

Assessment of Public Comments

Revisions to 6 NYCRR Part 375, Environmental Remediation Proposed on October 16, 2024

1. GENERAL COMMENTS

1.1. Metals Classification

A commenter noted that selenium is not a metal and arsenic is a metalloid.
(Commenter 1)

Response 1.1. *Comment acknowledged.*

1.2. Comment Period Extension

A commenter requested that the comment period for revised Part 375 be extended.
(Commenter 2)

Response 1.2. *The comment period was extended by 15 days to end on January 31, 2025.*

1.3. Application of Soil Cleanup Objectives

Commenters inquired as to when the new Soil Cleanup Objectives (SCOs) would be effective. One commenter asserted that the new SCOs should be applied to existing Records of Decision (RODs), particularly at sites where remedial construction has not been completed. 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 3, 8)

Response 1.3. *The New York State Department of Environmental Conservation (DEC) clarifies that DEC will not categorically apply the revised SCOs retroactively to reopen RODs and other Decision Documents without more information. The relevant provision of the National Contingency Plan at 40 CFR 300.430(f)(1)(ii)(B)(1) provides that “[r]equirements that are promulgated or modified after ROD signature must be attained ... only when determined to be applicable or relevant and appropriate and necessary to ensure that the remedy is protective of human health and the environment.” The benchmark for applying the new SCOs to an existing remedy, therefore, is whether the new SCOs are necessary ensure that the remedy remains protective of human health and the environment.*

DEC does not believe that a transition period for application of the new SCOs is warranted.

1.4. Incorporation by Reference for ASTM 1527-21

A commenter asked that ASTM 1527-21, *Standard Practice for Environmental Site Assessment*, be incorporated by reference. (Commenter 9)

Response 1.4. *ASTM 1527-13 and ASTM 1527-21 will be submitted to the Department of State for incorporation by reference when the revised regulation is adopted.*

1.5. Removal of Historic Fill Definition

A commenter 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. (Commenter 8)

Response 1.5. *DEC has changed how material previously referred to as “historic fill” is addressed in solid waste regulations, 6NYCRR Part 360. Excavated material is now defined as “soil, rock or other material excavated during construction or maintenance activities” and only when it is reused is it referred to as “fill”. It would be inconsistent to refer to material that has not been excavated as excavated material or fill. DEC does not differentiate between native soil and “historic fill” in practice in the State’s remedial programs, so it is no longer appropriate to differentiate between those materials in regulation.*

1.6. Providing Information to Public on Brownfield Cleanup Program Tax Credits

A commenter suggested that DEC provide more clear and comprehensible information regarding the level of financial assistance or tax credits. The commenter asserted that the fiscal impact of the program is difficult for the ordinary public to understand. (Commenter 11)

Response 1.6. *Comment acknowledged. Public participation requirements are robust and outlined in DER-23 / Citizen Participation Handbook at:*

https://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf. Information on Brownfield Cleanup Program (BCP) tax credits is available on the DEC website at: <https://dec.ny.gov/environmental-protection/site-cleanup/brownfield-and-state-superfund-programs/brownfield/work-plan-report-documents/brownfield-cleanup-program-tax-credit-eligibility-and-rates>.

1.7. Process to Establish if a Project Requires Financial Assistance

A commenter suggested that DEC regulations should have a provision to establish a process for determining whether a project requires financial assistance. (Commenter 11)

Response 1.7. *Comment acknowledged. Eligibility criteria for sites in the BCP do not include whether or not a project or site requires financial assistance. Thus, DEC does not have the legal authority to establish this process. Financial capability is a factor in*

determining whether or not a party that applies to the BCP can have the \$50,000 application fee waived.

1.8. Prohibit Stacking of Subsidies

A commenter suggested that the DEC provide a regulatory provision to prohibit stacking subsidies. (Commenter 11)

Response 1.8. *Comment acknowledged. DEC does not have the legal authority to limit participation in the BCP.*

1.9. Zoning Regulations and BCP

A commenter inquired about the relationship between the BCP and zoning rules and regulations. (Commenter 12)

Response 1.9. *Comment acknowledged. DEC ensures that the site is remediated to be protective for the anticipated use. DEC does not have authority to change or modify zoning requirements. It is the responsibility of the Applicant to ensure that the planned use is consistent with zoning.*

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

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

A commenter asserted that the regulation does not include off-site contamination from an upgradient source and is thus inconsistent with § 375-1.8(d)(2)(ii)(c). (Commenter 8)

Response 2.1. *Comment acknowledged. Per DEC's prior response, "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 New York State Department of Health (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.” (Response 2.1, Part 375 Assessment of Public Comments, October 16, 2024)

2.2. 375-1.2(al) Definition of Qualified Environmental Professional

A commenter asserted that the definition of a Qualified Environmental Professional be limited to a licensed professional engineer or geologist. (Commenter 7)

Response 2.2. *The definition of Qualified Environmental Professional has not changed from the original 2006 regulations; therefore, the comment cannot be addressed via this rulemaking.*

2.3. 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 Program (SSF)) and Subpart 3 (Brownfield Cleanup Program (BCP)). (Commenters 8, 9)

Response 2.3. *Comment acknowledged. Per DEC’s previous response, “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 SSF 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.” (Response 2.2, Part 375 Assessment of Public Comments, October 16, 2024)

2.4. 375-1.2(e) Definition of Change of Use

The commenter recommended including a list of non-physical change of use activities that would be automatically waived from a work plan requirement. Two specific examples of physical work (demolition and support of excavation) are focused on. It appears this comment is primarily on 375-1.11(d)(1), which is related to 375-1.2(e). (Commenters 8)

Response 2.4. *The regulation revision provides a uniform definition of the “change of use” for DEC’s remedial programs. 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, does not compromise the integrity of a planned or completed remedial program, and is protective of public health and the environment. In order to fulfill its statutory obligations to accept 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) is not intended to change the review and acceptance process of non-intrusive work and 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.” Demolition and Support of Excavation are just two examples of physical work, however there are many other physically intrusive activities that may occur via a change of use that require a work plan for DEC’s review and approval. Previous response to comments on 375-1.2(e) can be found at Response 2.4, Part 375 Assessment of Public Comments, October 16, 2024.*

2.5. 375-1.5(b)(6), 375-3.5(c)(4) Right to Invoke Dispute Resolution

A commenter asserted that DEC should revise its proposed regulation to account for the flexibility necessary for parties that are attempting to comply with schedules and terms. The commenter stated that the regulation deprives the remedial party of their right to invoke dispute resolution for disagreements over a work plan’s implementation. (Commenter 9)

Response 2.5. *Comment acknowledged. The new definition does not preclude dispute resolution.*

2.6. 375-1.6(c)(ii), (iii) Final Engineering Report

Some commenters expressed concern with the currently proposed language limiting the ability of smaller environmental firms and non-engineering firms to continue to successfully participate in the BCP. Others appreciate the current language’s consistency with New York State Education Department (NYSED) law. Numerous edits are suggested by various commenters, as well as the establishment of a formal process if there is a change in remedial engineers for a site. (Commenters 6, 8, 9, 10)

Response 2.6. *DEC’s intent is not to limit the participation of small firms in the BCP, but to be consistent with State Education Law Article 145 and New York State Education*

Department (NYSED) guidance. Particularly, that a professional engineer may not delegate engineering work to non-licensed engineers. Section 1.6(a)(3) discusses field activities which includes, but is not limited to, engineering work while 375-1.6(c)(ii), (iii) (b) is specific to engineering work and is consistent with the above referenced NYSED law. In February 2023, DEC requested that NYSED review this language for consistency, and NYSED approved the language.

2.7. 375-1.8(d)(1)(iii), 3.8(f)(4)(ii) Plume Stabilization

Commenters 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 8, 9)

Response 2.7. *Per DEC’s previous response, “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 the BCP in section 3, particularly 3.8(f)(4)(ii).” (Response 2.14, Part 375 Assessment of Public Comments, October 16, 2024)*

Additionally, Subparagraph 375-1.8(d)(1)(iii) refers to a site related plume with no off-site upgradient contribution while 375-3.8(f)(4)(ii) refers to an “on-site plume,” thus there isn’t any inconsistency between the two provisions.

2.8. 375-1.8(d)(2)(a-c) Volunteers and “Environmental” Exposure from Off-site Sources

A commenter objected to the word “environmental” in describing on-site exposures that would require investigation of off-site sources. Another commenter asserted that there is no definition for the word, “exposure” and expressed concern that volunteers’ cleanup efforts would be impacted by off-site sources. (Commenter 8, 9)

Response 2.8. *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. (Response 2.15, Part 375 Assessment of Public Comments, October 16, 2024)*

2.9. 375-1.8(g)(2)(ii)(a)(2) Common Ownership

A commenter stated that it is not clear how the case of common ownership of land in perpetuity would be handled under the revised regulation. They noted that tax law amendments may be needed for single family projects to utilize all available tax credits. (Commenter 8, 12)

Response 2.9. *Comment noted. Per DEC's previous response, DEC is clarifying that properties remediated to restricted residential, which will require ongoing engineering and institutional controls to ensure effective controls remain 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). (Response 2.19, Part 375 Assessment of Public Comments, October 16, 2024)*

2.10. 375-1.9(e) Certification of Completion Revocation

A commenter 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 the Department to revoke or modify certificates of completion based on misstatements or disagreements regarding tangible property tax credits. (Commenter 9)

Response 2.10. *As stated in DEC's previous response, ECL 27-1419(5)(a-d) set out the criteria for revoking a COC and the regulations reflect the statutory requirements. The proposed 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 certificates of completion could be "revoked based on any disagreement between an applicant and the Department 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 proposed language. Moreover, disputes pertaining to tax credit values are more properly in the purview of the New York State Department of Tax and Finance (NYSDF). (Response 2.23, Part 375 Assessment of Public Comments, October 16, 2024)*

2.11. 375-1.11(d) Work Plans for Change of Use

A commenter requested that the proposed requirement for submission of work plans for any Change of Use notices be removed, as it would be unnecessary and onerous. (Commenter 9)

Response 2.11. *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, ensure that intrusive work is performed appropriately and does not compromise the integrity of a planned or completed remedial program, and is protective of public health and the environment. In order to fulfill its statutory obligations to accept or deny the change of use under ECL 27-1317, a work plan regarding the full scope of the change is needed. The revised regulation for Part 375-1.11(d)(2) is not intended to change the review and acceptance process of non-intrusive work and 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.” For example, 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 does not compromise the remedial program and is protective of public health and the environment through approval of a work plan which may impose certain conditions on the work which is consistent with current practices.*

3. Comments on Subpart 375-3, Brownfield Cleanup Program

3.1. 375-3.2(e) Definition of Cover System

A commenter asserted that the phrase “the redevelopment” is unnecessary and undefined. Additionally, the phrase systems “must otherwise meet” applicable building code may confuse readers into equating building code compliant thicknesses with EC requirements and should be removed. The commenter state that the last sentence in clause (2) should be deleted, asserting that the definition of an engineering control is strictly within the purview of DEC and is not subject to any provision of the Tax Law. (Commenter 9)

Response 3.1. *As stated in DEC’s previous response, 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. (Response 4.1, Part 375 Assessment of Public Comments, October 16, 2024)*

3.2. 375- 3.2(k), 3.3(b)(1)(ii) and 3.8(c)(5) Potentially Responsible Party Search

Commenters objected to the proposal to require BCP Applicants to conduct the search for Potentially Responsible Parties (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. A commenter also objected the requirements that volunteers perform a Superfund feasibility study instead of an alternatives analysis pursuant to changes when attempting to bring a Class 2 Superfund site into the BCP. (Commenters 8, 9)

Response 3.2. *As stated in DEC’s previous response, ECL 1405(2)(a) states that DEC determines 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. (Response 4.2, Part 375 Assessment of Public Comments, October 16, 2024)*

3.3. 375-3.2(l) Definition of Renewable Energy Facility Site

Commenters challenged the inclusion of requirement that real property have a “primary use” for renewable energy generation or co-located storage to qualify for tangible property credits. One commenter (5) also recommended DEC include stand-alone energy storage systems within the definition of qualifying sites and requested the removal of language excluding “real property that has a primary use for the production of fossil fuel-based energy.” (Commenters 5, 8, 9)

Response 3.3. *DEC reviewed the comments received and determined no change is necessary. The inclusion of the requirement that sites must have “a primary use” for a renewable energy system or co-located storage is consistent with legislative intent and the public service law. The use of the term “renewable energy facility” implies something more substantial than a “renewable energy system.” Had the legislature intended to include any appurtenant renewable energy system within the ambit of the Brownfields program, it could have more clearly indicated so. Moreover, several amendments have been made to the BCP imposing additional eligibility requirements for applicants seeking Tangible Property Tax Credits (TPTCs) for sites located in cities having a population of one million or more. It would be incongruous to reverse that policy by opening eligibility to any developer who includes appurtenant renewable energy systems or co-located storage to a property that is otherwise unrelated to renewable energy.*

Stand-alone energy storage systems are not included in the regulatory definition because they are absent from the statutory definition. 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 exclusion of properties primarily used for fossil fuel-based energy production from the definition of renewable energy facility site is consistent with the statutory definition of renewable energy system found in the sixty-six-p of the public service law. Accordingly, this clarifying provision will not be removed from the regulatory definition. Regarding the assertion that this provision would allegedly discourage sites presently used for fossil fuel-based energy generation from transitioning to renewable energy generation, this appears to fundamentally misapprehend the eligibility requirements for the Brownfields program, which among other things, is based on the site's intended final use after remediation work is completed. A fossil fuel-based energy production facility seeking to transition to a renewable energy generation facility is not inherently excluded from the program solely by virtue of its present use.

DEC provided further response on this definition in Response 4.3, Part 375 Assessment of Public Comments, October 16, 2024)

3.4. 375-3.3(a)(1) Definition of BCP Site Eligibility

A commenter asserted that the amendment requires contamination to be present site-wide in order to the site to be eligible for the BCP. (Commenter 8)

Response 3.4. *Comment noted. Per DEC's previous response, the definition in this revision is consistent with the language in the Brownfield Statute and does not require further change. (Response 4.6, Part 375 Assessment of Public Comments, October 16, 2024)*

3.5. 375-3.3(a)(3), (4) BCP Eligibility

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 8, 9)

Response 3.5. *DEC considered these comments and determined that no change is necessary. Per DEC's previous response, 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. (Response 4.7, Part 375 Assessment of Public Comments, October 16, 2024)

3.6. 375-3.3(a)(5) Reasonably Anticipated Use of Site

A commenter requested that the regulation refer to the BCP eligibility criteria found in ECL 27-1415 to include “reasonably anticipated use of the site.” (Commenter 9)

Response 3.6. *Comment acknowledged. Per DEC’s previous response, 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. (Response 4.8, Part 375 Assessment of Public Comments, October 16, 2024)*

3.7. 375-3:3(b) BCP Eligibility for Class 2 Sites

A commenter objected to the inclusion of Class 2 sites into the BCP, stating that there will not be the same level of cleanup for these sites in the BCP versus the SSF program. If this change is implemented, commenter requests that the PRP search conducted be more transparent. (Commenter 4)

Response 3.7. *A significant threat BCP site is equivalent to a Class 2 site, but listing is deferred because contamination will be addressed under the BCP. The distinction*

between programs is that significant threat BCP sites are classified as “A” for active, versus the classification as a “2” under the SSF. With regards to remedial actions, the remedy under a BCP significant threat site is no different than it would be under the SSF as a Class 2 site. In each circumstance, DEC selects a remedy that must address the significant threat to the public health and/or the environment.

If a site applies to the BCP, the PRP search is primarily conducted by the Applicant given the due diligence performed during the property purchase and the operator searches on the site as part of the BCP application process. DEC can rely upon the PRP search conducted by the Applicant in making its decision regarding a PRP’s viability or insolvency. A PRP search conducted by DEC in either program is considered a legal work product and is not shared with the public.

3.8. 375-3.3(f) Tangible Property Tax Credits

A commenter questioned whether the referenced regulatory language would remain in place, asserting that it created a work around for Real Property Tax Law. (Commenter 8)

Response 3.8. *Per DEC’s previous response, 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. (Response 4.11, Part 375 Assessment of Public Comments, October 16, 2024)*

3.9. 375-3.5(c)(4) Brownfield Cleanup Agreement Termination

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. (Commenter 8)

Response 3.9. *Per DEC’s previous response, 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. (Response 4.15, Part 375 Assessment of Public Comments, October 16, 2024)

3.10. 375-3.8(b)(2)(i)(a-d) Off-site Obligation for Volunteers

DEC received comments asserting that the proposed regulatory language would impose offsite remediation obligations upon BCP Volunteers which are inconsistent with the BCP statute. (Commenters 8, 9)

Response 3.10. *Consistent with DEC’s previous response, DEC considered the comments and determined that no changes to the language are necessary. As an initial matter, the final sentence of 27-1415(2)(b) explicitly provides that some off-site investigation may be required to identify and sample potential areas of contamination to support the qualitative exposure assessment. 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. (Response 4.17, Part 375 Assessment of Public Comments, October 16, 2024)*

3.11. 375-3.8(e)(1)(iii)(a-c) Elimination of Conditional Track 1

DEC received comments objecting to elimination of the Conditional Track 1. (Commenters 8, 9)

Response 3.11. *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. (Response 4.19, Part 375 Assessment of Public Comments, October 16, 2024)

3.12. 375-3.8(e)(1)(iv) Engineering Controls to Achieve Track 1

DEC received a comment 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 8)

Response 3.12. *Comment acknowledged. Per DEC's previous response, 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. (Response 4.20, Part 375 Assessment of Public Comments, October 16, 2024)*

3.13. 375-3.8(e)(2) Track 2 and Cleanup Below 15 Feet

A commenter asserted that the statutory definition of a Track 2 site does not have a depth limit, and that DEC is creating a change to the Track 2 definition. (Commenter 8)

Response 3.13. *Per DEC's previous response, 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. (Response 4.21, Part 375 Assessment of Public Comments, October 16, 2024)*

List of Commenters

1. Christopher Rooney
2. George Duke
3. Town of Oyster Bay Department of Public Works
4. Voice of Gowanus

5. Rise Light and Power, LLC
6. Vektor Consultants
7. New York State Council of Professional Geologists
8. Knauf Shaw LLP
9. New York City Brownfield Partnership
10. Seacliff Environmental
11. Benjamin Brown
12. Paul Desser