

Assessment of Public Comment

Revisions to 6 NYCRR Part 375, Environmental Remediation Proposed on February 14, 2024

1. GENERAL COMMENTS

1.1. Timeline for New Soil Cleanup Objectives (SCOs)

Commenters inquired as to when the new SCOs would be effective. One commenter suggested that there should be a phase in period while other commenters suggested that SCOs become effective one year after the regulations are promulgated. (Commenters 5, 13, 15)

Response 1.1. *SCOs will not be applied retroactively and will be used in remedial decision-making upon the effective date of the regulatory revisions. The regulations will be effective/adopted on the date that they are signed by the DEC Commissioner, and they will subsequently be noticed in the State Register and in DEC's Environmental Notice Bulletin. When the regulations are adopted, any site with a previously issued Decision Document or Record of Decision will not change. The Regulations will apply to any Decision Document or Record of Decision approved after the revisions are adopted.*

1.2. Elimination of Historic Fill Definition:

Commenters objected to the removal of the "Historic Fill Material" definition from Part 375 1.2 because historic fill material is present on many brownfield sites. (Commenters 9, 13, 14)

Response 1.2. *The regulation removes the definition of historic fill material because the term will no longer be used in the regulation. The three instances where the term was previously used in the current regulation are:*

- *375-2.8(c)(3)(ii): The Department may approve a remedial program for soil that considers site specific background concentrations, including the location of a site in areas of historic fill, in the development of the remedy*
- *375-4.8(c)(3)(ii): The Department may approve a remedial program for soil that considers site specific background concentrations, including the location of a site in areas of historic fill, in the development of the remedy*
- *375-6(d)(3)(vi): The Department may issue a site-specific exemption for one or more of the requirements set forth in paragraph (1) above, based upon site specific conditions, including but not limited to the presence of historic fill in the vicinity of the site.*

The function of these three references to historic fill is to recognize historic fill as a "background" condition that may not require remediation, even though soil cleanup objectives are exceeded. Case law that developed during the early days of the Brownfield Cleanup Program (BCP) did not support this interpretation, and, in practice, historic fill has been evaluated with the same methods as other soil or fill material. Any fill that exceeds SCOs will be evaluated as part of site remediation.

1.3. Perfluorooctanoic acid (PFOA) and Perfluorooctane sulfonate (PFOS) Not Included in the SCO Tables in Part 375 6.8

1.3.1. Oppose Removal: Commenters disagreed with the removal of PFOA and PFOS SCOs from the tables in Part 375 6.8(a) and (b) from a prior proposed revision to Part 375. (Commenters 3, 4)

1.3.2. Support Removal: A commenter disagreed with the proposed, future inclusion of SCOs for PFOA and PFOS. (Commenter 5)

Response 1.3. *SCOs for PFOA and PFOS are not included in this rulemaking. Per Environmental Conservation Law (ECL) 27-1415, DEC is required to publish threshold values for contaminants in soil. SCOs for PFOA and PFOS will be include in a separate rulemaking after completion of a NYS rural background in soil study and review of all available data. In the interim, DEC is publishing guidance values for PFOA and PFOS SCOs in a proposed draft of CP-51 that is available for public comment until September 26, 2024.*

1.4. Incorrect SCO Values for 1,2,4- and 1,3,5-trimethylbenzene Incorrect

The commenter advised DEC that the protection of public health SCOs for 1,2,4-trimethylbenzene and 1,3,5-trimethylbenzene in Part 375 6.8(b) were different from the values in the Technical Support Document, Table AD-4. (Commenter 2)

Response 1.4. *Comment acknowledged. This error has been corrected. The tables in Part 375 and the TSD have been thoroughly reviewed for accuracy and updated.*

1.5. References for Derived Value of SCOs in Technical Support Document (TSD)

The commenter asserted that the level of detail provided in the TSD for the Part 375 Regulation is insufficient for review. Stating that justifications and rationale for changes in exposure factors were not provided in sufficient detail and supporting information or literature citations were not proved. (Commenter 17)

Response 1.5. *Comment acknowledged. DEC always seeks to improve transparency on the methods and data used for deriving soil cleanup objectives. Your comments will be considered during future reviews of the TSD.*

1.6. Elemental/Total Mercury Values

DEC received the following comments concerning the revised SCOs for mercury;

- 1) The values for unrestricted use, residential use, and restricted residential use are higher than the values for the rural soil background. As such, these values should be set at 0.30.
- 2)The reference concentrations (RfC) used to calculate the SCOs is overly conservative.

3) An additional footnote should be provided to clarify how the cleanup objectives can be adjusted based on the speciation of the mercury present.
(Commenter 17)

Response 1.6.

1) The NYS Department of Health (NYSDOH) has reviewed the comment regarding the toxicity analysis for mercury and stands by their selection of the toxicity value. NYSDOH is not restricted to only using USEPA's Integrated Risk Information System Tier 1 source within Part 375. Their rationale for selecting California EPA's number is provided in the Technical Support Document Addendum.

2) The unrestricted use criteria include consideration for protection of ecological resources. For ecological resources, the rural background is evaluated in habitat areas, and a background level of 0.18 mg/kg was established based on that evaluation.

3) DEC acknowledges that the SCOs for mercury for residential use and restricted residential use should reflect the rural background concentration of 0.30 mg/kg. That change will be made in the revised table. The proposed footnote "If total mercury is found in soil above the published SCO, then subsequent analysis of the separate species of mercury can be taken into consideration during the remedy selection process." will be added to the SCO tables.

1.7. Footnotes in Table AD-4 of the TSD

The commenter suggested that footnote 5 in Table AD-4 of the TSD be revised and separated into two footnotes. (Commenter 17)

Response 1.7. *Comment acknowledged. The TSD was not part of the public comment package, however, we will review the footnotes in the TSD.*

1.8. Expand Tables in 6.8

A commenter encouraged an expansion of the contaminants listed in Part 375 Tables 6.8(a) and (b), particularly adding ammonia to the Tables. (Commenter 14)

Response 1.8. *At the time that this rulemaking was initiated, nitrobenzene and aniline were added to the tables in 375-6 because those chemicals have been identified as contaminants of concern requiring remediation and the development of site-specific SCOs at several sites. DEC is required to update the SCOs every 5 years and will consider adding chemicals during that process. In the interim, DEC publishes CP-51/Commissioner's Policy 51, Soil Cleanup Guidance (CP-51) which describes the methods by which supplemental SCOs can be developed for any contaminant at a site, even if that contaminant is not listed in the Part 375 tables.*

1.9. Definition of "Extent Feasible"

The commenter urged DEC to include a baseline definition of "extent feasible." (Commenter 14)

Response 1.9. *“Extent feasible” is not defined in regulation because any definition would necessarily either be overly restrictive or so vague that it would not be useful. Determining what is feasible requires substantial, site-specific evaluation. For example, geologic conditions, technologies, and location (e.g., NYC versus a wetland) can greatly affect feasibility.*

1.10. Keep Hard Copies Available in Public Libraries

The commenter requested that DEC include explicit clarification that information on remedial sites will continue to be made available in hard copy at public libraries. (Commenter 14)

Response 1.10. *While site notices and fact sheets are delivered electronically, DEC consistently keeps hard copy remedial documents available to the public at site repositories. DEC is currently committed to maintaining hard copies in a physical repository, however, we anticipate that there will be a migration to electronic sources over time. In an effort to promote the State of New York’s sustainability goals, we encourage stakeholders to view the Environmental Notice Bulletin (ENB) (<https://www.dec.ny.gov/enb/enb.html>) and subscribe to the DER email listserv (www.dec.ny.gov/chemical/61092.html). The ENB and listserv may also be viewed electronically at public libraries.*

1.11. The BCP Should be a Public Work

The commenter stated that the BCP should be defined as a “public work.” (Commenter 14)

Response 1.11. *Comment Acknowledged. This is a legislative initiative beyond the scope of DEC’s regulatory authority.*

2. Comments on Subpart 375-1, General Remedial Program Requirements

2.1. 375-1.2(ad); Definition of Off-site Contamination

Commenters objected to the proposal to add soil vapor to the definition of “Off-site Contamination.” They expressed concern that this requirement would eliminate a Volunteer’s ability to achieve a Track 1 or 2 cleanup because of off-site soil vapor migration. Additionally, one commenter noted that there are not published soil vapor standards, but rather, DEC relies on screen level matrices provided by NYSDOH. (Commenters 5, 13)

Response 2.1. *The revised definition of off-site contamination does not change a Volunteer’s responsibility to ensure that the on-site remedy is protective of public health, regardless of the source of the contamination (i.e., even if on-site contamination is emanating from an off-site source). The regulations at 375-3.8(e)(1)(iii) state that a Track 1 remedy cannot rely on the long-term use of institutional or engineering controls to achieve remedial objectives. If the remedy selected for a Volunteer site includes active vapor mitigation to protect public health for the occupants of the site, the site cannot achieve Track 1 standards until/unless the vapor mitigation system (engineering control) is no longer needed to protect public health. In this case, the site would achieve a Track 2 cleanup at the time the Certificate of Completion (COC) is issued. If,*

within 5 years of the issuance of the COC, the Volunteer can demonstrate to DEC and NYSDOH that the vapor mitigation system (engineering control) is no longer needed, DEC would issue an amended COC for a Track 1 cleanup.

All remedies under NYS remedial programs must be protective of public health and the environment, which obligates DEC and NYSDOH to address vapor intrusion. DEC relies on the NYSDOH matrices and guidance on vapor intrusion as one of the “Standards, Criteria and Guidance” to be considered in our implementation of the remedial program. Questions regarding NYSDOH regulations should be directed to that agency.

2.2. 375-1.2(as), 375-2.2(a) Definition of Responsible Party

Commenters oppose the addition of defining “Responsible Party” in Subpart 1, arguing that the term contaminant, used within the definition, has different meanings in Subpart 2 (State Superfund) and Subpart 3 (Brownfield Cleanup Program). (Commenters 5, 6, 13, 15)

Response 2.2. *The commenters are correct in identifying that within the Part 375 programs, the term “contaminant” has multiple meanings. Part 375-1.2(h) provides a broad definition of contaminant to include “hazardous waste and/or petroleum.” Therefore, depending on the program, the term “contaminant” used within each respective program will be utilized. In fact, Part 375-2.2(h) provides that the term “contaminant” as defined in Part 375-2-2(a), which expressly excludes petroleum, shall be substituted in the definition of “responsible party” in Part 375-1.2. Therefore, a responsible party in the Superfund Program will only be responsible for the definition of contaminant used for that program, which is subject to the petroleum exclusion, and a responsible party under the BCP will be responsible for contamination that could include either hazardous waste or petroleum.*

DEC has no intention to “change applicable case law” as one comment alluded to. Moving the definition of “responsible party” to Subpart 1 was intended to provide greater clarity for those sections where “responsible party” was not defined, thereby providing a universal definition applicable to all remedial programs.

2.3. 375-1.2(c) Definition of Brownfield Site Remedial Program Definition

The commenter proposed that the added phrase, “pursuant to a brownfield site cleanup agreement,” in the definition of Brownfield site remedial program be withdrawn and replaced with “in conformance with 375-1.6.” (Commenter 5)

Response 2.3. *Comment acknowledged. The reference to a brownfield site cleanup agreement as stated is appropriate.*

2.4. 375-1.2(e), 375-1.11(d)(1) Definition of Change of Use

Commenters object to the “change of use” definition included in Subpart 1, specifically the inclusion of “change to the tax lot designation or boundary” as a type of change of use. Additionally, there were concerns raised regarding the need for a work plan for a “change of

use” that does not include a physical alteration of the site. Commenters also requested that a list of activities that do not require a “work plan” be included. Finally, Commenters objected to the definition as “excessively broad,” with a particular concern about inclusion of title transfer or changes in tax lot designation as a “change of use.” (Commenters 5, 13, 15)

Response 2.4. *The regulation provides a uniform definition of the “change of use” language used throughout DEC’s remediation program regulations thus it is appropriate to define it in Subpart 1.*

Commenters objected to the inclusion of “any change to the tax lot designation or boundary” as a type of “change of use.” This inclusion is necessary because changes in tax lots or boundaries can have an impact on institutional and engineering controls required in a Site Management Plan. DEC agrees that notice can be provided at the time the application for the tax lot designation or site boundary has been tentatively approved.

The addition in Part 375-1.11(d)(1) requiring a work plan to accompany a change of use is needed for DEC to fully understand the totality of the proposed changes and ensure that intrusive work is performed appropriately and does not compromise the integrity of a planned or completed remedial program. In order to fulfill its statutory obligations to approve or deny the change of use under ECL 27-1317, a work plan regarding the full scope of the change is needed and is not just limited to requirements for the Community Air Monitoring Plan (CAMP) and Health & Safety Plan requirements. The revised regulation for Part 375-1.11(d)(2) includes language that “[i]f the change of use does not involve any physical alteration of the site, then DEC may waive the requirement for a work plan.” DEC will not require a work plan for the transfer of title to all or part of the site or adding a new party to the brownfield cleanup agreement (BCA); any change to the tax lot designation or boundary; or site address changes. However, if there is physical work undertaken at a site, DEC must ensure that such work is protective of public health and the environment through approval of a work plan which may impose certain conditions on the work.

Some commenters asserted that the revised definition of change of use is overly broad and without merit, citing ECL 27-1317, which provides that DEC shall define the term “substantial change of use.” Therefore, it is the intent of the legislature that DEC define what a substantial change of use is. The inclusion of transfer of title and tax lot designation are needed because these changes can have impacts on issues such as access, the implementation of the Site Management Plan, institutional controls, and engineering controls, which would constitute activities that “may substantially change the manner in which an inactive hazardous waste disposal site on the registry [is] prepared and maintained...” (ECL 27-1317).

2.5. 375-1.5(b)(3)(i), (vi) Timeframe for Invoices

Commenters objected to the addition of the phrase “timeframe specified on the invoice or in the associated order or agreement” with the concern that DEC could shorten the timeframe that an invoice is due. Commenters suggested revisions to the default 45-day time frame. (Commenter 15)

Response 2.5. *The default timeframe for invoice payment is 45 days unless specified in a negotiated order or agreement. The revisions allow for flexibility on negotiated timeframes.*

2.6. 375-1.5(b)(3)(ii)(c); Categories of Expenses in Invoices

Commenters objected to DEC's proposal to remove the categories of expenses that currently must be specified in DEC invoices to remedial parties. They also recommend that a new item be added to provide that invoicing for outside contractor services must be accompanied by a description of the work performed by such contractor, providing sufficient detail to confirm the remedial party's responsibility for such costs. (Commenter 5)

Response 2.6. *Comment acknowledged. DER has not included on invoices the expense categories in question in over a decade, which is the reason for the updated regulatory language. Our current cost recovery invoice format meets statutory requirements and provides sufficient information for the vast majority of respondents. In the few cases where additional information is required, DEC is responsive to follow-up inquiries. Creating a regulatory requirement for a new item on cost recovery invoices is not warranted.*

2.7. 375-1.5(b)(6); Termination Clause

DEC received multiple comments regarding the addition of a termination clause to the standard provisions of orders, agreements, and State assistance contracts. One commenter raised concerns that the proposed language would give DEC "overly broad authority to terminate orders, agreements, and State assistance contracts... if a party fails to meet a non-mandatory scheduled date." Another commenter requested DEC add clarifying language "by which the regulated party unambiguously has a certain period of time to cure any alleged violations prior to termination." A third party noted that "substantial non-compliance" is not defined in the regulations. (Commenters 5, 9, 13)

Response 2.7. *This revision reinforces that DEC has the authority to terminate orders and agreements for cause in all remedial programs, not just the BCP. Termination has and will remain a last resort for DEC, however, DEC requires the ability to terminate agreements for cause in order to protect public health and the environment.*

Additionally, the revised text clarifies standard contract provisions, codifies existing DEC practices, encourages communication between DEC and remedial parties, and removes parties who are obstructing remediation efforts or not performing their contractual obligations. Orders, agreements, and State assistance contracts are supported by general principles of contract law. Termination "for cause" requires a material breach of contract (i.e., "failure to substantially comply"), rather than a mere change in project schedule. Project schedules may be amended as needed, so long as DEC is made aware of the need to amend. Consistent with prior DEC practice, the termination of an order, contract, or State assistance contract is a last resort where remedial parties have demonstrated egregious failure to comply with legal obligations under the controlling document. Moreover, this would not relieve DEC of its burden to demonstrate that cause for termination exists under 6 NYCRR Parts 375-2.5 or 375-3.5, as applicable.

Substantial non-compliance is an established legal term which does not need to be defined in regulation.

2.8. 375-1.6 Capitalization of Work Plan

A commenter noted that DEC capitalized “Work Plan” in some instances, however, “Work Plan” is not a defined term in the regulation. (Commenter 5)

Response 2.8. *Comment acknowledged. All instances of “work plan” are uncapitalized.*

2.9. 375-1.6(a), 375-1.6(a)(3) Daily Reports

2.9.1 Oppose: Commenters objected to the revision to include submission of daily reports on remedial activities to the Project Manager. Commenters asserted that it would be burdensome to the remedial party’s field staff and DEC. (Commenters 9, 13)

2.9.2 Support: Commenters supported the revision stating that properly trained staff can complete the requirements. Commenters appreciated the transparency that this revision would create and encouraged regular uploading of reports to DECinfo Locator. (Commenter 14)

Response 2.9. *The submission of daily reports creates a record that work was performed according to approved work plans. Requirements for daily reports of field work activities have been included in the work plans approved by DER for several years. DER has not received negative feedback from stakeholders or consultants on this requirement. Furthermore, this requirement provides DEC and NYSDOH with timely updates on issues such as community air monitoring plan (CAMP) exceedances, deviations from work plans, and other problems encountered as they arise rather than after a final engineering report (FER) has been submitted.*

2.10. 375-1.6(a)(3) Qualified Environmental Professional Required On-Site

Commenters supported the proposal requiring a Qualified Environmental Professional to be on-site during remediation. (Commenter 5)

Response 2.10. *Comment acknowledged.*

2.11. 375-1.6(c)(4)(ii), (iii) Final Engineering Reports/ Professional Engineers

DEC received multiple comments regarding potential impacts to small environmental consulting firms that do not employ in-house professional engineers, asserting that the proposed revisions will drive small firms out of business if they cannot retain a third-party professional engineer to oversee and sign-off on implementation of remedial action work plans. Several commenters proposed alternate language. (Commenters 5, 8, 9, 10, 11, 12, 13, 15, 16)

Response 2.11. *DEC considered these comments and determined that no change is necessary. The language is consistent with State Education Law Article 145 and New York State Education Department (NYSED) guidance that a professional engineer may not delegate engineering work to non-licensed engineers. In February 2023, DEC requested that NYSED review this language for consistency, and NYSED approved the language. The response from NYSED included the following: “The term ‘practitioner’ is more commonly used within NYSED OP [Office of the Professions], rather than ‘proprietor’.” If the commentors believe that these revisions will affect their business, the commentor should engage NYSED.*

2.12. 375-1.7 Site Classification and Administrative Designations

A commenter asserted that adding DEC administrative classification for sites does not have a statutory basis and could potentially cause confusion. They stated that the phrase “No Further Action at the Time” implies the further action may be required in the future and suggested that these sites be removed from the electronic database rather than being classified as an “N” site. The commenter stated that the site characterization applicable to a “P” site should be more detailed and that if “P” site enters the BCP, it should be removed from the electronic database. (Commenter 5)

Response 2.12. *Previous versions of DEC’s regulations have allowed for administrative, non-registry designations for sites for several decades. These non-registry designations have historically been used by DEC and are published on DEC’s website at <https://dec.ny.gov/environmental-protection/site-cleanup/database-search/site-classifications>.*

These non-registry designations provide certainty and increased transparency to the public in understanding the site status. For example, P-sites that enter another program (such as the BCP), could be reclassified to “N” if there are no off-site impacts or could remain as a “P” if there are potential off-site issues. In keeping with DEC’s efforts to keep the public informed, sites are not removed from the electronic database.

2.13. 375-1.8(a) Habitat Reconstruction

Commenters asserted that the new requirement to provide “reconstruction of habitat disturbed by the remedial program” was overly broad and that there should be a definition of habitat in Part 375 or there should be a cross-reference to other DEC regulations that define habitat. Commenters requested that any habitat restoration mandate be more specific and more targeted to specified categories of significant habitat. (Commenters 9, 15)

Response 2.13. *Comment acknowledged. As noted in the definition, habitat is a component of ecological resources (375-1.2(n)) and is consistent with the concept as it appears throughout the ECL (e.g. ECL Section 11-0303) and supporting regulations. For the purposes of remedial programs, the types of habitats are further clarified in DER-10/Technical Guidance for Site Investigation and Remediation (DER-10) in the Fish and Wildlife Impact Analysis decision key (DER-10 Appendix 3C).*

2.14. 375-1.8(d)(1)(iii), 375-3.8(f)(4)(ii) Volunteers and Off-site Contamination

Oppose 2.14.1. Commenters supported the clarification that Volunteers are required to address only the on-site plume of groundwater contamination to prevent off-site migration, however, they objected to the added phrase “at the site boundary.” One commenter asserted that in 375-3.8(f)(4)(ii), the phrase “any plume” should be amended to read “any site-related plume” to provide consistency. (Commenters 5, 13, 15)

Support 2.14.2. One commenter strongly supported the revisions to 375-1.8(d)(1)(iii), 375-1.11(d), and 375-3.8(b) (Commenter 14)

Response 2.14. *The added language does not preclude remedial alternatives that address the on-site source within the site. The added language is intended to ensure that monitoring at the site boundary demonstrates that the on-site remedy is effectively preventing further off-site*

migration of the groundwater plume. The phrase “at the site boundary” was added to be consistent with the BCP in section 3, particularly 375-3.8(f)(4)(ii).

2.15. 375-1.8(d)(2)(ii)(‘a’), (‘c’) Volunteers and “Environmental” Exposure from Off-site Sources

Commenters objected to the word “environmental” in describing on-site exposures that would require investigation of off-site sources. (Commenters 5, 13, 15)

Response 2.15. *Comment acknowledged. “Environmental” is removed as an exposure pathway in clauses (a) and (c). A Volunteer would not have any responsibility to prevent environmental exposures (i.e., impacts to groundwater or ecological resources) related to an exclusively off-site source. A Volunteer would be responsible to ensure that there are no human health exposures on their site related to contamination emanating exclusively from an off-site source.*

2.16. 375-1.8(f) Climate Change in Remedial Design

A commenter stated that DEC’s proposed regulations do not provide sufficient direction to address the effects of sea level rise in remedial selection. (Commenter 9)

Response 2.16. *DEC has department wide policies with respect to climate change, sea level rise, and sustainability that apply to all sites. These are applied on a site-by-site basis. More information is available here:*

[Climate Change Statutes, Regulations, And Policies - NYSDEC](#)

Specific to Environmental Remediation Programs, DER-31/Green Remediation (DER-31), issued in August 2010, revised in January 2011, is the current program policy. DER-31 is undergoing revisions and in the interim DEC has provided additional guidance related to Green and Sustainable Remediation and Climate Resiliency in Environmental Cleanups here:

[DEC’s GSR and Climate Resiliency in Environmental Cleanups - NYSDEC](#)

DEC is also revising DER-10 to further incorporate these concepts into its remedial program decision making.

2.17. 375-1.8(f)(9)(iii)(‘l’) Corridors of Movement

A commenter stated that there is no definition of “corridors of movement” in the ECL and requested that DEC provide a more specific definition or make provisions for formal or informal designation of corridors of movement. (Commenter 15)

Response 2.17. *Comment acknowledged. The regulatory language regarding the concept of “corridors of movement” has shifted. To resolve Part 375 language with language in other regulations including the Climate Leadership and Community Protection Act (CLPCA), Clean Water, Clean Air, and Green Jobs Environmental Bond Act, 19 NYCRR Part 900 Office of Renewable Energy Siting and the legislatively approved New York Wildlife Crossing Act, the language in subclause ‘l’ is amended to state: “including waterways, aquatic connectivity, wildlife movement corridors ~~of movement~~, wildlife refuges,”*

2.18. 375-1.8(g)(2)(i), 375-2.8(f) Groundwater Use Restrictions at Residential Use Sites

The commenter stated that DEC's allowance of institutional and engineering controls for groundwater contamination that could not otherwise be addressed at residential use sites would contradict that language in 375-3.8(e)(2)(iii) where it states that institutional or engineering controls for groundwater contamination at residential use sites is not allowed. (Commenter 5)

Response 2.18. *This provision would be applied in very limited instances when it is infeasible to remediate existing single-family homes that contain contamination in environmental media. This exception has been applied at only one site in New York State to date, however, it is critical for DEC to have this discretion in limited circumstances in order to protect homeowners from significant disruptions.*

2.19. 375-1.8(g)(2)(ii) Restricted Residential Use Prohibits Single-family Housing

Commenters supported clarification that restricted residential uses prohibit single-family housing unless the land is commonly owned in perpetuity. They noted that some changes in NYS Tax Law may be needed for single-family projects to take advantage of tax credits. Additionally, it is unclear what type of real property interest must be held in common for perpetuity and if this violates the rule against perpetuities. (Commenters 5, 13)

Response 2.19. *Comment noted. DEC is clarifying that properties remediated to restricted residential, which will require ongoing engineering and institutional controls to ensure effective controls remains in place, need to be managed by a single entity that can inspect the applicable controls and certify that controls remain in place. This can be a single owner of land upon which apartments or condos are built, or a homeowners' association that has indicated to DEC it will be the "remedial party" for purposes of certifying that controls remain in place at a restricted residential site. The provision is not intended to impair marketability of property, does not violate the rule against perpetuities, but instead clarifies that responsibility for site management must rest with a single entity instead of multiple entities (i.e., single family homeowners).*

2.20. 375-1.8(g)(6) DEC Determination of Appropriate Land Use Category

The commenter objected to the proposal because they were concerned that it would give DEC the authority to determine the appropriate land use category for a site. (Commenter 5)

Response 2.20. *Based upon the statutory language found in 27-1415(3)(i), DEC has the authority to consider zoning, surrounding uses, and current and future anticipated land uses when selecting a remedy for a site in the BCP. This also allows DEC to consider the multi-use nature of properties when selecting a remedy. This revision clarifies that in instances where there are both residential and commercial uses occurring at a property, the more protective SCOs will apply to those remedies.*

2.21. 375-1.8(h)(2)(iii) Environmental Easement Not Needed for Groundwater Restriction Only

Summary: The commenter supported the clarification that an environmental easement is not needed where the only restriction imposed by the easement would be a restriction on using groundwater and there is already a local prohibition in place. (Commenter 5)

Response 2.21. *Comment acknowledged.*

2.22. 375-1.9(e) COC Terminated if Application Misrepresents Facts

The commenter supported the proposal that if an Applicant is applying for the tangible property tax credits as part of its application and it misrepresents the facts justifying eligibility, then its COC can be terminated. (Commenter 13)

Response 2.22. *Comment acknowledged.*

2.23. 375-1.9(e)(1)(iv) Revocation of a COC

Commenters raised concerns about the proposed edits to the circumstances warranting modification or revocation of a COC. Both comments noted that the proposed language in 375-1.9(e)(1)(iv) would potentially allow for DEC to revoke or modify COCs based on misstatements or disagreements regarding tangible property tax credits. (Commenters 5, 18)

Response 2.23. *ECL 27-1419(5)(a-d) set out the criteria for revoking a COC and the regulations reflect the statutory requirements. The language pertains to “misrepresentations of material facts” pertaining to the eligibility of a party to receive tangible property credits “or elements thereof,” i.e., a false statement or omission made with intent to deceive. The assertion that a COC could be “revoked based on any disagreement between an Applicant and DEC regarding any component of a tax credit claim” or revoked based on a “difference of opinion between the state and a taxpayer” is not substantiated by the language. Moreover, disputes pertaining to tax credit values are more properly in the purview of the NYS Department of Tax and Finance (NYS DTF).*

2.24. 375-1.10 Enhancements to Citizen Participation Plans

The commenter asserted that the citizen participation requirements in 375-1.10 should be expanded. They stated that developers in the BCP in particular should be required to establish community advisory groups for sites at which residents desire additional outreach and transparency. (Commenter 14)

Response 2.24. *Public participation requirements are robust and outlined in [DER-23/Citizen Participation Handbook for Remedial Programs \(DER-23\)](#), https://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf. DEC implements consistent public participation procedures at every site but adapts specific actions (including language access needs) to the particulars of each site. In instances where there is significant public interest at a site, a significant number of remedial sites in a region or neighborhood, or a significant environmental justice concern, DEC has and will continue to establish or require enhanced public participation plans and actions to address those unique circumstances.*

2.25. 375-1.10(h) Strengthen Public Notice Requirements for Interim Remedial Measures (IRMs) on Class 2 sites

The commenter encouraged DEC to strengthen public notice requirements for IRMs for Class 2 sites in the BCP and public comment requirements for IRMs which will impact a significant portion of the remedy for all BCP sites. (Commenter 14)

Response 2.25. *DEC routinely requires a public comment period on any IRM that constitutes a significant component of the final remedy per DER-23. This conforms with the public participation components of the statute. Furthermore, the Citizen Participation Plan guidance and template at, <http://www.dec.ny.gov/data/der/tools/templates/bcpcppplan.docx>, includes discussion of public notice for IRMs, as do the citizen participation activities description available on DEC's website: <https://dec.ny.gov/environmental-protection/site-cleanup/brownfield-and-state-superfund-programs/brownfield/bcp-citizen-participation-milestones>.*

2.26. 375-1.11(d)(2) Change of Use

See Response to Comment 2.4.

2.27. 375-1.11(d)(3) Change of Use Work Plan Requirement for Track 1

The commenter recommends that the work plan requirement should not apply to Track 1 COCs that do not have Site Management Plans, given that such sites pose no threat to human health or the environment. (Commenter 5)

Response 2.27 *The change clarifies the requirements for change of use in the statute. The work plan requirement clarifies what is specified within the statute for a complete notice. Where such activity occurs after the COC is issued at a restricted use site and is identified as work that is outlined in the Site Management Plan, a Change of Use notice is not required if the person complies with the notification requirements of the Site Management Plan.*

2.28. 375-1.12(a)(1) Use of Term “Emanating”

The commenter noted that the term “emanating” is used in this proposal and suggests that the term “migrating” should be used instead. (Commenter 5)

Response 2.28. *The word emanate means to come from a source, whereas migrate does not indicate source. The distinction here is that DEC wants to use the correct term indicating that contamination is from a source site.*

2.29. 375-1.12(f) In-kind Replacement

The commenter asserted that no guidance is provided to determine how a particular habitat is an important component of the environment. (Commenter 15)

Response 2.29. *The language “with the goal of in-kind replacement of habitat structure and function” sufficiently captures issues of feasibility and practicability. Further detail describing the scope and determination of affected habitats is provided in 375-6.6(b) and clarified in DER-10 through the Fish and Wildlife Impact Analysis decision key (DER-10 Appendix 3C)*

3. Comments on Subpart 375-2, Hazardous Waste Disposal Site Remedial Program (Superfund)

3.1. 375-2.7(c)(1) State Superfund Classification Deferral

A commenter objected to the clarification that deferral of assessment of sites for inclusion on the Registry of Inactive Hazardous Waste Disposal Sites (Superfund) for those sites which are subject of a “complete” application for participation in the BCP. (Commenter 15)

Response 3.1. *DEC considered this comment and determined that no change is necessary. The statutory provision at ECL 27-1305(2)(b) provides that DEC shall defer assessment of a site for inclusion on the Registry of Inactive Hazardous Waste Disposal Sites (Superfund) if the site is “the subject of negotiations for, or implementation of, a brownfield site cleanup agreement.” The language clarifies DEC’s position that “negotiations for” a BCA commences upon DEC’s determination that an application is complete. Mere submission of an incomplete application is not sufficient to begin negotiations for a BCA.*

3.2. 375-2.7(e)(1)(iv) Notification of Reclassification

A commenter requested that the proposal to provide notification of reclassification to “local governments or jurisdiction” be revised to clarify whether DEC or the responsible parties should provide the notice. (Commenter 5)

Response 3.2. *Subparagraph 375-2.7(e)(1)(iv) has been deleted and subparagraph 375-2.7(e)(1)(iii) has been revised to clarify that the required notification performed by DEC to the site contact list will include the local governments of jurisdiction.*

3.3. 375-2.7(e)(4)(ii)(b)(2) Delist Site when Soil Vapor Intrusion Measure is in Place

The commenter supported the proposal that DEC may delist a site when soil vapor intrusion measures are in place. (Commenter 5)

Response 3.3. *Comment acknowledged.*

3.4. 375-2.8(f) Use of Institutional and Engineering Controls at Superfund Sites at Residential-use Sites

The commenter supported inclusion of institutional or engineering controls to control potential human exposures at residential sites where complete remediation is not technically feasible. They noted that this is also a practice at industrial and commercial sites and suggested that DEC replace the phrase “at existing residential use properties” with “existing properties” in the proposed text. (Commenter 9)

Response 3.4. See *Response to Comment 2.18*.

4. Comments on Subpart 375-3, Brownfield Cleanup Program (BCP)

4.1. 375-3.2(e) Cover System or Site Cover Requirements

Commenters are unclear on the intent of the language in (2) noting the thickness must adhere to building codes. Some would like the language removed, as well as the language referencing the NYS Tax Law. Others would like a “formula” to determine cover thickness. Commenters also noted the distinction is unclear between redevelopment hardscape and physical structures that serve as Engineering Controls and those that do not. One comment noted the cover system could also serve to *mitigate* exposures when it is not possible or necessary to eliminate them entirely. (Commenters 5, 7, 9, 13, 15, 18)

Response 4.1. *This language was reviewed with and found acceptable by NYSDTF. The language is appropriate and complies with current applicable statutes and cannot be altered further without changes to ECL or NYS Tax Law. DEC’s definition of “cover system” is not intended nor meant to supersede any other federal, state, or local building code requirements. This is why DEC did not include a formula for hardscape cover system thickness. DEC is willing to engage in further discussions with the NYSDTF and interested parties in order for DEC to give further guidance or specifics on how NYSDTF will be calculating tax credits under this scenario.*

4.2. 375-3.2(k), 3.3(b)(2)(ii), 3.4(b)(1) Applicants Required to Conduct Potentially Responsible Party (PRP) Search

Multiple commenters objected to the proposal to require BCP Applicants to conduct the search for PRPs, asserting that the proposal contradicts ECL 27-1405(2)(a). Commenters stated that conducting the search would be costly and believe that DEC has greater resources to conduct the search. They also stated that Applicants already submit information regarding historical owners and operators and that the PRP search should remain DEC’s responsibility. (Commenters 5, 13, 15)

Response 4.2. *ECL 1405(2)(a) states that DEC determine if there are any responsible parties that can pay for a brownfield cleanup at a Class 2 site. However, the Applicant is in the best position to conduct a search for responsible parties in the first instance, in the light of their familiarity with the property, including any due diligence performed as part of the property purchase. The Applicant already performs prior operator searches on the site as part of the brownfield application process. Thus, the Applicant is in the best position to undertake a PRP search concurrently with it seeking to demonstrate eligibility for the program, and DEC can rely upon that search in making its determination. If DEC conducted the search, it would be an*

unnecessary duplication of effort and potentially delay an Applicant's participation in the program.

4.3. 375-3.2(l) Renewable Energy Facility Site

Commenters challenged the inclusion of requirements that renewable energy facility sites be primarily used for energy generation and encouraged DEC to include energy storage systems within the definition. One commenter also challenged DEC's proposed regulations requiring real property to have a primary use of renewable energy generation or co-located storage in order to qualify for tangible property credits. Commenters suggested that Tangible Property Tax Credits (TPTCs) be awarded based on the proportion of the site used for renewable energy facilities. (Commenters 5, 13)

Response 4.3. *DEC has reviewed the comments received and determined no change is necessary. Renewable energy generation and co-located storage systems are the qualifying components of a renewable energy facility site provided in statute. DEC's clarification that renewable energy facility sites must incorporate renewable energy generation or co-located storage as a primary use is consistent with legislative language. The use of the term "renewable energy facility site" in ECL 27-1407(1-a) indicates that the Legislature envisioned something more substantial than mere appurtenant renewable energy systems. Had the legislature intended the inclusion of any appurtenant renewable energy system to meet the eligibility requirements of the program, it could have easily indicated so.*

NYSDTF lacks the statutory authority to award TPTCs based on the proportion of the site used for renewable energy facilities. In contrast to the Affordable Housing Project gateway, qualification for which the Legislature specified would be determined by the percentage of qualifying units within a larger project, the Renewable Energy Facility Site gateway makes no mention of qualification based on proportional use.

4.4. 375-3.2(o) Underutilized Definition

A commenter asserted that DEC's definition of Underutilized is problematic and that it has eliminated this pathway from the statute as only a handful of sites now qualify as "underutilized" under this definition. (Commenter 5)

Response 4.4. *Comment noted. The definition has not changed substantially and remains consistent with Statute. The definition was previously included in Part 375 at 375-3.2(m) and has been moved to 375-3.2(o).*

4.5. 375-3.3 Exclude PRPs from BCP

The commenter urged the agency to exclude sites where a viable PRP [under Title 13] exists from eligibility for the BCP. (Commenter 14)

Response 4.5. *DEC cannot expand the categories of sites ineligible for participation in the BCP without statutory authorization. DEC points out that the BCP statute at ECL 27-1405(2) specifically identifies two classes of sites that are ineligible for participation in the BCP if a viable PRP exists, namely those properties listed in the Registry of Inactive Hazardous Waste Disposal Sites (Superfund) with a Classification of 1 or 2 at the time of application, and sites that are*

permitted or required to be permitted as a Resource Conservation and Recovery Act (RCRA) hazardous waste treatment, storage, or disposal facility. The Legislature's enumeration of these specific classes of sites forecloses the ability of DEC to declare all sites with viable PRPs are ineligible to participate in the BCP.

Finally, the Department believes that such a clause would delay the cleanup of the property in question. Even if a potentially responsible party is identified, recovering costs from those parties is not always possible and is almost always costly and time consuming. DEC recognizes that this could shift some costs from the responsible party to the taxpayers, but having the cleanup completed in a timely manner is an acceptable trade-off.

4.6. 375-3.3(a)(1) Brownfield Site Definition

Commenters objected to the addition of "contamination on-site" to the definition of a brownfield site. (Commenters 5, 13)

Response 4.6. *Comment noted. The definition in this revision is consistent with the language in the Brownfield Statute and does not require further change.*

4.7. 375-3.3(a)(3), (4) BCP Eligibility

Several commenters asserted that the eligibility language improperly narrows the statutory definition of "Brownfield site" and attempts to overturn Court of Appeals precedent in *Lighthouse Pointe Prop. Assoc. LLC v. N.Y. State Dep't of Env'tl. Conserv.*, 14 N.Y.3d 161 (2010) ("*Lighthouse Pointe*"). (Commenters 5, 13)

Response 4.7. *DEC considered these comments and determined that no change is necessary. The language related to BCP eligibility is derived from two statutory provisions: ECL 27-1405(2), which provides the statutory definition of a "Brownfield site," and ECL 27-1407(1), which provides the requirements for a BCP application. The language harmonizes BCP eligibility with the 2015 revisions to these statutory provisions whereby the Legislature: (1) replaced the ambiguous "may be complicated by the presence or potential presence of a contaminant" in the definition of "Brownfield site" with a requirement that contamination exceed SCOs or other standards, criteria, or guidance adopted by DEC "that are applicable based on the reasonably anticipated use of the property"; and (2) added the requirement that Applicants submit an investigation report "that is sufficient to demonstrate that the site requires remediation in order to meet the remedial requirements of this title" with a BCP application. The remedial requirements of the BCP are linked with a site's reasonably anticipated future use. Therefore, the language pertaining to site eligibility is harmonious with the 2015 statutory revisions.*

Furthermore, the references by commentors to the Court of Appeals decision in Lighthouse Pointe are inapposite. In Lighthouse Pointe, the Court of Appeals interpreted the former BCP statutory definition of "Brownfield site." As noted above, the NYS Legislature revised the definition of "Brownfield site" in the 2015 BCP amendments to clarify that a site's eligibility for the BCP is based upon the presence of contamination above standards, criteria, or guidance that requires remediation based on the site's reasonably anticipated future use. DEC also disagrees with the comments that apparently assert that DEC's criteria at 375-3.3(a)(4) run afoul of Lighthouse Pointe by giving DEC discretion to deny entry of a site into the BCP based upon "few exceedances." The list of factors provided in 375-3.3(a)(4) is non-exhaustive, and no single factor is dispositive in DEC's determination of whether a site requires remediation.

Therefore, any assertions that the revised language is an attempt to overturn Lighthouse Pointe are incorrect.

Finally, DEC's identification of criteria to evaluate whether a site requires remediation to be eligible to participate in the BCP does not exceed DEC's authority to interpret the revised statutory language in ECL 27-1407(1). The identification of criteria represents both an effort to be more transparent and to clarify an Applicant's burden to demonstrate that a site requires remediation.

4.8. 375-3.3(a)(5) BCP Eligibility Criteria

The commenter noted that the list of factors to determine eligibility did not refer back to ECL 27-1415, which includes a list of sixteen factors used to determine eligibility. (Commenter 5)

Response 4.8. *Comment acknowledged. Subparagraph 375 3.3(a)(5)(vi), stating "or any other factor set forth in ECL 27-1415" is added to refer to additional factors set forth in ECL 27-1415.*

4.9. 375-3.3(b)(2) Strengthen Accountability in BCP

The commenter stated that "375-3.3 (b)(2) needs additional strengthening to ensure polluter accountability, community safety, and transparency," adding that sites with known responsible parties should be cleaned up at the owner's expense. (Commenter 14)

Response 4.9. *The requirements for BCP site eligibility are described on our website and are clarified in DER-32/Brownfield Cleanup Program Applications and Agreements. More information on the program can be found at:*

https://extapps.dec.ny.gov/docs/remediation_hudson_pdf/der32.pdf.

Additionally, Class 2 sites with a viable PRP are not eligible for the BCP.

4.10. 375-3.3(b)(5) Interim Status Facilities Added as Brownfield Sites

A commenter supported the addition of interim status facilities to the categories of eligible brownfield sites. (Commenter 5)

Response 4.10. *Comment acknowledged.*

4.11. 375-3.3(f) Tangible Property Tax Credits (TPTCs)

DEC received comments questioning whether the existing process would remain available to Applicants seeking TPTCs in certain instances where the supporting documentation justifying a TPTC award will not be available prior to the issuance of a COC. (Commenter 5, 13)

Response 4.11. *DEC will not be revising the regulatory language as this language reflects the existing statutory requirements. DEC will use its discretionary authority when the circumstance arises. DEC will work with the regulated community to continue addressing this issue.*

4.12. 375-3.4(b)(1) Application Completion and PRP Search

A commenter objects to the proposal that an application would not be considered complete until DEC completes the PRP viability determination, stressing that this could potentially delay the start of projects. (Commenter 5)

Response 4.12. *While this only relates to a handful of sites across the state, review of the PRP search is critical for DEC to determine eligibility to enter the BCP. DEC is requiring that Applicants provide necessary information for DEC to complete its statutory obligation to identify PRPs, and DEC may not act on eligibility until that review is complete.*

4.13. 375-3.4 (c), 375-3.6(b) Timeframes for DEC

The commenter noted that timeframes or deadlines to be imposed on DEC are absent from the regulation. (Commenter 5)

Response 4.13. *Comment noted. The reason the legislature included “best efforts” language for DEC review of submittals in the BCP was to acknowledge that DEC has a significant workload, including remediating Class 2 sites, that present a significant threat to public health or the environment. DEC must have flexibility in review times because of these competing priorities.*

4.14. 375-3.4(c)(3) Addition to Tangible Property Tax Credit (TPTC) Application Criteria

The commenter suggested adding “when applicable” to DEC’s proposed revision to applications for TPTCs. (Commenter 5)

Response 4.14. *Language in the BCA indicates whether the Applicant has submitted sufficient information to demonstrate eligibility for TPTCs. If the Applicant has not submitted sufficient information, the BCA will indicate that the site is not eligible for TPTCs and that the Applicant may submit documentation for TPTC eligibility at any time prior to the COC. The exception would be underutilized sites, which must demonstrate eligibility at the time of application.*

4.15. 375-3.5(c)(4) Termination Clause

DEC received comments asserting the proposed regulation would allow DEC to terminate a BCA for any deviation from the work plan, including those which have positive or de minimis impacts on site remediation. (Commenters 5, 13)

Response 4.15. *The revised language does not support the contention that DEC may terminate a BCA for mere minor deviations from an approved work plan. The language provides for termination of a BCA where an Applicant performs remedial program work that is specifically not included in a DEC-approved work plan. Where such work performed outside of a DEC-approved work plan significantly impacts the implementation of a comprehensive remedial program at a site, DEC may conclude that the Applicant failed to substantially comply with the terms of the BCA and terminate the BCA as provided in ECL 27-1409(5). Therefore, the revised language does not contravene the statutory authority at ECL 27-1409(5).*

DEC agrees with the comment that ECL 27-1409(3) applies to minor disputes that arise under the implementation of DEC-approved work plans. Specifically, the statutory dispute resolution provision within ECL 27-1409(3) applies to “disputes arising from the evaluation, analysis, and oversight of the implementation of the work plan.” As noted above, however, such minor disputes are not within the purview of the revised language, which applies to remedial program work that is not included within a DEC-approved work plan. Therefore, ECL 27-1409(3) is not applicable, and the revised language does not deprive Applicants of their due process rights.

4.16. 375-3.5(g) Addition of BCA Fees/Waivers.

Commenters supported the addition of a BCA fee and associated waivers. (Commenters 5, 13)

Response 4.16 *Comment acknowledged.*

4.17. 375-3.8(b)(2)(i) Off-Site Investigatory Obligations for Volunteers in the BCP

DEC received comments asserting that the proposed regulatory language would impose offsite remediation obligations upon BCP Volunteers which are not allowable by statute. (Commenters 5, 9, 13, 15)

Response 4.17. *DEC considered the comments and determined that no changes to the language are necessary. Requiring Volunteers to conduct off-site investigation has been in practice for many years and is supported by the statutory and regulatory framework. This does not impose offsite remediation obligations upon the Volunteer. A Volunteer must collect sufficient information on-site and off-site during the Remedial Investigation (RI) to complete the Qualitative Human Health Exposure Assessment (QHHEA). The QHHEA is used as a basis for the Significant Threat determination (see 375-3.7(a)) and must include an evaluation of potential for off-site exposure to site-related contaminants. If, during the review of the RI Report, DEC and/or NYSDOH determine that there is insufficient data to support the QHHEA or to complete the Significant Threat determination, DEC may request collection of additional data. This can include off-site soil, groundwater, and/or soil vapor. While off-site soil vapor intrusion (SVI) sampling is unlikely to be requested, DEC reserves the right to request it from a Volunteer to fulfill the statutory requirement to complete the Significant Threat determination.*

4.18. 375-3.8(c)(5) Feasibility Studies for Registry Sites in the BCP

DEC received comments objecting to the use of feasibility studies as part of the alternatives analysis and remedy selection process for Class 2 sites accepted into the BCP. (Commenters 5, 13)

Response 4.18. *Class 2 registry sites that have been determined to be significant threats are higher priority sites for action and held to a higher standard than other, non-significant threat sites. Additionally, since 2015 less than a handful of Class 2 sites have been the subject of applications to the BCP. Based on this, a more robust alternative analysis within a feasibility study is not an extensive or overly burdensome requirement for Applicants. Additionally, this analysis will ensure that Class 2 sites in the BCP are being remediated consistent with the National Contingency Plan, which will protect DEC's cost recovery rights and the Applicant's rights for contribution for work they perform.*

4.19. 375-3.8(e)(1)(iii) Conditional Track 1 Cleanups

DEC received several comments objecting to elimination of the Conditional Track 1. (Commenters 5, 7, 13, 18)

Response 4.19. *A "Conditional Track 1" was created by DEC in prior versions of its regulations and does not otherwise exist in the Brownfield statute. As the commentor correctly noted, the statute provides that so long as "the bulk reduction of groundwater contamination to asymptotic levels has been achieved" a site being remediated by a Volunteer can achieve a Track 1*

cleanup even with long term institutional or engineering controls. DEC's change more accurately reflects the statute, as it allows a period of no more than five years for a Volunteer to achieve that bulk reduction in groundwater contamination. As long as an Applicant demonstrates the existence of the bulk reduction within that five-year time frame, DEC will modify a Track 2 COC to become a Track 1 at that time.

Previously, Volunteers were receiving the benefit of a Track 1 cleanup before demonstrating bulk reduction in groundwater contamination, which is in conflict with the statutory language. In the past, sites that have never achieved bulk reduction in contamination have received Track 1 credits; however, they were not required to relinquish those credits under the existing regulations. This revision ensures that Volunteers are diligent in completing the remediation projects to earn the benefits that the BCP provides.

This change incentivizes Volunteers to demonstrate that bulk reduction as quickly as possible to achieve Track 1 tax credits, and more importantly, it directly implements the intent and plain language of the statutory language.

4.20. 375-3.8(e)(1)(iv) Groundwater Remediation and Track 1 Sites

DEC received comments objecting to the modification of regulatory language pertaining to the availability of institutional or engineering controls for groundwater cleanup as they apply to Track 1 eligibility. (Commenter 13)

Response 4.20. *Comment acknowledged. The Brownfield statute provides that only Volunteers can receive the benefit of the long-term use of institutional or engineering controls for groundwater contamination and still achieve a Track 1 cleanup as detailed in the above response.*

4.21. 375-3.8(e)(2) Cleanup Below 15 Feet

DEC received comments both supporting and objecting to the implementation of a 15-foot limit for soil cleanup under track 2. (Commenters 5, 13)

Response 4.21. *The specification that cleanup objectives for a site will not apply to soils at a depth greater than 15 feet under specific conditions is found in the current regulation at 375-3.8(e)(2). The revision merely condenses existing clauses into a single subparagraph. There was no intent to limit removal of source material below 15 feet. As in 375-1.8(g)(2)(i) and 375-2.8(f), the added provisions would only be applied in very limited instances and where it is not feasible to remediate existing single-family homes.*

4.22. 375-3.8(f)(4)(ii) Omit "At the Site Boundary"

DEC received a comment suggesting revisions to the regulation to clarify Volunteer's obligations regarding plume stabilization. (Commenter 5)

Response 4.22. *The phrase "at the site boundary" is in the existing Part 375-3.8 and not a revision. The language does not preclude remedial alternatives that address the on-site source within the site. The language ensures that monitoring at the site boundary demonstrates that the on-site remedy is effectively preventing further off-site migration of the plume.*

4.23. 375-3.8(h)(3) Meaning of “Commencement of Remedial Design”

A commenter asked for clarification on what is meant by “commencement of remedial design” in the proposed new text. (Commenter 1)

Response 4.23. *This language is pulled directly from ECL 27-1415(7)(b) and applies to sites that will employ institutional and/or engineering controls and execute an environmental easement which can be confirmed at the time of Remedial Action Work Plan or Decision Document acceptance or IRM approval.*

List of Commenters

1. Jenna Raup
2. Danielle D’Altrui, Sovereign Consultants
3. Kate Bartholomew, et. al, Sierra Club
4. Anne Rabe, et al., NYPIRG
5. New York State Bar Association, Environmental and Energy Law Section
6. Empire State Energy Association, Inc. and the New York State Energy Coalition, Inc.
7. Real Estate Board of New York
8. Ezgi Karayel, Vektor Consultants
9. Environmental Energy Alliance of New York
10. New York State Society of Professional Engineers
11. Victoria Whelan
12. Karen Tyll, Tyll Engineering
13. Linda Shaw
14. Clean Air Coalition of WNY
15. The Business Council of New York State
16. Rachel Ataman, Touchstone Environmental Geology
17. Dana McCue, EHS Support
18. Julia Martin