



## Compliance Alert: Kentucky's Bona Fide Prospective Purchaser

By Scott R. Smith/March 2013

There may now be a way to generate interest in the redevelopment of contaminated properties in Kentucky's cities and counties. In the past, no one wanted to purchase old gasoline stations or manufacturing facilities because of potential environmental liability, so the sites have remained empty and in some cases have become community eyesores. House Bill 465 was passed by the 2012 Legislature and may be the key that can unlock these properties and get them back into creating jobs and tax revenue.

The Kentucky Division of Waste Management is currently developing regulations to implement HB 465. Even though the regulations have not been finalized, transactions can occur under the Statute. In fact, one site has already been closed under the Statute.

The Statute clearly states that a person who owns real property where a release of petroleum or a release of hazardous substance, pollutant or contaminant has occurred shall not be liable for performing characterization, correcting the effects of the release on the environment or performing corrective action, provided they meet certain criteria. In general, this means that if you didn't put it there, you don't have to clean it up.

In order to qualify for this defense, a person needs to certify seven straight forward requirements including:

- The release occurred prior to the property owner's acquisition of the property;
- The property owner made all appropriate inquiries into previous ownership and uses of the property in accordance with generally accepted practices (this means that an ASTM Phase I Site Assessment has been conducted); and
- The property owner has complied with any information requests by the Cabinet for Energy & Environment.

Additionally, the Division of Waste Management must agree that planned future uses of the property will not interfere with the cleanup of the release that has taken place by others, increase the impacts of the release on human health or the environment or expose the public and environment to unacceptable harm. The new owner must allow access to the property for characterizing and cleaning up the old contamination.

Kentucky's Statute is similar to the Small Business Liability Relief and Brownfields Revitalization Act that was passed by the U.S. Congress in 2002. This law, like Kentucky's, added conditional statutory protections against liability for "Bona Fide Prospective Purchasers". Congress excluded "Bona Fide Prospective Purchasers" from environmental liability. The consistency between these two statutes will ensure a basic agreement in this approach between the two agencies.

Smith Management Group has worked with the Division of Waste Management to obtain an approval under this Statute. Overall the process was straight forward and the buyers were able to easily work out the technical and legal issues with the state. The key to success is to have willing buyers and sellers and a consultant that understands the remediation requirements and has a good working relationship with the Division of Waste Management.

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