

## CHAPTER 98

## ( HB 370 )

AN ACT relating to property redevelopment.

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

➔Section 1. KRS 224.1-512 is amended to read as follows:

As used in KRS 224.1-510 to 224.1-532:

- (1) "Hazardous substance" shall have the meaning in KRS 224.1-400(1)(a) and also include any pollutant or contaminant, as those terms are defined in KRS 224.1-400(1)(f), any hazardous substance, pollutant, or contaminant designated by the cabinet in accordance with KRS 224.1-400(2), and any hazardous substance included in KRS 224.1-400(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 KRS 224.1-514;
- (5) "Remediation" means the characterization of a release of a hazardous substance or petroleum, in accordance with KRS 224.1-400~~[(18)]~~ for hazardous substances or KRS 224.1-405 for petroleum, **and any administrative regulations promulgated under those statutes**, and actions necessary to correct the effects of the release on the environment, as required by KRS 224.1-400 for hazardous substances, pollutants, or contaminants or KRS 224.1-405 for petroleum, **and any administrative regulations promulgated under those statutes**; and
- (6) "Site" shall have the meaning in KRS 224.1-400(1)(c), **and shall also refer to any area undergoing remediation as defined in subsection (5) of this section.**

➔Section 2. KRS 224.1-514 is amended to read as follows:

- (1) A Voluntary Environmental Remediation Program is established and shall be administered by the cabinet in accordance with KRS 224.1-510 to 224.1-532.
- (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 224.1-400.
- (3) To apply to enter the voluntary environmental remediation program, an applicant shall:
  - (a) **Complete**~~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 **site** characterization plan for the releases or threatened releases adequate to comply with KRS 224.1-400, 224.1-405, 224.1-510 to 224.1-532, and any administrative regulations promulgated pursuant thereto;
  - (c) Submit a **five thousand dollar (\$5,000)** 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. ***The notice shall include a reference to the local public library where pertinent documents related to the application may be found and reviewed by the public.***
- (4) Fees ~~and costs~~ collected under KRS 224.1-510 to 224.1-532 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.
- ~~(6){(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;
- ~~(b){(e)}~~ Characterization report;
- ~~(c){(d)}~~ Corrective action plan;
- ~~(d){(e)}~~ Corrective action completion report;
- ~~(e){(f)}~~ Any notices of deficiency and any responses thereto; and
- ~~(f) Corrective action liability agreement{(g) — Covenant not to sue}.~~
- ➔ Section 3. KRS 224.1-516 is amended to read as follows:
- (1) The cabinet shall notify an applicant for the voluntary environmental remediation program within ***thirty (30){forty five (45)}*** working days of receipt of ***a new or revised{the}*** application as to whether the application is ***complete. Within forty-five (45) working days of determining that an application is complete, the cabinet shall notify the applicant as to whether the application is*** accepted, ***deemed technically deficient,*** or denied.
- (2) The cabinet shall deny an application if:
- (a) The cabinet determines the property is ineligible to participate in the program under KRS 224.1-510 to 224.1-532; ***or***
- (b) ***The applicant fails to satisfy the requirements of this Act{cabinet withdraws from agreed order negotiations pursuant to KRS 224.1-518; or***
- ~~(c) — The application is not complete}.~~
- (3) If the cabinet denies ***a new or revised{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) ***If the cabinet determines that the application is technically deficient,*** the applicant may submit ~~a{, within ninety (90) working days of receipt of the initial denial notice, a completed or}~~ revised application ***to address deficiencies identified by the cabinet*** 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 4. KRS 224.1-520 is amended to read as follows:

- (1) ***Once an application has been accepted by the cabinet***~~[Upon execution of an agreed order]~~, the applicant shall submit to the cabinet within the~~[agreed]~~ timeframe ***proposed in the site characterization plan***, a site characterization report and a corrective action plan ***that meet the requirements of KRS 224.1-400, 224.1-405, and 224.1-510 to 224.1-532 and any administrative regulations promulgated under those statutes. The cabinet may grant reasonable extensions to the submittal timeframes specified in the site characterization plan if requested by the applicant.***
- (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 224.1 400, 224.1 405, 224.1 510 to 224.1 532, 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 224.1 400 and 224.1 405 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 224.1 400 and 224.1 405, 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 5. KRS 224.1-522 is amended to read as follows:

- (1) Within one hundred twenty (120) working days of receipt of a corrective action plan ***and the completion of the public comment period required by KRS 224.1-524***, the cabinet shall:
  - (a) Review and evaluate the characterization and the corrective action plan for compliance with~~[the agreed order,]~~ KRS 224.1-400, 224.1-405, ***and 224.1-510 to 224.1-532***~~;~~ and any administrative regulations promulgated under ***those***~~[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 224.1 400(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.~~
- ~~{(3){(4)} The cabinet shall deny a corrective action plan for failure to comply with KRS 224.1-400, 224.1-405, or 224.1-510 to 224.1-532~~~~;~~ or any administrative regulations promulgated under ***those***~~[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 6. KRS 224.1-524 is amended to read as follows:

- (1) *Within ten (10) days from the date the*~~{On or before the date that an}~~ applicant submits a corrective action plan to the cabinet, the applicant shall:
  - (a) *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. The public notice shall also contain a reference to the local public library where pertinent documents related to the corrective action plan may be found;*
  - (b) Notify local government units affected by the remediation of the provisions of the corrective action plan; *and*
  - (c) *Until the corrective action plan has been approved by the cabinet,*
    - ~~{(b) Provide a copy of the corrective action plan to at least one (1) public library in any county affected by the remediation;~~
    - ~~(e) 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 *a corrective action plan for remediation of the site is undergoing review by the cabinet and, if approved, remediation will be conducted in accordance with the approved plan. The sign shall also provide*~~{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 7. KRS 224.1-526 is amended to read as follows:

- (1) Upon *completion*~~{full performance}~~ of *those tasks outlined in* an approved corrective action plan, the applicant shall submit for the cabinet's review, *within the timeframe proposed in the corrective action plan*~~{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 KRS 224.1-518(2)(e). 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 *or any administrative regulations promulgated under KRS 224.1-400, 224.1-405, and 224.1-510 to 224.1-532,*~~{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 *corrective action liability agreement*~~{covenant not to sue}~~.
- (5) With respect to the releases identified in the corrective action plan, the *corrective action liability agreement*~~{covenant not to sue}~~ shall preclude any suit or claim by the Commonwealth for the prosecution of

civil or administrative enforcement action against the applicant for failure to perform remediation under KRS 224.1-400, 224.1-405, 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 224.1-400 or 224.1-405 and any administrative regulations promulgated under these statutes.

- (6) The **corrective action liability agreement**~~{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 **corrective action liability agreement and all deed restrictions, restrictive covenants, and institutional controls approved by the cabinet as part of the approved corrective action plan shall run with the land and inure to the benefit of, and be enforceable by the cabinet against**~~{cabinet shall have the authority and duty to enforce any restrictive covenants or institutional controls with respect to}~~ the applicant and all subsequent landowners, *assignees, transferees, or successors*. The **corrective action liability agreement**~~{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 **corrective action liability agreement**~~{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 KRS 224.1-510 to 224.1-532,~~{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 224.1-400;
  - (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.
- (8) Subject to subsection (7) of this section, the issuance of a **corrective action liability agreement**~~{covenant not to sue}~~ for a brownfield site, as defined in 42 U.S.C. sec. 9601(39), shall preclude any suit or claim under state law to compel the performance of remediation in excess of that required in the approved corrective action plan.
- (9) **The issuance of a corrective action liability agreement**~~{Subsection (8) of this section}~~ shall not be construed to limit:
- (a) Appeals of final cabinet orders and determinations as provided for in this chapter;

- (b) Actions against the cabinet to compel compliance with the terms of the corrective action plan; or
- (c) The availability of remedies to persons, other than the cabinet, for injury to property or person.

➔Section 8. KRS 224.1-528 is amended to read as follows:

The following actions of the cabinet shall be considered final determinations under KRS 224.1-510 to 224.1-532 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;~~
- (3) ***Denial or approval of a corrective action completion report;*** and
- (4) Issuance or denial of a ***corrective action liability agreement***~~{covenant not to sue}.~~

➔Section 9. The following KRS section is repealed:

224.1-518 Voluntary remediation agreed order.

**Signed by Governor April 2, 2018.**