



Review of Kentucky's Brownfields Development Program

By Sara G. Smith

The Brownfield Development program in Kentucky has been in force for several years. We have seen success in helping previously used properties become vibrant and effective places of business, contributing to their communities once again. The program revolves around a statute that grants exemptions from investigation and cleanup liability to a person that purchases property known or suspected to have been contaminated by someone else. Also, the releases causing the contamination must have occurred before the person took title. To qualify for the exemptions the purchaser must conduct appropriate due diligence immediately before taking title to the property and it must use good management practices to prevent its use from causing unacceptable harm. Kentucky manages the program in a way that allows a prospective purchase to find out before it takes title to property if it will qualify for the exemptions.

The Kentucky Brownfield Development program was enacted to promote the safe use of environmentally-impaired property. It does this by: 1) creating a process for defining what management practices are needed to safely use of a parcel of contaminated property; and 2) granting exemptions from investigation and cleanup liability to a bona fide prospective purchaser (i.e., a purchaser unrelated to persons who caused the contamination, who bought the property after the contamination occurred and who conducted due diligence before taking title). By providing relative certainty as to management practices needed for safe use and providing cleanup liability exemptions, a prospective purchaser can obtain some security that it will not incur unexpected costs for investigations, cleanup or to manage the property.

To obtain the liability exemptions, the owner or prospective owner must file an application which certifies the following information:

- All releases of petroleum governed by KRS 224.1-405 or a release of a hazardous substance, pollutant, or contaminant governed by KRS 224.1-400 occurred prior to the applicant's acquisition of the property; **(this means the contamination was there when you bought the property)**
- The applicant made all appropriate inquiries into previous ownership and uses of the property in accordance with generally accepted practices; **(you did everything that was common practice at the time you purchased)**
- The applicant has provided all legally required notices under this chapter with respect to hazardous substances, pollutants, contaminants, petroleum, or petroleum products found at the property; **(if you were required to notify someone about something, you did – and you will notify in the future)**

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- The applicant is in compliance with all land use restrictions and will not impede the effectiveness or integrity of any institutional control required for the property; **(if there are any restrictions applicable to the property, you are abiding or will abide by them)**
- The applicant complied with any information requests by the cabinet under KRS Chapter 224. **(If anyone has asked you for information you have provided it and all information required by the application is here)**
- The applicant is not and has not been affiliated with any person who is potentially liable for the release of hazardous substances, pollutants, contaminants, petroleum, or petroleum products on the property pursuant to KRS 224.1-400, 224.1-405, or 224.60-135 through:
 - a. Direct or indirect familial relationship;
 - b. Any contractual, corporate, or financial relationship, excluding relationships created by instruments conveying or financing title or by contracts for sale of goods or services; or
 - c. Reorganization of a business entity that was potentially liable; and **(you are not closely related to the polluter and your purchase was not engineered to avoid liability)**
- The applicant has not caused or contributed to the releases of petroleum governed by KRS 224.1-405 or the releases of a hazardous substance, pollutant, or contaminant governed by KRS 224.1-400. **(You did not cause the problem or make the situation worse)**

The application requires appropriate documentation of the due diligence completed before taking title. For a transaction today, that would be a current Phase I environmental assessment. It must also contain a property management plan that describes management practices the purchaser will follow to make its use of the property safe. Lastly, it requires a copy of the current deed and a \$2500 application fee.

The property management plan addresses the current and planned future use of the property, and the management practices the owner will follow to make its use of the property safe considering known or suspected contamination. This plan must be certified by a professional engineer or professional geologist that it is sufficient to make use of the property safe.

The Kentucky Division of Waste Management reviews an application, and if it finds the application sufficient, but the purchaser has not yet taken title, it will issue a Notice of Eligibility letter. If the purchaser has already taken title (and for a purchaser that received a Notice of Eligibility letter, once the purchaser gives the agency a copy of the deed by which it took title) the Division of Waste Management will issue of Notice of Concurrence letter. The Notice of Concurrence letter states that the agency concurs that the purchaser qualifies for the liability exemptions.

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Qualifying for the liability exemption means the regulatory agency cannot require the purchaser to investigate or clean up the contamination found or suspected during the due diligence investigation. If the purchaser discovers contamination not previously identified, but that occurred before the purchaser acquired the property, it can retain the exemption by modifying its property management plan as required to assure its use of the property, considering the new information, remains safe. If the purchaser causes the property to become contaminated, it is not excused from liability for the cost of investigation or cleaning up that contamination.

Please feel free to contact SMG with questions about this innovative program. Sara Smith, 859-231-8936 ext. 105, saras@smithmanage.com

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