

**Voluntary Remediation Program Memorandum of Agreement
Between the
U. S. Environmental Protection Agency, Region 4
and the
Kentucky Department for Environmental Protection**

This Memorandum of Agreement (MOA) is entered into between the U.S. Environmental Protection Agency (EPA), Region 4 and the Commonwealth of Kentucky, Department for Environmental Protection (KYDEP) to support and strengthen efforts to achieve cleanups that are protective of human health and the environment through the appropriate use of the Kentucky voluntary remediation program, which is governed by Kentucky Revised Statutes (KRS) 224.01-450 to 224.01-465 and KRS 224.01-510 to 224.01-532 and the regulations promulgated thereto. This MOA is intended to help property owners, developers, consultants, public officials, and the general public to understand the roles and responsibilities of the EPA and KYDEP and the potential utilization of the KYDEP Voluntary Environmental Remediation Program (VERP) to assess and address environmental contamination.

I. PURPOSE AND SCOPE

A. General

The EPA Region 4 and KYDEP agree to exercise their respective legal authorities in order to:

1. Facilitate timely implementation of the environmental cleanup requirements of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9601 *et seq.* (CERCLA, also known as Superfund);
2. Assist the EPA in meeting the federal Government Performance and Results Act of 1993, 31 U.S.C. § 1115 *et seq.* (GPRA) implementation schedule;
3. Facilitate the cleanup and productive redevelopment and sustainable reuse of brownfields and other contaminated properties in Kentucky;

Meet each agency's mandate to protect human health and the environment; and recognize the KYDEP VERP program for grant funding eligibility purposes under § 128(a) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act of 2002, 42 U.S.C. § 9628(a).

B. Applicability

1. Except as provided in Paragraph B. 2. below, this MOA addresses contaminated or potentially contaminated properties (brownfields) that are "eligible response sites," as defined in CERCLA § 101(41) and that are cleaned up under KYDEP's oversight pursuant to VERP:
 - a. After the effective date of this MOA; or
 - b. In accordance with the VERP authorities, KRS 224.01-450 to 224.01-465 and KRS 224.01-510 to KRS 224.01-532 and the regulations promulgated thereto, in effect as of the date of this MOA and the terms of any agreement with KYDEP.

2. This MOA does not apply to:

- a. Any site that is the subject of a federal enforcement or response action under CERCLA, including, but not limited to, an administrative order, a judicial order, a permit, an injunction, a consent decree, a CERCLA general or special notice letter, or an information request under CERCLA § 104(e);
- b. Any property that is part of or contains a site which is on the National Priorities List established by the U.S. Environmental Protection Agency;
- c. Any property that 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;
- d. Any property or site that is the subject of state or federal environmental enforcement action relating to the release for which the application is submitted;
- e. Any property or site that presents an environmental emergency; or
- f. Radioactive material facilities licensed under KRS 211.842 to KRS 211.852 and the administrative regulations promulgated pursuant thereto.

C. Reservation of Rights

This MOA does not have any legally binding effect, does not create any legal rights or obligations and does not in any way alter the authority or ability of KYDEP or the EPA Region 4 under state or federal law. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity against KYDEP or the EPA, their officers or employees or any person. The EPA Region 4 retains its authority to bring enforcement actions under federal law and KYDEP retains its authority to bring enforcement actions under state law.

Nothing in this MOA modifies federal or state statutory requirements (or regulations promulgated there under) or KYDEP's agreement to fully implement Kentucky's authorized hazardous waste management program under the Resource Conservation and Recovery Act (RCRA) Subtitle C or Kentucky's authorized underground storage tank program under RCRA Subtitle I.

By statute, entry into this MOA makes the Commonwealth of Kentucky eligible for grant funding under CERCLA § 128(a)(1)(A)(ii). However, this MOA does not obligate federal funds. Any USEPA funding decision will be based on funding priorities specified in USEPA's guidelines for CERCLA § 128 Brownfields State and Tribal Response Program grants. In addition, all activities USEPA may take in furtherance of this MOA are subject to the availability of appropriated funds.

II. AUTHORITY

A. Environmental Protection Agency, Region 4

The EPA enters into this MOA in furtherance of its statutory and regulatory responsibilities and authorities under CERCLA.

B. Kentucky Department for Environmental Protection

KYDEP enters into this MOA in furtherance of its statutory and regulatory responsibilities and authorities under:

- Kentucky Revised Statutes (KRS) 224.01-450 to 224.01-465 (“No Further Remediation” cleanups);
- KRS 224.01-510 to 224.01-532 (“Voluntary Environmental Remediation Program” cleanups); and
- Kentucky Administrative Regulations (KAR) promulgated thereto (401KAR 100:030).

III. BACKGROUND

A. Mandate, Authorization and Purpose

The Commonwealth of Kentucky and the EPA Region 4 are mandated to protect human health and the environment. The EPA Region 4 and KYDEP have a history of working cooperatively to remediate contaminated properties and environmental media.

The EPA Region 4 and KYDEP acknowledge the potential benefits that can be achieved by clarifying the intentions and expectations of the EPA Region 4 and KYDEP regarding the cleanup and reuse of contaminated properties that are addressed by KYDEP under Kentucky law. To the extent possible, the EPA Region 4 and KYDEP seek to facilitate the productive redevelopment and sustainable reuse of industrial and commercial properties in Kentucky by minimizing legal impediments to the acquisition, cleanup, transfer and appropriate use or reuse of those properties.

Both the KYDEP and the EPA Region 4 acknowledge their mutual respect, positive working relationship, and commitment to the successful implementation of the MOA. In particular, the KYDEP and the EPA seek to clarify the roles and responsibilities of the EPA Region 4 and KYDEP with respect to properties with real or perceived contamination, so as to increase the numbers and timeliness of cleanups that will result in the protection of human health and the environment by:

1. Supporting the use of KYDEP’s KRS 224.01-450 to 224.01-465 and KRS 224.01-510 to 224.01-532 comprehensive cleanup law where this is appropriate for achieving timely and protective cleanups;
2. Providing coordinated and consistent technical assistance and information to allow for informed decision making by property owners, prospective purchasers, lenders, public and private developers, citizens, local units of government, and elected officials;
3. Ensuring that the timely cleanup of sites protects human health and the environment, and promotes revitalization of contaminated property for appropriate use;

4. Facilitating the effective use of all available authorities and resources and selecting the optimum programmatic tools to increase the pace, efficiency, and quality of cleanups; and
5. Promoting processes by which cleanups that are carried out under state authority are performed in a manner that is consistent with federal objectives and comply with requirements for the site or media of concern.

B. Specific CERCLA Program Goals

The KYDEP and the EPA Region 4 intend to ensure that CERCLA cleanup program goals are met for sites addressed by this MOA. KYDEP and the EPA Region 4 intend to work together to ensure that adequate and timely investigation and cleanup of brownfields sites are conducted, consistent with reasonably anticipated future use, to ensure that the necessary environmental response actions are taken in accordance with applicable federal and state law and are protective of human health and the environment.

IV. MOA IMPLEMENTATION

A. Program Adequacy and Relevant State Authorities

1. Background

- a. The EPA Region 4 recognizes that KYDEP has successfully implemented cleanups at sites under KYDEP's VERP.
- b. In particular, the KYDEP's VERP is responsible for implementing Kentucky's Brownfields program and ensuring that all applicable statutory and regulatory requirements are met for remediating properties under Kentucky's Brownfields program. The KYDEP's various programs, laws, and regulations work together to achieve appropriate environmental remediation objectives and program goals as mentioned previously in this MOA.
- c. KYDEP intends to use, as appropriate, the KYDEP VERP's processes and standards for implementation of requirements at sites that may also be subject to CERCLA.

2. Evaluation of KYDEP's VERP under CERCLA § 128(a)

- a. The EPA Region 4 has evaluated KYDEP's VERP for the purpose of grant eligibility under CERCLA § 128(a) and determined that KYDEP's VERP includes each of the four elements of a state response program as described in CERCLA § 128(a)(2). KYDEP agrees to maintain all of these elements for KYDEP's VERP as follows:
 - i. Timely survey and inventory of brownfields sites in Kentucky. Kentucky maintains a brownfields inventory and has a process for adding to the inventory. Pursuant to KRS 224.01-400, KYDEP evaluates historic lists of sites to determine the priority of those sites for follow-up. In addition, KYDEP has an ongoing initiative to locate historic brownfields properties not previously identified. KRS 224.01-400 (17) requires that "The

Cabinet shall prepare and annually update an inventory of all sites in the Commonwealth at which there is or has been an environmental emergency or a release of a hazardous substance, pollutant, or contaminant.” This inventory is housed in the TEMPOtm environmental data management system. Though the statute only requires that it be updated annually, in practice it is updated continually. TEMPOtm also houses electronic copies of all documents associated with the release, assessment and cleanup/management of each site.

- ii. Adequate oversight and enforcement authorities and resources. Pursuant to KRS 224.01-450 to KRS 224.01-465 and KRS 224.01-510 to 224.01-532 and the regulations promulgated thereto, cleanups under KYDEP’s VERP will result in timely and appropriate response actions that protect human health and the environment and are conducted in accordance with applicable state and federal laws. If the party fails or refuses to complete the required actions, KYDEP has adequate enforcement resources and authority to ensure timely completion of response actions, including operation and maintenance or long-term monitoring by the responsible party. In the event that no party can be held responsible by a court of law, then Kentucky will utilize the Hazardous Waste Management fund to complete the cleanup. Moreover, the Cabinet has the authority, power and duty to recover the actual and necessary costs incurred while responding to a threatened release, an environmental emergency, or a release of a hazardous substance from a responsible party [KRS 224.01-400(15)]. It also has the authority to place a lien on the property to recover the costs if the property owner is liable under KRS 224.01-400[KRS 224.01-400(23)]. If KYDEP determines, either through an audit or a property inspection, that a VERP applicant or successive property owner, as applicable, who has been issued a Covenant Not to Sue pursuant to 224.01-526, has failed to comply with a requirement of KRS 224.01-510 to KRS 224.01-532, the Agreed Order under the KYDEP program, the approved Corrective Action Plan, the completion report, including any land use restrictions and engineering or institutional controls or that liability has resulted from the applicant’s exacerbation of releases identified in the Corrective Action Plan, the Covenant Not to Sue shall no longer apply pursuant to KRS 224.01-528.
- iii. Mechanisms and resources to provide meaningful opportunities for public participation. Pursuant to KRS 224.01-524, KYDEP’s VERP sets forth a process for public participation on cleanup decisions, and the public has access to site-specific documents that KYDEP will rely on in making cleanup decisions or conducting site activities.
- iv. Mechanisms for approval of cleanup plans and verification of completed response actions. The EPA Region 4 has determined that pursuant to KRS 224.01-450 to 224.01-465 and KRS 224.01-510 to KRS 224.01-532 and the regulations promulgated thereto, the cleanup program under KYDEP’s VERP provides for KYDEP reviews of all site assessments, work plans,

risk assessment reports, final reports and requests for case closure or a Covenant Not to Sue, and provides for KYDEP's written decision approving the investigation and cleanup activities. The EPA has also determined that pursuant to KRS 224.01-450 to 224.01-465 and KRS 224.01-510 to KRS 224.01-532, a party's participation in KYDEP's VERP does not prevent KYDEP from taking enforcement action after KYDEP withdraws its approval of a work plan which has the effect of terminating a Voluntary Remediation Agreement.

- b. The EPA Region 4 has reviewed and evaluated KRS 224.01-450 to KRS 224.01-465 and KRS 224.01-510 to KRS 224.01-532, specifically KRS 224.01-524, and KYDEP's VERP program and determined that it provides adequate access to information and meets the public record requirement described in CERCLA § 128(b)(1)(C). Through Kentucky's Open Records laws, located at KRS 61.870 to KRS 61.884, KYDEP will maintain and update this information at least annually and continue to make this record available to the public.

3. Recognition of KYDEP's standard-setting processes and standards

The EPA Region 4 has reviewed and evaluated Kentucky's cleanup standard-setting processes, and its capabilities and authorities as listed above and has determined that the standards and processes in the KYDEP VERP will result in cleanups that meet the objectives of CERCLA for sites subject to this MOA.

4. Recognition of KYDEP's VERP processes

- a. The cleanup criteria specified in KRS 224.01-450 to KRS 224.01-465 and KRS 224.01-510 to KRS 224.01-532 and the regulations promulgated thereto which establish the KYDEP VERP program provide for land-based cleanups which may entail environmental covenants, placement on KYDEP's geographic information systems (GIS) registry of completed sites, a combination of those institutional controls, or other restrictions in order to meet the criteria specified for each land use category.
- b. KYDEP will utilize criteria specified in the KYDEP VERP, KRS 224.01-450 to KRS 224.01-465 and KRS 224.01-510 to 532 and the regulations promulgated pursuant thereto, KRS 224.80-100 to KRS 224.80-210 and other applicable statutes and regulations when reviewing and approving institutional controls.
- c. KYDEP acknowledges its responsibility with respect to CERCLA to ensure that any investigation and cleanup conducted under state authority meets the objectives and requirements of the federal programs addressed by this MOA.
- d. Based on the assessment of KYDEP's capabilities and authorities, USEPA Region 4 has determined that the processes in the KYDEP VERP will result in cleanups that meet the objectives of CERCLA for sites subject to this MOA.
- e. The EPA Region 4 has reviewed and evaluated the KYDEP VERP statutes and regulations promulgated pursuant thereto, public record and participation requirements, and guidance, and has determined that KYDEP's VERP program is adequate to ensure that the federal objectives identified in Paragraph III.B. are met at sites subject to this MOA.

B. Future USEPA Action

CERCLA § 128(b) provides limitations regarding federal enforcement actions at “eligible response sites,” as defined in CERCLA § 101(41), that are being addressed in compliance with a state program that (a) specifically governs response actions for the protection of public health and the environment and (b) maintains and updates a public record, as required by CERCLA § 128(b)(1)(C). These limitations operate as a matter of law and are subject to the exceptions listed in CERCLA § 128(b). Thus, subject to the exceptions in CERCLA § 128(b), the EPA does not anticipate taking an administrative or judicial enforcement action under CERCLA §§ 106(a) or 107(a) against a person regarding a specific release at an eligible response site that is being addressed by that person in compliance with KYDEP’s VERP requirements.

C. Coordination between KYDEP and USEPA

1. The EPA Region 4 and KYDEP have developed an effective process for prioritizing sites or facilities and determining which agency is primarily responsible for a particular site. The EPA Region 4 and KYDEP share information on sites or facilities, implementation priorities, new program initiatives, cleanup criteria decisions, federal grant opportunities and other relevant issues. As part of this process, the KYDEP may request, and the EPA Region 4 may transfer to KYDEP, primary responsibility for overseeing activities at a federal-lead facility within the legal parameters of that program.
2. In order to maintain this level of communication, KYDEP and the EPA Region 4; conduct annual meetings and conference calls where they discuss progress in implementing this MOA; perform a joint critique on KYDEP’s overall cleanup program; evaluate annual milestones such as achieving state and federal commitments and; work through funding opportunities and facility- or property-specific concerns.
3. On an annual basis, KYDEP will report to the EPA Region 4 on the following:
 - a. Number of sites that have entered KYDEP’s VERP in the previous year; and
 - b. Number of sites which have submitted requests to ask KYDEP to close the sites as being remediated pursuant to the requirements of KRS 224.01-450 to 224.01-465 and KRS 224.01-510 to 224.01-532 and the regulations promulgated pursuant thereto and for which such requests have been granted consistent with the above statutes and regulations and KYDEP’s VERP procedures in the previous year. KYDEP will also provide the number of VERP sites which are utilizing institutional controls.

D. Entry and Modification

This MOA has been developed by mutual cooperation and consent and hereby becomes an integral part of the working relationship between the EPA Region 4 and KYDEP.

The EPA Region 4 enters into this MOA based upon review of KYDEP’s VERP cleanup criteria and processes. KYDEP agrees to provide the EPA Region 4 with prompt notice of significant changes to the laws, regulations and guidance and practices addressed through this MOA.

KYDEP and the EPA agree to review this MOA, if the EPA promulgates new regulations or develops relevant guidance after the effective date of this MOA.

This MOA may only be modified by the mutual written agreement of both parties. This MOA may be terminated by either the mutual written agreement of the parties, or forty-five (45) days after receipt by a signatory of this MOA (or his or her successor) of written notice of termination signed by the other signatory to this MOA (or his or her successor).

For the Kentucky Department for Environmental Protection



R. Bruce Scott, Commissioner

12/13/12
Date

For the United States Environmental Protection Agency, Region 4



Gwendolyn Keyes Fleming, Regional Administrator

12/19/12
Date