant and the cabinet shall enter into an agreed order which shall set forth the mutual responsibilities of the parties with respect to the remediation project.*
- (2) *A voluntary remediation agreed order shall include:*
 - (a) *The applicant's agreement to:*
 - 1. *Identify any hazardous substance and any petroleum released or believed to be released to the environment at the site and provide a characterization plan for the releases or threatened releases adequate to comply with KRS 224.01-400, KRS 224.01-405, Sections 1 to 12 of this Act, and any administrative regulations promulgated pursuant thereto;*
 - 2. *Submit to the cabinet on the agreed schedule a characterization report and a corrective action plan complying with KRS 224.01-400, KRS 224.01-405,*

Sections 1 to 12 of this Act, and any administrative regulations promulgated pursuant thereto within one hundred twenty (120) days after the date the agreed order is entered by the secretary of the cabinet, or such longer period agreed upon by the parties; and

3. *Submit to the cabinet a corrective action report by the date agreed upon by the parties. The corrective action report shall contain a certification by the applicant that the remediation has been completed in accordance with the approved corrective action plan;*
 - (b) *A general listing of the estimated costs the cabinet expects to incur for its review and oversight of the remediation;*
 - (c) *The applicant's agreement to reimburse the cabinet for all reasonable actual and necessary costs of review and oversight that exceed the program's application fee, along with a schedule of the applicant's payments to reimburse the cabinet for its costs. The cabinet may waive in whole or in part its right to be reimbursed its costs related to properties of less than three (3) acres if the cabinet determines the waiver will best serve the public interest, in which case the agreed order shall note the waiver determination;*
 - (d) *The applicant's agreement to complete remediation on the agreed schedule in compliance with the approved corrective action plan;*
 - (e) *A requirement that records related to the site's remediation be retained and provided to the cabinet on request;*
 - (f) *A provision that the applicant may withdraw from the agreed order prior to issuance of the covenant not to sue, and have no further obligations thereunder, subject to payment of the cabinet's costs incurred prior to the withdrawal and the cabinet's reservation of its rights; and*
 - (g) *Any other provisions the cabinet determines are necessary to protect human health, safety, and the environment, or to effectuate the purposes of Sections 1 to 12 of this Act.*
- (3) *If the applicant and the cabinet are unable to negotiate an agreement in good faith within a reasonable time after negotiations have commenced, either party may withdraw from further negotiations.*

SECTION 6. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *Upon execution of an agreed order, the applicant shall submit to the cabinet within the agreed timeframe a site characterization report and a corrective action plan.*
- (2) *The corrective action plan for properties involving hazardous substances over which the Department for Public Health has regulatory authority shall, at the time of submittal to the cabinet, also be submitted to the commissioner of the Department for Public Health.*
- (3) *A corrective action plan shall comply with KRS 224.01-400, KRS 224.01-405, Sections 1 to 12 of this Act, and any administrative regulations promulgated under these statutes, and shall include:*
 - (a) *Detailed documentation of the characterization conducted by the applicant to determine the nature and extent of the release or threatened release as required*

under KRS 224.01-400 and 224.01-405 and a description of any remediation performed on the site;

- (b) A description of any corrective action and additional characterization proposed to complete the remediation in accordance with KRS 224.01-400 and 224.01-405, together with a proposed schedule for implementation;*
- (c) Descriptions of sampling and analysis methods, techniques, and results, and quality assurance methods and controls used or proposed;*
- (d) A description of measures to protect human health and safety during the remediation;*
- (e) A plan of action to inform the public about the remediation and redevelopment of the property and to provide for meaningful public comment;*
- (f) Identification of any limitations on land use or activity proposed for the site;*
- (g) Identification of any petroleum storage tanks on the site and an outline of how the applicant intends to comply with Subchapter 60 of KRS Chapter 224 and 401 KAR Chapter 42; and*
- (h) A requirement to update the corrective action plan to characterize and remediate releases discovered or caused during characterization or corrective action.*

SECTION 7. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) Within one hundred and twenty (120) working days of receipt of a corrective action plan, the cabinet shall:*
 - (a) Review and evaluate the characterization and the corrective action plan for compliance with the agreed order, KRS 224.01-400, KRS 224.01-405, Sections 1 to 12 of this Act, and any administrative regulations promulgated under these statutes, and if necessary, inspect the property and any relevant conditions in the area surrounding the property; and*
 - (b) Approve or deny the corrective action plan.*
- (2) The cabinet may request an applicant to submit additional or corrected information during the applicable evaluation period. If the cabinet makes a request, the applicant may:*
 - (a) Comply with the request by notifying the cabinet in writing and submitting the additional or corrected information within thirty (30) days after receiving the cabinet's request. From the date of the request by the cabinet until the additional or corrected information is submitted to the cabinet, the applicable evaluation period shall be suspended; or*
 - (b) Request a final determination in accordance with KRS 224.01-400(22) within thirty (30) days after receiving the cabinet's request.*
- (3) If the cabinet approves a corrective action plan, the cabinet shall, in writing, notify the applicant and commenters.*
- (4) The cabinet shall deny a corrective action plan for failure to comply with KRS 224.01-400, KRS 224.01-405, Sections 1 to 12 of this Act, or any administrative regulations promulgated under these statutes. The cabinet may deny a corrective action plan for*

failure to respond to its request for information. If the cabinet denies a corrective action plan, it shall notify, in writing, the applicant and commenters, specifying the reasons for the denial. The cabinet shall also inform the applicant of the right to appeal the decision in accordance with KRS 224.10-420(2). Within thirty (30) days of receipt of the notice of denial, the applicant shall inform the cabinet if a revised corrective action plan or corrective action completion report will be submitted.

SECTION 8. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *On or before the date that an applicant submits a corrective action plan to the cabinet, the applicant shall:*
 - (a) *Notify local government units affected by the remediation of the provisions of the corrective action plan;*
 - (b) *Provide a copy of the corrective action plan to at least one (1) public library in any county affected by the remediation;*
 - (c) *Submit for publication in a newspaper of general circulation in the county or counties where the property is located, a notice requesting public comment on the corrective action plan, and submit to the cabinet a copy of the notice as published, within ten (10) days of its publication; and*
 - (d) *Post a sign on the property stating that the site is undergoing remediation and providing information on where and when the corrective action plan is available for public review and comment.*
- (2) *A comment period of at least thirty (30) days shall follow publication of the notice. During the comment period, any person may submit written comments to the cabinet concerning the corrective action plan and may request a public hearing. The cabinet may hold a public hearing if the request is made.*
- (3) *The cabinet may hold a public hearing in any geographical area affected by the remediation on the question of whether to approve or deny the corrective action plan.*
- (4) *The cabinet shall consider all written comments and public testimony prior to taking any action.*

SECTION 9. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *Upon full performance of an approved corrective action plan, the applicant shall submit for the cabinet's review, by the deadline agreed upon by the parties, a corrective action completion report, and shall certify therein that the applicant has successfully completed remediation in compliance with the approved corrective action plan.*
- (2) *The cabinet shall review the corrective action completion report in the same manner as it reviewed the corrective action plan.*
- (3) *The cabinet may conduct its own investigation, including but not limited to its own characterization to verify that remediation has been completed in compliance with the approved corrective action plan. The reasonable actual and necessary costs of this verification shall be considered oversight costs reimbursable under Section 5(2)(c) of this Act. Any confirmatory sampling by the cabinet shall be completed within the deadline agreed to by the parties.*

- (4) *If the cabinet determines that no further remediation is required under the approved corrective action plan, and upon the applicant's payment of the cabinet's costs for review and oversight of the remediation, the cabinet shall issue the applicant a covenant not to sue.*
- (5) *With respect to the releases identified in the corrective action plan, the covenant not to sue shall preclude the cabinet's prosecution of civil or administrative enforcement action against the applicant for failure to perform remediation under KRS 224.01-400, KRS 224.01-405, any administrative regulations promulgated under these statutes, or the federal Comprehensive Environmental Response Compensation and Liability Act as amended, 42 U.S.C. sec. 9601 et seq. for injunctive relief, lien assertion, reimbursement of costs, or civil penalties imposed under KRS 224.99-010 for failure to perform remediation under KRS 224.01-400 or 224.01-405 and any administrative regulations promulgated under these statutes.*
- (6) *The covenant not to sue shall be in recordable form, and shall be recorded by the applicant, along with all deed restrictions and institutional controls approved by the cabinet, among the real estate records in the office of the county clerk where the property is located, within thirty (30) days of issuance by the cabinet. The cabinet shall have the authority and duty to enforce any restrictive covenants or institutional controls with respect to the applicant and all subsequent landowners. The covenant shall not be effective until it is recorded and a certified copy of the record instrument is delivered to the cabinet. The covenant shall not be effective with respect to any assignees, transferees, or successors until the requirements of the agreed order and the corrective action plan are incorporated as restrictions in the deed or other transfer instrument that is recorded and a certified copy of the record instrument is delivered to the cabinet.*
- (7) *The covenant not to sue shall not apply to:*

 - (a) *Releases other than those expressly identified in the corrective action plan;*
 - (b) *Claims based on the failure of the applicant, or the failure of any successive landowner as applicable, to comply with a requirement of Sections 1 to 12 of this Act, the agreed order, the approved corrective action plan, or the approved corrective action completion report, including any required land use restrictions and engineering or institutional controls;*
 - (c) *Liability resulting from the applicant's exacerbation of the releases identified in the corrective action plan;*
 - (d) *Criminal liability;*
 - (e) *Petroleum storage tanks;*
 - (f) *Claims or liability based on or resulting from misrepresentations or intentional omissions by the applicant;*
 - (g) *Liability for any conditions at the site that were not known to the cabinet when the cabinet approved the corrective action plan or the corrective action completion report, provided those conditions prevent the remediation from being protective of human health, safety, and the environment;*
 - (h) *Claims based on changes in the development of scientific knowledge, as reflected in published peer-reviewed health or environmental standards, that indicate that the remediation is no longer protective of human health, safety, and the environment;*

- (i) *An environmental emergency as defined in KRS 224.01-400;*
- (j) *Any cabinet action for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release pursuant to the Federal Comprehensive Environmental Response Compensation and Liability Act as amended, 42 U.S.C. sec. 9601 et seq.; and*
- (k) *Any administrative or civil action by the cabinet not expressly identified in subsection (5) of this section.*

SECTION 10. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

The following actions of the cabinet shall be considered final determinations under Sections 1 to 12 of this Act that may be appealed in accordance with KRS 224.10-420(2):

- (1) *Denial of an application to participate in the voluntary environmental remediation program;*
- (2) *Cabinet withdrawal from negotiations with an applicant for an agreed order;*
- (3) *Denial or approval of a corrective action plan; and*
- (4) *Issuance or denial of a covenant not to sue.*

SECTION 11. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *The numerical values contained in the document titled "Region 9 Preliminary Remediation Goals," published by the United States Environmental Protection Agency's Region 9, are hereby established as screening levels and shall be used by the cabinet in conformance with the guidance set out in the Region 9 Preliminary Remediation Goals. It is not the intent of this section to establish these levels as the cleanup standards for individual contaminants that may be present at any site.*
- (2) *Within one (1) year from the effective date of this Act, the cabinet shall promulgate regulations establishing standards under KRS 224.01-400 and 224.01-405 with respect to hazardous substances, pollutants, contaminants, petroleum, or petroleum products, that are protective of human health, safety, and the environment.*
- (3) *Within one (1) year from the effective date of this Act, the cabinet shall promulgate a regulation defining tiered remediation management options that account for the following:*
 - (a) *Current and proposed land use;*
 - (b) *Zoning, if applicable, of the property and surrounding properties; and*
 - (c) *The nature and extent of the contamination.*
- (4) *Nothing in this section shall affect or impair the ability of the cabinet to implement and enforce the provisions of KRS 224.01-400 and 224.01-405.*
- (5) *Nothing in this section shall be construed to limit the options available to the applicant under KRS 224.01-400(18) through 224.01-400(21).*

SECTION 12. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

The cabinet shall implement Sections 1 to 12 of this Act from and after the effective date of this Act. The cabinet shall publish forms by October 31, 2001, and may promulgate necessary administrative regulations, to implement Sections 1 to 12 of this Act.

SECTION 13. A NEW SECTION OF SUBCHAPTER 26 OF KRS CHAPTER 154 IS CREATED TO READ AS FOLLOWS:

Costs incurred by an applicant in remediating a property in accordance with Sections 1 to 12 of this Act shall be considered eligible costs for the purposes of KRS 154.26-010 to 154.26-100.

SECTION 14. A NEW SECTION OF SUBCHAPTER 28 OF KRS CHAPTER 154 IS CREATED TO READ AS FOLLOWS:

Costs incurred by an applicant in remediating a property in accordance with Sections 1 to 12 of this Act shall be considered eligible costs for the purposes of KRS 154.28-010 to 154.28-100.

SECTION 15. A NEW SECTION OF KRS CHAPTER 224A IS CREATED TO READ AS FOLLOWS:

Remediation of a property owned by a governmental agency in accordance with Sections 1 to 12 of this Act shall qualify as an infrastructure project for the purposes of this chapter.

SECTION 16. A NEW SECTION OF SUBCHAPTER 1 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *"The Agricultural Warehousing Sites Cleanup Fund" is hereby established as a separate account in the State Treasury. This shall be a special fund administered by the Cabinet for Economic Development. Within sixty (60) days of the effective date of this Act, the Cabinet for Economic Development shall issue guidelines and application forms to administer this fund.*
- (2) *The purpose of the agricultural warehousing sites cleanup fund is to provide financial assistance to persons who did not cause or contribute to the contamination on property used for agricultural warehousing activity on or before the effective date of this Act, and who propose to undertake a voluntary cleanup of the property. The financial assistance shall be in an amount of up to seventy-five percent (75%) of the costs incurred for completing an environmental study and implementing a cleanup plan by an eligible applicant. Financial assistance may be in the form of grants as provided in this section or low-interest loans, to be lent at a rate not to exceed two percent (2%).*
- (3) *Grants may be made to political subdivisions or their instrumentalities or local economic development agencies for the purposes of this section, if the grantee owns the site on which the cleanup is being conducted and the grantee is overseeing the cleanup. The total amount of grants awarded under this section in any one (1) fiscal year shall not exceed twenty percent (20%) of the total amount of the agricultural warehousing sites cleanup fund.*
- (4) *Loans meeting the requirements of subsection (2) of this section may be made to the following categories of applicants:*
 - (a) *Local economic development agencies;*
 - (b) *Political subdivisions or their instrumentalities; and*
 - (c) *Other persons determined to be eligible by the Cabinet for Economic Development.*

- (5) *The Cabinet for Economic Development shall take all of the following factors into consideration when determining which applicants shall receive financial assistance under this section:*
- (a) *The benefit of the remedy to human health, safety, and the environment;*
 - (b) *The permanence of the remedy;*
 - (c) *The cost-effectiveness of the remedy in comparison with other alternatives;*
 - (d) *The financial condition of the applicant;*
 - (e) *The financial or economic distress of the area in which the cleanup is being conducted; and*
 - (f) *The potential for economic development.*
- (6) *The Cabinet for Economic Development shall consult with the cabinet when determining priorities for funding under this section.*
- (7) *The Cabinet for Economic Development may set terms and conditions applicable to loans and grants as it deems appropriate. The Cabinet for Economic Development may consider such factors as it deems relevant, including current market interest rates and the necessity to maintain the moneys in this fund in a financially sound manner. Loans may be made based upon the ability to repay from future revenue to be derived from the cleanup, by a mortgage or other collateral, or on any other fiscal matters which the Cabinet for Economic Development deems appropriate.*
- (8) *In addition to any funds appropriated by the General Assembly, federal funds, and private contributions, moneys may be transferred from the hazardous waste management fund to the agricultural warehousing sites cleanup fund for the purpose of implementing the program established in this section. Moneys received by the Cabinet for Economic Development as repayment of outstanding loans shall be deposited in the agricultural warehousing cleanup fund. Any interest earned by moneys in this fund shall remain in this fund.*
- (9) *The Cabinet for Economic Development shall, on October 1 of each year, report to the Legislative Research Commission on the grants, loans, expenditures, and commitments made from this fund. The annual report shall include an evaluation of the effectiveness of this fund in recycling agricultural warehousing sites. The evaluation shall include any recommendations for additional changes if necessary to improve the effectiveness of this fund in recycling these sites.*

Section 17. This Act may be cited as the Voluntary Environmental Remediation Act.

Approved March 20, 2001