

Summary of Express Terms

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

Full text of the Express Terms is available on the New York State Department of Environmental Conservation's website at <https://www.dec.ny.gov/regulations/101908.html>

Part LL of Chapter 58 of the Laws of 2022 (2022 Amendments) amended and added new language to ECL Article 27, Title 14 (Subpart 375-3). Part BB of Chapter 56 of the Laws of 2015 (2015 Amendments) amended and added new language to the Environmental Conservation Law (ECL) and various other laws of the State. This rule making amends 6 NYCRR Part 375 (Part 375), Environmental Remediation Programs, to conform with the 2015 and 2022 Amendments with respect to the Brownfield Cleanup Program (BCP) at ECL Article 27, Title 14; addresses and enhances requirements pertaining to the Inactive Hazardous Waste Disposal Site Remedial Program (also known as State Superfund Program, SSF) at ECL Article 27, Title 13 and the Environmental Restoration Program (ERP) at ECL Article 56, Title 5; and updates the soil cleanup objectives (SCOs) based on review and comments received by DEC staff and the New York State Department of Health.

The rule making amends Part 375 to incorporate needed changes, clarifications, and modifications based on the experience gained while implementing the BCP. The changes will increase consistency across remedial programs (SSF, BCP, ERP) administered by DEC's Division of Environmental Remediation and provide DEC with the tools necessary to implement these programs more effectively.

Notable proposed amendments to Part 375 are described in greater detail below. Additional minor, non-substantive, grammatical and formatting changes are proposed in each

Subpart as needed.

Subpart 375-1 (General Remedial Program Requirements)

Changes to section 375-1.2 (Definitions) include:

- “Brownfield site” is revised to reflect the amended statute, which references the presence of contamination rather than the complication of reuse.
- “Change of use” is removed from each of Subparts 375-2, 375-3 and 375-4, and added to 375-1, providing a consistent definition for all programs.
- “Responsible party” is moved from Subpart 375-2 to 375-1. The term responsible party is also used in Part 375-3, and a consistent definition should apply to all uses of that term.
- “Historic fill” is removed from 375-1.2 definitions and 375-2.8(c)(3)(ii), 375-4.8(c)(3)(ii), and 375-6(d)(3)(vi). The function of the definition and these three references was to recognize historic fill as a “background” condition that may not require remediation even if SCOs are exceeded. Legal precedent developed during the early days of the BCP dictates that all material, historic or otherwise, be evaluated under the same criteria as undisturbed soil. Therefore, any fill that exceeds SCOs will be part of the site remediation and the definition and use of “historic fill” is no longer relevant.
- “Off-site contamination” is revised to include soil vapor and sediment.
- “Professional geologist” was added to define geologists as described in article 145 of the Education Law of NYS.

The general provisions that apply to orders and agreements are clarified. The timeframes for

payment of state costs are clarified to enhance DEC's ability to collect payment. Changes in Part 375-1.5(b)(2)(i) provide a timeframe and specify that dispute resolution requests under an order or agreement be sent to the Division Director. A new provision at Part 375-1.5(b)(6) explicitly states that DEC has the authority to initiate the termination of an order or agreement with cause.

Additional details are set forth in section 375-1.6 related to work plans and report requirements. A new provision requires daily reports during field work. This provision is intended to ensure that sufficient oversight is provided by the remedial party and documentation required for the Final Engineering Report (FER) is generated during the field work. Work plans will be required to provide details about import/export of fill and other materials. The information required to be provided in the FER, which is currently reflected in templates and guidance, is added to the regulation. This includes a description of the work completed in accordance with the work plan, any changes to the approved design or work plan, and a list of wastes, documentation of disposal, manifests, etc. The certification requirements for the FER are updated to clarify who the certifying party(ies) is and the level of oversight required.

DEC has created administrative inactive hazardous waste disposal site classifications which are posted on the DEC public website. These classes are an important element used in the management of sites (particularly for sites in the BCP program and sites being evaluated for listing on the Registry), a new section is added at 6 NYCRR 375-1.7 to describe the specific administrative classes. Classes "A" and "C" are used in the BCP to denote sites that are "active" and "complete", respectively. Class "P" is assigned to sites being evaluated for listing on the Registry. Additional definitions regarding evaluating the appropriate class were necessary and include:

- The definition of "remedial site" in section 375-1.2 is revised to include sites being

evaluated for listing on the Registry (Class P sites).

- A definition is added to section 375-1.2 for “site characterization” which is a preliminary investigation used to determine whether a potential site (or Class “P” site) should be listed on the Registry.

The remedial program requirements found in section 375-1.8 are modified to include the reconstruction of habitat disturbed by the remedial program, to acknowledge DEC’s existing authority under 6 NYCRR Part 182, Part 608, Part 661, and Part 663. Groundwater plume stabilization and management requirements applicable to volunteers in the BCP are clarified to state that a volunteer is required to evaluate the on-site plume and prevent further migration of any plume off-site. Activities allowed under restricted use scenarios (particularly agricultural) are also clarified to allow raised planters, roof-top gardens, and, if approved by DEC, community gardens.

Clarifying details are added to the Certificate of Completion (COC) provisions in 375-1.9(e) to specify that DEC can revoke a COC if the COC holder misrepresented facts regarding their status as a volunteer or the qualification for the project for tangible property credits, and that COCs may not be transferred to a responsible party. Further, ECL 27-1419(a-d) sets out the criteria for revoking a COC and the proposed regulations reflect the statutory requirements.

Modifications to miscellaneous section 375-1.11 clarify notification and plan requirements when there is a change of use. Modifications to permits section 375-1.12 clarify DEC’s authority regarding permit waivers to include disturbance to habitat subject to certain regulations.

Subpart 375-2 (Inactive Hazardous Waste Disposal Site Remediation Program)

Revisions in this Subpart clarify that:

- DEC has the authority to enter a “cash out” consent order in circumstances where it is implementing a remedy.
- A site is designated on the Registry on the date that the director of the Division of Environmental Remediation or their designee enters their approval of the reclassification in the electronic database.
- The presence of engineering controls to address potential vapor intrusion would not necessarily prevent a site from being delisted.

Subpart 375-3 (Brownfield Cleanup Program)

Most amendments made within this Subpart and are mandated by the 2015 and 2022 Amendments.

The following terms are defined and are consistent with the intent of the 2015 Amendment.

- “Potentially Responsible Party (PRP) search” is a search to identify PRPs who may be legally liable for contamination at a particular site. A PRP search is defined so that volunteers seeking entry of a Class “2” site in the BCP have a clear understanding of the search required as part of application.
- The proposed regulations will not include a definition of “site preparation costs” since the definition is codified in section 21 of the Tax Law.

The following terms are defined and are consistent the intent of the 2022 Amendments.

- “Affordable Housing Project” definition is further refined to clarify eligibility and benefits.

- “Cover system or site cover” defines the requirements for this engineering control as a physical barrier employed to eliminate exposure pathways to soil contamination by active or passive containment of soil.
- “Disadvantaged community” means a community identified pursuant to section 75-0111 of the ECL.
- “Renewable Energy Facility” is a property which is primarily used for a renewable energy system.

These regulations clarify eligibility requirements in section 375-3.3 for the BCP. Class 2 Superfund sites are now eligible for the program if there is

no viable responsible party. The regulations also clarify the information required to demonstrate “contamination” for eligibility purposes and incorporate the provisions introduced in the 2015 Amendments that a property is not eligible for the BCP unless the site “requires remediation.” Criteria used to determine the site’s anticipated use are provided.

6 NYCRR 375-3.3(d) is added to formalize the requirements related to tangible property tax credits (TPTCs) from the statute related to the source of contamination. For example, TPTCs are not available if groundwater contamination or soil vapor issues are entering the site from an off-site source or if the property was previously remediated (under another program) for the property’s “then intended use.”

Additional requirements for project eligibility for TPTCs in a city with a population of one million or more are in 6 NYCRR 375-3.3(e) and include:

- Projects are required to demonstrate substantial government assistance when applying for TPTCs under the ‘underutilized’ gateway.
- Projects in a disadvantage community or a renewable energy facility may be eligible for TPTCs.

Clarification of requests for DEC’s eligibility determination for TPTCs is addressed in 6 NYCRR 375-3.3(f).

6 NYCRR 375-3.8(e) is modified to clarify the details related to the institutional and engineering controls and soil cover for parties seeking any of the four Tracks (1, 2, 3, or 4). Provisional Track 1 criteria is eliminated and replaced with a provision that COCs be issued in the appropriate Track but can be upgraded to Track 1 if applicable criteria are met within 5 years.

The proposed regulations also clarify that a volunteer may be required to conduct an off-site field investigation and sampling to complete the exposure assessment including

groundwater, soil and soil vapor intrusion sampling.

Subpart 375-4 (Environmental Restoration Program)

Minor changes are proposed for Subpart 375-4. The revisions clarify that DEC prioritizes ERP applications based on need. Clarifications to the ERP explain that DEC can undertake the remediation using ERP funds, complete the remediation and incur the costs on behalf of the municipality, and be paid by the municipality through the ERP.

Subpart 375-6 (Soil Cleanup Objectives)

The proposed regulations update and revise various SCOs. Over half of the SCOs are revised, most by a factor of two or three, but some changed more substantially. A full explanation of the changes is provided in the July 2020 Addendum to the Technical Support Document (issued in September 2006).

An illustrative example of the changes is Hexavalent Chromium where the Protection of Ecological Resources SCO will increase from 1 to 20 part per million (ppm) and residential and restricted residential protection of public health SCOs will decrease from 22 to 1 ppm and from 110 to 1 ppm, respectively.

Two new chemicals, aniline and nitrobenzene, are added to Tables 375-6.8(a) and 375-6.8(b). Aniline and nitrobenzene are contaminants of concern at one or more remediation sites since the original SCOs were published. One pesticide, 2,4,5-TP Acid (Silvex), is removed. A review of over 11,000 samples found no detections of this pesticide above the unrestricted use criteria. DEC did not find evidence that this chemical is found at elevated levels. This is the only herbicide included in the SCOs. If herbicides are identified as a potential contaminant of concern

at a site, then sampling for herbicides (including, but not limited to 2,4,5-TP acid) could still be required. Existing footnotes are amended as needed.

In summary, the proposed amendments to 6 NYCRR Part 375 will:

- (1) clarify general remedial program requirements (Subpart 375-1);
 - (2) address requirements pertaining to SSF at ECL Article 27, Title 13 (Subpart 375-2);
 - (3) update BCP regulations related to the 2015 and 2022 amendments to DEC's regulations at ECL Article 27, Title 14 (Subpart 375-3);
 - (4) address requirements pertaining to ERP at ECL Article 56, Title 5 (Subpart 375-4);
- and
- (5) update SCOs (Subpart 375-6).

SUMMARY OF REGULATORY IMPACT STATEMENT

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

Full text of the Regulatory Impact Statement is available on the New York State Department of Environmental Conservation's website at <https://www.dec.ny.gov/regulations/101908.html>

INTRODUCTION

6 NYCRR Part 375 describes the requirements for environmental remediation programs, including those performed under an order, agreement, stipulation, or State assistance contract entered by the New York State Department of Environmental Conservation (DEC). The Division of Environmental Remediation (DER) proposes to revise portions of this regulation to support DEC's mission to protect public health and the environment in New York State (State).

1. STATUTORY AUTHORITY

Part LL of Chapter 58 of the Laws of 2022 (2022 Amendments) amended and added new language to Environmental Conservation Law (ECL) Article 27, Title 14 [Subpart 375-3]. Part BB of Chapter 56 of the Laws of 2015 (2015 Amendments) amended and added new language to the ECL and the various other laws of the State. This rule making amends 6 NYCRR Part 375 (Part 375), Environmental Remediation Programs, to conform with both the 2015 and 2022 Amendments with respect to the Brownfield Cleanup Program (BCP) at ECL Article 27, Title 14; addresses and enhances requirements pertaining to the Inactive Hazardous Waste Disposal Site Remedial Program (also known as State Superfund Program, SSF) at ECL Article 27, Title 13 and the Environmental Restoration Program (ERP) at ECL Article 56, Title 5; and updates the soil cleanup objectives (SCOs) based on review and comments received by DEC staff and the New York State Department of Health.

DEC's general authority to adopt any necessary, expedient, or desirable rules to carry out the environmental policy of the State is provided by ECL Article 3, Title 3, Section 3-0301(2)(a) and (m); additionally, DEC's specific authority to adopt rules of procedure for adjudicatory proceedings is provided by State Administrative Procedure Act (SAPA) § 301(3).

2. LEGISLATIVE OBJECTIVES

In furtherance of its commitment to environmental protection and economic revitalization, the State, created an array of programs and resources to help clean up and reuse contaminated sites. Specific to Part 375's rulemaking, the State administers the SSF, created in 1979; the BCP, created in 2003; and the ERP, created in 1996. General provisions that apply to all programs are found in Subpart 375-1, while provisions specific to the SSF, BCP and ERP are found in Subparts 375-2, 375-3 and 375-4, respectively.

The SSF identifies and characterizes suspected inactive hazardous waste disposal sites and provides for the investigation and remediation of sites that pose a significant threat to public health or the environment.

The BCP encourages private-sector remediation of contaminated sites and reduces development pressure on "greenfields." The BCP addresses abandoned, idled, or underutilized brownfield sites that are often located in already industrialized or urban areas and restores these properties to productive use in the community. Local economies are improved by encouraging use of existing infrastructure rather than creating new infrastructure to reach "greenfields." The BCP encourages a cooperative approach among the DEC, current property owners, lenders, developers, and prospective purchasers to investigate, remediate, and return contaminated sites to productive use. The BCP addresses the environmental and financial barriers and legal liabilities that often hinder the redevelopment of contaminated properties by providing financial incentives. Incentives include tax credits for remediation, related development and real property taxes.

The ERP was created under the 1996 Clean Water/Clear Air Bond Act. This remedial program provides increased financial assistance and incentives to municipalities for investigation and clean up at municipally owned sites.

3. NEEDS AND BENEFITS

The proposed amendments to Part 375 are mandated by the 2015 and 2022 Amendments. DEC is making additional amendments to Part 375 to incorporate clarifications and modifications based on the experience developed during the last 10 years which will increase consistency across remedial programs administered by DER and provide the tools necessary to implement the programs more effectively. These changes are detailed in the Summary of Express Terms and summarized in the Regulatory Impact Statement.

- Subpart 375-1.2(b) revises the definition of a “brownfield site”, based on the 2015 Amendments.
- Subpart 375-1.6(a) adds a requirement for daily reports to be submitted for all field activities.
- Subpart 375-1.11(d)(2) requires sites to submit a work plan for any proposed change of use activity. DEC will maintain the ability to waive the requirement if the change does not include a physical alteration of the site.
- Subpart 375-1.12(f) clarifies that habitats disturbed during remedial activities will require reconstruction.
- Subpart 375-3.2(a)(3) adds a definition of “Affordable Housing Project” per the 2022 Amendments.
- Subpart 375-3.2(e) defines for “Cover system or site cover” as an engineering control design to eliminate exposure pathways to contaminated soil.
- Subpart 375-3.2(f) defines “Disadvantaged community” per the 2022 Amendments.
- Subpart 375-3.2(l) defines “Renewable energy facility” per the 2022 Amendments.

- Subpart 375-3.3(b)(2) allows Class 2 SSF sites, which represent a significant threat to public health or the environment, to enter the BCP program with specific requirements.
- Subpart 375-3.5(g) requires that BCP applicants must pay a \$50,000 application fee (375-3.5(g)) as required by the 2022 Amendments. Conditions for fee waiver are included in the regulation.
- Subpart 375-3.8(b) clarifies that a volunteer may be required to conduct an off-site field investigation and sampling to complete the exposure assessment including groundwater, soil and soil vapor intrusion sampling.
- Subpart 375-3.8(e) changes which cleanup track a site is eligible for when Institutional Controls/Engineering Controls are used.
- Subpart 375-6 Tables 375-6.8(a) and (b) include revisions to SCOs because of DEC's required periodic review. Two new chemicals are added: aniline and nitrobenzene. The changes are summarized and explained in the July 2020 Addendum to the Technical Support Document (issued in September 2006), which is included in this rulemaking package. SCOs for PFOA and PFOS were not included in this revision because DEC and DOH are completing a rural soil background study for PFAS. SCOs for PFOA and PFAS will be proposed in a separate rulemaking.

Additional minor, non-substantive, grammatical, and formatting changes will also be made to each Subpart of Part 375 as needed.

4. COSTS

The updates to Part 375 will result in only nominal additional costs to the regulated community or other branches of local or State government. The BCP and ERP programs are not compulsory, so participation in ECL Article 27, Title 14 and ECL Article 56, Title 5 is voluntary.

a. Costs to Regulated Parties

Promulgation of these regulations are anticipated to have minimal increased costs, examples of which are provided below. Costs provided were developed by DEC based on our own contracting experience and reviewed by engineering firms working in these programs. A more detailed explanation of the estimated costs is provided in the full RIS.

- Daily Reports for Field Activities (Subpart 375-1.6(a)) – Additional costs range from none up to an estimated \$150 per day.
- Change of Use Work Plans (Subpart 375-1.11(d)(2)) – Costs are estimated to range from \$25,000 to \$40,000, which will vary based on site specifics.
- Habitat reconstruction (Subpart 375-1.12(f)) – This will not increase costs, as this is an existing requirement outside of Part 375.
- PRP Search – This cost is estimated at a minimum of \$25,000 and could be significantly more for sites where ownership is complicated.
- Application Fee – The application fee of \$50,000 required by the 2022 Amendments (Subpart 375-3.5(g)) will be offset by tax credits achieved by completing remedial projects. Conditions for waiver of the fee are also provided.
- Off-Site Field Investigation and Sampling (Subpart 375-3.8(b)(2)) – The cost to the remedial party is estimated to be \$25,000 on average but could range up to \$50,000a-\$75,000 for sites with technical or logistical challenges.
- Change of SCOs (Subpart 375-6) – For the SCOs whose values decreased, there may be some increase in costs associated with site remediation. For the SCOs whose values increased, there should be a decrease in costs associated with site remediation.

Overall, the Part 375 amendments are anticipated to result in minimal cost changes to regulated entities. There are mechanisms to offset costs for sites in the BCP and ERP. The cost of SSF work is borne in the first instance by the parties responsible for the contamination or by the State if there is no viable responsible party.

b. Costs to DEC, State and Local Governments

There will be continued costs incurred by DEC that exist under current statutes and regulations in administering the Part 375 remedial programs. There will be some costs to DEC to review and approve such newly required documents as PRP searches and daily reports. DEC's regulation and administration of the remedial programs in Part 375 currently necessitates extensive review of documents and data; therefore, the additional documents resulting from the amendments are proportionally inconsequential.

The proposed rulemaking requires no additional statutory authority, does not create new regulatory programs, does not expand existing regulatory programs, and does not expand the regulated community. These regulations generally will not impose any additional direct costs on local governments.

5. LOCAL GOVERNMENT MANDATES

This rule making is not a mandate on local governments. Local governments have no additional compliance obligations compared to other subject entities.

To the extent that New York City certifications are required for projects to meet the definitions of underutilized or affordable housing, these certification programs are in place or are developed and implemented at the discretion of the local government.

6. PAPERWORK

Additional paperwork associated with the proposed amendments to Part 375 will be related to the requirements for the submittal of daily reports during all field activities and change of use work plans at sites where remediation has been completed. No other reporting requirements are being added.

7. DUPLICATION

The proposed rulemaking is not intended to duplicate, overlap, or conflict with any other State or federal requirements.

8. ALTERNATIVES

Many of the proposed changes to Part 375 are the result of the 2015 and 2022 Amendments and required by statute to be incorporated. For these changes, the only alternative considered was “no action,” which would not have satisfied the statutory requirement and therefore is not feasible. Proposed changes to Part 375 unrelated to the 2015 and 2022 Amendments were subject to extensive internal review for several years as well as public outreach efforts. During this process, alternatives specific to each individual change were evaluated. The result of this process is the proposed regulations that DEC considers protective of the environmental resources in a manner that limits the cost to the regulated community.

9. FEDERAL STANDARDS

The proposed regulations will not exceed any minimum federal standards where applicable or where there is no comparable federal standard.

10. COMPLIANCE SCHEDULE

Many of the changes in Part 375 reflect the 2015 and 2022 Amendments and have been in effect since the laws were enacted (e.g., changes to BCP eligibility and tax credits). Other changes document or clarify DEC interpretations, procedures or processes which are also already in practice. Changes made to these regulations that are not already in practice will be implemented when the regulations become effective. Changes to SCOs will only apply to sites that do not have a remedy selected as of the adoption date of the revised regulations.

11. INITIAL REVIEW OF RULE

DEC will conduct an initial review of the rule within 3 years as required by SAPA §207.

RURAL AREA FLEXIBILITY ANALYSIS

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

6 NYCRR Part 375 describes the requirements for environmental remediation programs, including the State Superfund Program (SSF); Brownfield Cleanup Program (BCP); and Environmental Restoration Program (ERP). These programs are performed under an order, agreement, stipulation, or State assistance contract entered into by the New York State Department of Environmental Conservation (DEC) and all work plans, reports, certificates, and other remedial program documents are approved, accepted, or issued by DEC. DEC's Division of Environmental Remediation proposes to revise portions of this regulation to support DEC's mission to protect public health and the environment in New York State (State). DEC does not anticipate the rulemaking to have a negative economic impact on rural areas.

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS

For purposes of this Rural Area Flexibility Analysis (RAFA), "rural area" means those portions of the state so defined by Executive Law section 481(7), SAPA section 102(10). Under Executive Law section 481(7), rural areas are defined as "counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of two hundred thousand or greater population, 'rural areas' means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein." There are 44 counties in the State that have populations of less than 200,000 people and 71 towns in non-rural counties where the population densities are less than 150 people per square mile. Of DEC's approximately 6600 remedial sites, 22% are found in rural areas. The proposed changes to 6 NYCRR Part 375 will apply statewide; therefore, they apply to all

rural areas of the State.

2. REPORTING, RECORDKEEPING, OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES

The rulemaking will not directly impose any significant service, duty, or responsibility upon any county, city, town, village, school district, or fire district in a rural area. This rulemaking does not directly mandate the expenditure of funds by any sector of local government. Minor increases to reporting, recordkeeping, compliance requirements, and professional services, which have been determined by DEC to be necessary for DEC to obtain the information needed to implement the remedial programs, are included in the amendments.

These changes include:

- Daily report submittal requirement to adequately document remedial activities (375-1.6(a));
- Requirement for sites to submit a work plan for any proposed change of use activity, which DEC will maintain the ability to waive if a physical alteration of the site is not involved (375-1.11(d)(2));
- Reconstruction plan requirement for sites where there is a disturbance to habitat (375-1.12(f));
- Potentially responsible party (PRP) search requirement for BCP Class 2 sites (375-3.4(b)(1));
- Off-site field investigation and sampling requirement for BCP volunteers when deemed necessary to complete the human health exposure assessment (375-3.8);

These changes will be imposed statewide, including in rural areas and will affect local governments and private entities. Each remedial program requires that various reports, work plans, and citizen participation activities be conducted and documented. These requirements are derived from current statutory, regulatory, and programmatic provisions.

3. COSTS

The amendments to Part 375 will not impose any direct costs on rural areas and will be applied

statewide. However, rural area governments may be a responsible party under the SSF or a participant in the BCP. There will be minor cost increases for responsible parties in the SSF and participants in the BCP, primarily due to increased reporting requirements. The great majority of the mandates to clean up contamination and the associated costs are a result of existing statutory provisions and not this rule making. Additionally, costs associated the BCP (application fees) and ERP remedial programs can be offset through tax credits (BCP) or receive substantial reimbursement through grants (ERP). The ERP has a financial benefit to local governments, including those in rural areas, by reducing the fiscal burden associated with the investigation and remediation of contaminated properties.

Some examples of fiscal effects are provided below. Costs provided were developed by DEC based on our own contracting experience, and reviewed by engineering firms working in these programs:

- Daily Reports – The amendment to Part 375 regarding daily reports is not intended to increase oversight or costs but is intended to provide consistency in reporting methods and the oversight necessary to successfully complete the program. Some BCP sites currently submit daily reports during remedial activities as described in the site’s Remedial Action Work Plan. Furthermore, the information and documentation provided in the daily reports is also required information for the Final Engineering Report (FER). In most cases, there will be no change in process, and, therefore, no change in cost. In other instances where daily reports were not being submitted or were insufficient, there may be some marginal increase in cost, estimated at \$150 per day, for regulated parties to prepare and submit the documents. Total potential costs for each project will depend on variables such as a site’s remedy, size, and duration of remedial activities.
- Change of Use Work Plans – Subpart 375-1.11(d)(2) will require sites to submit a work plan for any proposed change of use activity. This will create an increase in costs to the regulated party for the document preparation of roughly \$25,000 to \$40,000. Costs will vary based on the proposed activity,

size, extent of potential exposure, and other variables, and can be waived if the change of use does not involve a physical alteration to the site.

- **Habitat Reconstruction** – The requirement of reconstructing habitats disturbed during remedial activities will not increase costs for SSF, BCP, or ERP sites, as this is an existing requirement in State laws and regulations outside of Part 375 and costs of such habitat reconstruction are already incurred under existing projects.
- **PRP Search** – Requiring Class 2 sites applying to the BCP to submit a PRP search with their application will increase costs to applicants. A PRP search is estimated to cost a minimum of \$25,000 and could be significantly more for sites where ownership and corporate succession is complicated. The PRP search is required prior to acceptance into the BCP and is currently being completed by DEC; this rule change will result in shifting the burden of completing the PRP search from DEC to the applicant. The applicant should already have information on prior owners or operators of sites, as applicants typically have already performed title searches and Phase I Environmental Assessments as part of the purchase of potential BCP properties. The cost of the PRP search cannot be directly offset by tax credits, as it will be completed prior to the execution of the Brownfield Cleanup Agreement.
- **Applicants to the BCP program (375-3.5(g))** must now pay a \$50,000 application fee. Conditions for fee waiver are included in the regulation.
- **Off-Site Investigation** – The clarification in Subpart 375-3.8(b)(2) that may require BCP Volunteers to complete a qualitative exposure assessment of contamination that may have migrated off-site will result in costs for some sites in the program; however, this work is required by ECL §27-1415(2)(b) and does not expand the existing requirements. For sites with on-site data that allows for a complete exposure assessment, no additional costs will be incurred. For sites where additional, off-site data is needed to determine whether off-site contamination represents a significant threat to public health or the

environment, costs will be incurred for these investigation activities. The cost to the remedial party for work to complete this assessment is estimated to be \$25,000 on average but could range up to \$50,000-\$75,000 for sites with technical or logistical challenges. A portion of the cost of this investigation is recoverable by the remedial party in the form of tax credits (the investigation will be considered a site preparation cost). Clarifying and enforcing the responsibility for a volunteer to collect off-site data (when necessary) to complete the exposure assessment as required by ECL §27-1415(2)(b) will ensure efficient use of resources in determining the need to list and investigate if a significant threat is posed by the off-site portion of some BCP sites. The amount of the off-site investigation costs will vary based on the on-site data, type and extent of contamination at the site, surrounding land use, and site conditions such as geology and groundwater flow.

4. MINIMIZING ADVERSE IMPACT

The proposed amendments will not cause adverse impacts to rural areas of the State. Minor additional reporting requirements will affect all parties involved in remedial programs statewide, including rural areas, but only to the extent necessary for DEC to effectively implement the remedial programs. The proposed amendments will not create new regulatory programs, expand existing regulatory programs, or increase the regulatory requirements applicable to rural areas beyond existing State statutes. DEC has determined there will be a continued positive impact across the State, including rural areas, because contaminated sites will continue to be remediated under the remedial programs (SSF, BCP, ERP).

5. RURAL AREA PARTICIPATION

DEC continues to provide statewide outreach to regulated communities and interested parties, including those in rural areas of the State. Relevant information pertaining to the SSF, BCP, and ERP continues to be

posted on DEC's website. DEC maintains a listserv to which persons may subscribe to receive information and progress updates pertaining to SSF, BCP, and ERP sites.

Several forums were held statewide in 2017, 2018 and 2019 at various venues, including those that were accessible to rural communities, to present a summary of potential Part 375 amendments that were being considered by DEC. The forums also provided an opportunity for the audience to ask questions and engage in discussion.

DEC will ensure public notice and input on proposed amendments to Part 375 by issuing public notices in the State Register and DEC's Environmental Notice Bulletin; holding a comment period of at least 90 days and conducting public hearings. Interested parties, including those in rural areas, will have the opportunity to submit written comments and participate in the public hearings, as well as any webinars and public meetings that are held. DEC will also post relevant rule making documents on their website for public access.

6. INITIAL REVIEW OF THE RULE

DEC will conduct an initial review of the rule within 3 years as required by SAPA §207.

JOB IMPACT STATEMENT

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

1. NATURE OF IMPACT

The New York State Department of Environmental Conservation (DEC) is proposing amendments to 6 NYCRR Part 375 (Part 375) and the regulations apply statewide. This includes proposed amendments to the following remedial programs: Inactive Hazardous Waste Disposal Site Remedial Program (also known as State Superfund Program, SSF), the Brownfield Cleanup Program (BCP), and the Environmental Restoration Program (ERP). DEC does not anticipate these amendments to create an adverse impact on jobs and employment opportunities in New York State (State). The existing Part 375 has been in place for over 20 years, with the exception of the BCP which was initially adopted in 2006. The rule also incorporates needed clarifications and modifications to Part 375 based on the experience developed during the first decade of implementing the BCP. The amendments will increase consistency across remedial programs administered by the Division of Environmental Remediation and provide DEC with the tools necessary to more effectively implement the remedial programs.

2. CATEGORIES AND NUMBERS AFFECTED

The proposed amendments to Part 375 are not anticipated to negatively affect employment opportunities. Since its inception in 2003, the BCP has incentivized development of hundreds of contaminated properties resulting in the generation of thousands of jobs statewide. Part BB of Chapter 56 of the Laws of 2015 (2015 Amendments) amended the Environmental Conservation Law (ECL) to limit BCP tax incentives on sites located within cities having a population of one million or more with the objective to focus the incentives on the most contaminated and most difficult sites to redevelop. Since the 2015 Amendment, participation in the

program, which is voluntary, did not decline in the ensuing years, and the BCP continues to be a robust revitalization program. These amendments will not restrict the estimated several hundred construction and commercial jobs that will be created statewide.

Part LL of Chapter 58 of the Laws of 2022 (2022 Amendments) added definitions for affordable housing projects, disadvantaged communities, and renewable energy facilities, as well as a fee to enter the BCP program. The fee will be offset by BCP program tax credits. The new definitions will not restrict enrollment in the program and may provide further incentives.

The Part 375 amendments are minor regarding the ERP and SSF and will not fundamentally change how these programs are administered. Therefore, jobs are not anticipated to be impacted.

3. REGIONS OF ADVERSE IMPACT

Part 375 is currently and will continue to be administered statewide. Regardless of the regional location, the amendments are not anticipated to negatively impact jobs or employment opportunities.

4. MINIMIZING ADVERSE IMPACT

The rule is not anticipated to have an adverse impact on jobs and employment. DEC already regulates State Superfund sites, brownfield sites and environmental restoration projects covered by Part 375.

5. SELF-EMPLOYMENT OPPORTUNITIES

The rule is not anticipated to negatively impact self-employment opportunities.

6. INITIAL REVIEW OF RULE

DEC will conduct an initial review of the rule within three years of its adoption as required by SAPA

§207.

REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

1. EFFECT OF RULE

The 6 NYCRR Part 375 (Part 375), Environmental Remediation Programs, amendments are proposed to conform with the New York State's (State) Laws; Part LL, Chapter 58 of the Laws of 2022 (2022 Amendments) and Part BB, Chapter 56 of the Laws of 2015 (2015 Amendments) which revised the Environmental Conservation Law (ECL). This rulemaking addresses remediation requirements pertaining to the Inactive Hazardous Waste Disposal Site Remedial Program (State Superfund Program, SSF) at ECL Article 27, Title 13; the Brownfield Cleanup Program (BCP) at ECL Article 27, Title 14; and the Environmental Restoration Program (ERP) at ECL Article 56, Title 5. Soil cleanup objectives (SCOs, Subpart 375-6) are amended where appropriate. The 2022 amendments required revisions to the BCP with regards to affordable housing, renewable energy, and application fees. Amendments to Part 375 incorporate clarifications and modifications based on experience developed while implementing the BCP, SSF, and ERP, and will increase consistency across remedial programs administered by the Department of Environmental Conservation (DEC). The proposed amendments apply to all 62 counties of the State and will not negatively affect small business and local governments (SBLGs).

BCP and ERP participation is voluntary; obligations under these programs are required by statute because of a party's choice to participate thus, the rule will only affect entities that choose to participate in the BCP or ERP. Additionally, all municipalities are eligible to apply for ERP grants wherein the State covers 90% of remediation costs. Local governments often choose this option for site clean-up thus an increase in costs would be minimal. These changes would result in minimal increased costs to any small businesses that enter the

BCP. Based on the increasing number applications who participate in the BCP, these increased costs are not creating a significant disincentive. Parties responsible for contamination under the SSF will continue to be responsible for remedial site costs.

2. COMPLIANCE REQUIREMENTS

The proposed rule imposes the following additional requirements for SBLGs participating in the SSF, BCP, and ERP:

- Additional requirement to demonstrate tax credit eligibility for applicants in New York City;
 - Requirement for sites to submit work plans for any proposed change of use activity. DEC will maintain the ability to waive if physical alteration of the site is not involved (375-1.11(d)(2));
 - Reconstruction plan requirement for sites where habitat is disturbed (375-1.12(f));
 - “Site cover” definition added (375-3.2);
 - Potentially responsible party (PRP) search requirement for BCP Class 2 sites (375-3.4(b)(1));
 - Off-site field investigation and sampling requirement for BCP volunteers to complete the human health exposure assessment (375-3.8); and
 - Update SCOs, including changing SCO values (based on revised reference doses, partitioning coefficients, and exposure calculations) and addition of aniline and nitrobenzene (375-6.8(a, b)).
- Changes are summarized and explained in July 2020 Addendum to the Technical Support Document, issued in 2006 and amended in 2022.
- Under directive of the 2022 Amendments, BCP applicants must pay a \$50,000 application fee (375-3.5(g)). Conditions for fee waiver are included in the regulation.

3. PROFESSIONAL SERVICES

The amendments to Part 375 may slightly increase the existing need for professional services. If an SBLG is an SSF responsible party or BCP participant, the requirements noted above may require additional professional services. Examples include submitting daily reports, submitting change of use work plans, creating disturbed habitat reconstruction plans, and off-site investigation/sampling.

4. COMPLIANCE COSTS

Updates to Part 375 will implement the remedial programs without substantive changes, and, therefore, will result in nominal additional costs to SBLGs. Further, BCP and ERP are not compulsory programs, i.e., participation in ECL Article 27, Title 14 and ECL Article 56, Title 5 is voluntary. Participation in the ERP reduces the fiscal burden to municipalities associated with the investigation and remediation of contaminated property. State assistance grants available to local governments cover up to 90 percent of the eligible on-site and 100 percent of the eligible off-site costs. The remaining portion can be covered through federal, State, or private party monies. A new benefit to municipalities is the option to have DEC directly manage ERP projects, thus reducing the municipality's financial responsibility for remedial management and oversight of the project and for DEC's administrative costs.

Examples of fiscal effects on SBLGs are summarized below. Costs were developed based on DEC contracting experience and reviewed by engineering firms in these programs.

- Daily Reports – The Part 375 daily report amendment is not intended to increase oversight or costs but is intended to provide consistency in reporting methods and the oversight necessary to successfully complete the program. Some BCP sites currently submit daily reports during remedial activities as described in the site's Remedial Action Work Plan. Furthermore, the information and documentation that daily reports provide is required information for the FER. In

most cases there will be no change in process, and no change in cost. In instances where daily reports were not being submitted or were insufficient, there may be some increase in cost, estimated at \$150 per day, for regulated parties to prepare and submit the documents. Total potential costs for each project will depend on variables such as a site's remedy, size, and duration of remedial activities.

- Change of Use Work Plans – Subpart 375-1.11(d)(2) will require sites to submit a work plan for any proposed change of use activity. This will create an increase in costs to the regulated party for the document preparation of roughly \$25,000 to \$40,000. Costs will vary based on the proposed activity, size, extent of potential exposure, and other variables, and can be waived if the change of use does not involve a physical alteration of the site.
- Habitat Reconstruction – Reconstructing habitats disturbed during remedial activities will not increase costs for SSF, BCP, or ERP sites, as this is an existing requirement in State laws outside of Part 375, and costs of habitat reconstruction should already be included in existing projects.
- PRP Search – Requiring Class 2 sites applying to BCP to submit a PRP search will increase costs to applicants. A PRP search is estimated to cost at least \$25,000 or more for sites where ownership and corporate succession is complicated. The PRP search is required prior to acceptance into the BCP and is currently completed by DEC; this rule change shift the burden of the PRP search from DEC to the applicant. The applicant should have information on prior owners or operators of sites, as applicants typically have performed title searches and Phase I Environmental Assessments as part of the property purchase. The cost of the PRP search cannot be directly offset by tax credits because it is completed prior to the execution of the Brownfield Cleanup Agreement.

- Applicants to the BCP (375-3.5(g)) must now pay a \$50,000 application fee. Conditions for fee waiver are included in the regulation.
- Off-Site Investigation – The clarification in Subpart 375-3.8(b)(2) that BCP Volunteers may be required to complete an off-site qualitative exposure assessment of contamination will result in costs for some sites in the program; however, this work is required by ECL §27-1415(2)(b) and does not expand the existing requirements. For sites with on-site data that allows for a complete exposure assessment, no additional costs will be incurred. For sites where additional, off-site data is needed to determine whether off-site contamination represents a significant threat to public health or the environment, costs will be incurred for investigations. The cost to complete this assessment is estimated at \$25,000 on average but could range up to \$50,000-\$75,000 for sites with technical or logistical challenges. A portion this investigation cost is recoverable by the remedial party in the form of tax credits as a site preparation cost. Clarifying and enforcing the responsibility for a volunteer to collect off-site data to complete the exposure assessment as required in by ECL §27-1415(2)(b) will ensure efficient use of resources in determining the need to list and investigate if a significant threat is posed by the off-site portion of some BCP sites. The amount of the off-site investigation costs will vary based on the on-site data; type and extent of contamination at the site; surrounding land use; and site conditions such as geology and groundwater flow.
- Change of SCOs – These changes will apply to sites that do not have a selected remedy when the proposed regulation is adopted. For SCOs with decreased values, there may be increase in costs associated with remediation. The additional cost will be site-specific and will vary based on the level of contamination present, the site's end use, and the desired cleanup track. The lower SCOs, along with site-specific variables, may result in the need for additional material

excavation and disposal, which have associated costs. Based on the lower SCOs, sites that had minimal or no SCO exceedances may now have exceedances, which may result in additional sites being eligible for the BCP. For the SCOs whose values were raised, there should be a decrease in costs associated with remediation. More information on the data and methods used to calculate the SCOs is found in July 2020 Addendum to the Technical Support Document (issued in September 2006).

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

It is economically and technologically feasible for an SBLG to comply with the proposed rule. Increased costs resulting from the Part 375 amendments will be nominal, particularly in relation to costs currently incurred by regulated parties. The amendments will not create a need for additional technology beyond what is currently used to comply with the existing regulations. Furthermore, many of the amendments to Part 375 are already met by regulated parties, demonstrating the amendments are economically and technologically feasible.

6. MINIMIZING ADVERSE IMPACT

The rulemaking is not anticipated to have adverse impacts on SBLGs in the State. The proposed rule changes may create some minor increased costs to regulated parties, including SBLGs as discussed above. Costs associated with daily reports, qualitative exposure assessments, and additional remediation resulting from the changes to SCOs can be offset for BCP sites by tax credits. Costs to local municipalities participating in the ERP are similarly offset by State funds. Furthermore, participation in the BCP and ERP is voluntary, therefore, any obligations under the BCP or ERP are either required by statute or imposed because of a party's choice of action to participate in those programs. Despite the potential for slight cost increases, DEC has determined that there is an overall positive impact since areas across the State will be cleaned up because of the remedial

programs.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

DEC continues to provide statewide outreach to stakeholders, including SBLGs. Relevant information pertaining to the SSF, BCP, and ERP continues to be posted on DEC's website. DEC maintains a listserv to which persons may subscribe to receive information and progress updates pertaining to remedial sites.

Several forums were held statewide in 2017, 2018 and 2019 to present a summary of Part 375 amendments being considered by DEC. The forums provided an opportunity for the audience to ask questions and engage in discussion. Comments were received from stakeholders during the prior public comment period and DEC undertook additional stakeholder outreach prior to proposal of these revisions. Stakeholder input was considered, and changes were made to improve and clarify the proposed regulation.

DEC will ensure public notice and input on proposed amendments to Part 375 by issuing public notices in the State Register and DEC's Environmental Notice Bulletin and by holding a comment period of at least 90 days. Stakeholders will have the opportunity to submit written comments and participate in the public hearings. Relevant rule making documents will be posted on the DEC website for public access.

8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

No cure period or other opportunity for ameliorative action is needed. The rule making will not impose additional penalties on the regulated community, including SBLGs.

9. INITIAL REVIEW OF THE RULE

DEC will conduct an initial review of the rule within 3 years as required by SAPA §207.