

Summary of Express Terms

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

Full text of the Express Terms is available on the New York State DEC website at <https://dec.ny.gov/regulatory/regulations/proposed-emergency-recently-adopted-regulations/environmental-remediation-revisions>

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

The rulemaking amends Part 375 to incorporate changes, clarifications, and modifications based on experience gained while implementing the BCP. The changes increase consistency across the SSF, BCP, and ERP and provide DEC with the tools necessary to effectively implement these programs.

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

Subpart, as needed.

Subpart 375-1 (General Remedial Program Requirements)

Changes to section 375-1.2 (Definitions) include:

- *Brownfield site*: revised to reflect the amended statute, which references the presence of contamination rather than the complication of reuse.
- *Change of Use*: removed from Subparts 375-2, 375-3 and 375-4 and added to 375-1.
- *Responsible Party*: moved from Subpart 375-2 to 375-1. The term responsible party is also used in Part 375-3; the definition will apply to all uses of that term.
- *Historic Fill*: removed from 375-1.2 definitions and 375-2.8(c)(3)(ii), 375-4.8(c)(3)(ii), and 375-6(d)(3)(vi). The definition was included to recognize historic fill as a “background” condition that may not require remediation even if SCOs were exceeded. Legal precedent developed during implementation of the BCP dictates that all material, historic or otherwise, be evaluated under the same criteria as undisturbed soil. Therefore, any fill material that exceeds SCOs will be part of the site remediation.
- *Off-site contamination* is revised to include soil vapor and sediment.
- *Professional geologist* is added to define geologists per article 145 of the Education Law of NYS.

The general provisions applicable to orders and agreements are clarified.

Timeframes for payment of state costs are clarified to enhance DEC’s ability to collect

payment. Changes in Part 375-1.5(b)(2)(i) provide a timeframe and specify that dispute resolution requests under an order or agreement be sent to the Division Director. New Part 375-1.5(b)(6) explicitly states that DEC has the authority to initiate the termination of an order or agreement with cause.

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

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

- The definition of “remedial site” in section 375-1.2 is revised to include sites under evaluation for listing on the Registry (Class P sites).
- A definition is added to section 375-1.2 for “site characterization” which is a preliminary investigation used to determine whether a potential site (Class P) should be listed on the Registry.

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

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

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

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

Revisions clarify that:

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

Subpart 375-3 (Brownfield Cleanup Program)

Most amendments were mandated by the 2015 and 2022 Amendments.

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

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

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

- *Affordable Housing Project* definition is further refined to clarify eligibility

and benefits.

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

BCP eligibility requirements are clarified in section 375-3.3. Class 2 Superfund sites are now eligible for the program if there is no viable responsible party. The amendments clarify the required information to demonstrate “contamination” for eligibility purposes and incorporate the provisions introduced in the 2015 Amendments stating that a property is not eligible for the BCP unless the site “requires remediation.” Criteria used to determine the site’s anticipated use are provided.

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

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

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

eligible for TPTCs.

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

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

The proposed regulations clarify that a volunteer may be required to conduct an off-site field investigation and sampling to complete the exposure assessment including groundwater, soil, and soil vapor intrusion sampling.

Subpart 375-4 (Environmental Restoration Program)

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

Subpart 375-6 (Soil Cleanup Objectives)

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

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

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

DEC proposed this rulemaking on February 14, 2024, and received public comments through May 21, 2024. A commenter noted discrepancies between the protection of public health values of two contaminants in the Tables and those published in DEC's Technical Support Document (TSD). DEC subsequently completed a thorough review of the Tables and TSD, ensuring consistency between the two documents. Additionally, the residential and restricted residential use SCOs for mercury were changed to reflect rural background concentration and associated footnotes were amended. DEC is required to issue a revised rulemaking to correct these values as any change to the Tables constitutes a substantive change. No other substantive changes were made.

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

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