

**ENVIRONMENTAL LAW SECTION OF THE  
NEW YORK STATE BAR ASSOCIATION**

*Comments on Proposed Part 375 Regulations*

The Environmental Law Section of the New York State Bar Association thanks the Department of Environmental Conservation (“NYSDEC”) for the opportunity to comment on the Proposed Part 375 Regulations. The Section’s Hazardous Waste/Site Remediation Committee developed these comments, and they were subsequently reviewed and approved for submission by the Section’s Executive Committee and Cabinet. We respectfully request NYSDEC to consider these comments in promulgating its final Part 375 regulations.

**Overall Purpose and Structure**

We commend NYSDEC for undertaking the time-consuming task of reviewing the rules governing its various programs and reorganizing them into a coherent structure. The proposed form of organization of these rules will make them more easily accessible to the public and the regulated community and will provide for more transparency in the way NYSDEC administers these programs.

**Part 375, Section 1**

General Comment:

We understand that NYSDEC’s intent in creating subpart 375-1 was that the this subpart would apply to all of the remedial programs and may be referenced or used in all administrative orders and agreements issued by NYSDEC. However, subpart 375-1 contains many definitions and provisions that do not appear to apply to all of the remedial programs. It is unclear to us why terms or provisions that do not apply to all remedial programs would appear in subpart 375-1. Accordingly, we suggest that NYSDEC review subpart 375-1 to ensure that it contain only provisions and definitions that apply to all remedial programs. In our comments that follow, we have identified those terms and provisions that we believe should not appear in subpart 375-1 because they are not applicable to all remedial programs and suggest the applicable subparts where those provisions should be relocated.

375-1.2 -- Definitions

1.2(a) -- The definition of "all appropriate inquiry" (AAI) should refer to 40 CFR 312 and ASTM E1527-05 that EPA has determined is equivalent to the AAI rule.

1.2(b) -- In defining "brownfield site," the rule should clarify that a "site" can include one or more properties or parcels, and can include only a portion of a specific property or parcel. Note that in Section 375-1.8 regarding certification of controls, the draft rule refers to sites that may be comprised of multiple properties or parcels. However, if only a portion of a site enters the program, then the boundary of the site is the site that has entered the program, not the metes and bounds site description for the entire parcel.

1.2(g) -- The definition of "contaminant" includes petroleum. Since ECL 27-1301 does not apply to petroleum, it appears that this definition should not be included in the definitions of subpart 375-1. Alternatively, NYSDEC might consider using the definition of "contaminant" appearing in DER-10 (i.e., any discharged hazardous substance as defined pursuant to ECL 37-0101, hazardous waste as defined pursuant to ECL 27-1301 or petroleum as defined in ECL 17-1003 or section 172 of the Navigation Law).

In addition, the definition of "contaminant" includes "indoor air" even though there is no reference to indoor air in ECL 27-1301.

1.2(h) -- The definition of "contamination" does not include sediment, even though the definition of "environment" does. As a result, a significant threat to the environment can include contaminated sediment, even though the contamination to be addressed in the cleanup program does not include contaminated sediment. Moreover, this definition is not limited to "contamination" that poses a "significant threat". Likewise, this definition includes "indoor air", which is not applicable to ECL 27-1301. Because this definition does not apply to all of the remedial programs, we suggest that NYSDEC consider moving this definition to the subparts for the applicable remedial program.

1.2(i) -- The definition of "disposal" contains a reference to "contaminant". Either "contaminant" should be deleted or the definition of "disposal" should be removed from this subpart and placed in the subpart for the applicable remedial program. NYSDEC should consider using the definition of "disposal" appearing in DER-10.

1.2(o) -- The proposed definition of "emergency" refers to an imminent threat. Since there is case law defining what constitutes an "imminent and substantial endangerment", we recommend that this phrase be used in place of "emergency." In addition, we suggest that the reference to "contaminant" should be deleted since it would not apply to ECL 27-1301, and therefore should not appear in subpart 375-1 which is intended to apply to all remedial programs. Instead, NYSDEC may want to consider replacing that word with "hazardous waste or petroleum".

1.2(r) -- The definition of "environmental damage" should be revised to apply to releases or disposal of hazardous waste or petroleum in concentrations that exceeds applicable cleanup standards and causes injury or impairment to the environment. Note that the definition of "environmental damage" refers to "flora or fauna" while the definition of "environment" refers to "fish, wildlife, other biota". There is no need to refer to "flora or fauna" in the definition of "environmental damage" since "environment" is a defined term.

1.2(w) -- The definition of "grossly contaminated media" refers to "elevated contaminant vapor levels." Certain types of sampling equipment might not detect soil gas vapor, yet there could still be significant contamination in the soil or groundwater. The definition then goes on to state "or is otherwise readily detectable without laboratory analysis". Grossly contaminated media is likely to be identifiable by laboratory analysis and probably visually as well as olfactory. This definition is confusing. We recommend that this term be defined as the presence of hazardous waste or petroleum at concentrations above applicable cleanup standards that can be detected visually or by strong odors.

1.2(y)(4) -- The definition of "hazardous waste" includes "petroleum." Since ECL 27-1301 does not apply to petroleum contamination, we suggest that subparagraph 4 should either be deleted or the entire definition moved to 375-2.

1.2(z) -- The definition of "historic fill material" should not be limited to non-indigenous material that is used to raise the topographic elevation of a site since such material is also used to fill in depressions and bring the area up to the grade of the rest of the property. In addition, the definition should not be linked to the origins of the non-indigenous material. Because fill material is not heavily regulated, many property owners will not be able to identify the source of the fill material that is brought to a site now, much less that was imported to a site 100 or more years ago. A property owner should not have the burden of establishing that the fill material came from a particular source but just show that the material does not consist of natural soils. In addition, while historic fill material consists, *inter alia*, of non-hazardous solid waste, it can also contain constituents that would cause the fill material to be regulated as hazardous under state law. From a policy standpoint, it is inherently unfair and arbitrary for NYSDEC to define historic fill material in a way that would disqualify the waste from the Brownfield Cleanup Program based upon the origin of the waste, yet require the property owner to incur the costs of managing the very same material as a hazardous waste. If the fill material qualifies as a hazardous waste, then the property is contaminated with a hazardous waste and should qualify as a brownfield site.

NYSDEC should also indicate how the Part 360 Beneficial Reuse Determination (BUD) rules might be used in remedial programs to allow re-use of on-site materials.

1.2(ab) -- This definition should refer to subdivision 375 1.2(ao), not (an).

1.2(ac) -- The definition of institutional controls should be amended to add the last two sentences of the definition in DER-10. NYSDEC should also consider adding the definition of "engineering controls" set forth in ECL 27-1401(11)

1.2(ad) -- The definition of "Interim Remedial Measure" includes a reference to "free product". This term is undefined. We suggest that NYSDEC use the definition contained in DER-10. This definition also refers to "without extensive investigation". It would be more accurate to refer to a "remedial investigation" or perhaps "during site characterization".

1.2(ai) -- The definition of petroleum should be removed from this subpart since it does not apply to ECL 27-1301. It should be located in subpart 3 and simply refer to the Navigation Law Section 172 as defined in DER-10.

1.2(ao) -- The definition of "remedial program" references "wastes and contaminated materials". To avoid confusion, NYSDEC should consider using defined terms such as "hazardous wastes or petroleum" where applicable.

1.2(ao)(5) -- The phrase "post-remediation management" should be changed to Operations, Maintenance and Monitoring" since is the terminology used in DER-10.

1.2(ap) -- The definition of "Remedial Site" should include "or portion of such real property" in front of "constituting". It should also state that a remedial site may extend beyond the boundary of a particular parcel of real estate.

1.2(aq) -- The definition of "sediment" should refer to "organic matter" and not "particulate matter". To be consistent with NYSDEC guidance, it should exclude material found in enclosed sumps, sewers or piping systems not accessible to fish and wildlife, and that does not form any benthic or aquatic habitat for purposes of comparison to the NYSDEC Technical Guidance for Screening Contaminated Sediment.

1.2(at) -- The definition of "source area" or "source" refers to "area of concern", which is an undefined term. We suggest that the definition appearing in DER-10 be used.

This definition also refers to a "release of significant levels of contamination". This phrase is ambiguous. We suggest a release of hazardous waste or petroleum that exceeds applicable SCGs.

Note that the definitions of "release" and "waste" have been deleted from Part 375. We recommend that they be added back.

We also suggest a definition of "remediation" that clarifies whether the use of sub-slab depressurization systems (SSDS) is considered remediation or mitigation. If NYSDEC considers SSDS to be mitigation, NYSDEC should explain how OM&M requirements would differ from those for remediation? See also our comments to Subpart 375-3 as to the need for clarifying how the need SSDS may impact the cleanup tracks.

#### Part 375-1.5 -- Orders/Agreements/State Assistance Contracts

1.5(b)(1) -- We suggest that the term "emergency" be replaced with "imminent and substantial endangerment" since that phrase has a well-understood meaning that has been established by the courts. For situations not constituting such an imminent and substantial endangerment, we recommend that the original 15-day reporting requiring be retained.

Also note that NYSDEC appears to use "imminent" and "immediate" interchangeably. For the foregoing reasons, "imminent" should be used instead of "immediate".

1.5(b)(2) -- Dispute Resolution. This provision references a "designated individual" to resolve disputes, yet no such individual is specifically identified in current orders, agreements or SACs. Will designated dispute resolution or other individuals be identified in future agreements by name or title?

Section (ii) references a designated appeal individual. Section (iii) states that the decision by the designated appeal individual shall be the agency's final decision and defines the "designated individual" to "hear disputes" as the Director of the Environmental Remediation Division and designated appeal individual as the Assistant Director. The proposed language precludes a party from having its dispute heard before an administrative law judge. We believe that this is a denial of due process and is inconsistent with the state administrative procedures act (SAPA).

NYSDEC should use the standard dispute resolution language that is used in administrative orders on consent and the Brownfield Cleanup Agreements (see XIV.B).

The reference to the right of a party to seek judicial review pursuant to article 78 that normally appears in orders on consent has been deleted. Since NYSDEC contemplates that this section will be the language used in its orders, the reference to judicial review should be retained.

1.5(b)(3) -- A party should be afforded the opportunity to request an extended payout period for payment of state costs.

1.5(b)(4) -- The definition of "force majeure" is vague when it refers to "or the like". This phrase should be deleted and replaced with "failure to act or delay by a government agency, or any other fact or circumstance beyond the reasonable control" of the remedial party. Moreover, the remedial party should have the right to invoke dispute resolution with respect to a determination by NYSDEC that an event or circumstance did not constitute Force Majeure.

#### Part 375-1.6 -- Work Plans and Reports

1.6(a)(1)(ii) – We recommend that NYSDEC not continue to use guidance documents to govern important issues in the remedial action process. *See, e.g., Heimbach v. Williams*, 136 Misc.2d 1, 517 N.Y.S.2d 393 (Sup. Ct. Albany Co. 1987) (questioning validity of NYSDEC policy that had not been adopted pursuant to formal rulemaking). The final promulgated Part 375 should encompass all of the requirements with which parties have to comply for remediating sites. At the very least, NYSDEC should identify the specific guidance documents it intends to use. Please also see our discussion on this issue in our comments to subpart 375-3.

1.6(c)(6) -- NYSDEC should issue a certificate of completion or other final decision document upon approval of the final engineering report. We also suggest that NYSDEC include a time frame for issuing these decision documents.

1.6(d) -- This section should be amended to provide time frames for NYSDEC decision-making. Time frames for rendering decisions will expedite the remediation process, reduce the costs of remediation and accelerate the return of contaminated properties to productive reuse. Time frames can also serve as productivity measures for NYSDEC and its employees.

#### Part 375-1.8 -- Remedial Program

1.8(a) -- This provision states that all remedial programs addressed in Part 375 "shall address...source removal..." Source removal is not, but should be, a defined term.

1.8(b) -- This section requires that all bulk storage tanks and vessels be addressed regardless of the authority under which the site is being remediated. ECL 27-1301 does not address petroleum spills or releases from chemical bulk storage facilities. Accordingly, the requirements in this subsection should be moved to the applicable parts of 6 NYCRR.

1.8(b)(1) -- This section requiring registering of all petroleum storage tanks appears to go beyond the requirements of the Petroleum Bulk Storage Act, which is limited to facilities storing 1100 or more gallons of petroleum.

1.8(b)(3) -- This section should be amended to provide that it does not apply to tanks that were taken out of service or closed prior to the promulgation of 613.9 or 598.10.

1.8(c) -- The hierarchy set forth in this subsection appears to be inconsistent with that of ECL 27-1301 and may not be consistent with the NCP.

1.8(c)(3) -- This section applies to “the elimination of volatilization into buildings”. This is a new, undefined term. Moreover, the only limitation on this requirement is feasibility. Action should not be required for volatilization that results in indoor air concentrations below target concentrations.

1.8(d) -- Since volunteers in the BCP are not required to address off-site contaminated groundwater, we suggest that NYSDEC add “as applicable” after the reference to ECL 15-3109.

1.8(d)(2) -- This section should be amended to clarify that plume stabilization does not pertain to soil gas or vapor intrusion into buildings but simply obtaining hydrologic control over contaminated groundwater.

1.8(d)(3) -- This section may not necessarily apply to the BCP. We suggest that NYSDEC review this section to clarify its applicability to the various remedial programs.

1.8(f) -- In most remedial programs, the responsible party proposes a remedy and NYSDEC approves the remedy. This section should be revised so that the word “selected” is replaced with “approved”.

1.8(f)(9)(ii)(b) -- This section states that if cleanup is not consistent with current zoning (e.g., cleanup to a non-residential standard when zoning permits residential use), NYSDEC will not issue a certificate of completion until the zoning change has occurred. There is no apparent reason why, if the cleanup is more stringent than the zoning would otherwise require, NYSDEC should not issue the COC. As written, this provision may add unnecessary delays to a volunteer’s ability to obtain the liability protections and other benefits of a certificate of completion despite its compliance with NYSDEC regulations. In addition, COCs often influence financing, insurance, and general marketability.

1.8(g) -- We applaud NYSDEC’s recognition that different types of residential use (e.g., high-rise vs. single family) and recreational use result in different exposure patterns and therefore justify different target cleanup levels. Nonetheless, we note that, irrespective of the intended use, the actual use of a recreational area (active vs. passive) may in some circumstances be difficult to predict and enforce.

In stating, "the use of the site shall be either for unrestricted or restricted use," the draft rule appears to exclude the opportunity for multiple tracks to be used at a brownfield site. In line with the applicability of operable units on brownfield sites, this provision should clarify the ability of an applicant to implement multiple tracks at a brownfield site.

1.8(h) -- NYSDEC should propose criteria for when it intends to require financial assurances for institutional or engineering controls and how the amount of the financial assurance will be calculated.

### Section 375-1.9 -- Certificate of Completion

1.9 -- As a general comment, it appears that the issuance of COCs is limited to 27-1401. We suggest that NYSDEC explain its basis of its authority to issue COCs under the other remedial programs. It might be more appropriate to refer to no further action decision documents and then refer to the particular document within the appropriate subpart.

1.9(e)(1)(v) – We believe that modification or revocation of a COC for good cause should only be used in extremely egregious situations since NYSDEC has the ample authority to reopen COCs under a variety of circumstances. We recommend that NYSDEC consider limiting the use of its COC revocation authority to situations of intentional or willful violation of the terms of the COC, where the party has filed for bankruptcy and does not have adequate resources to maintain any ongoing institutional or engineering controls, or NYSDEC has determined that the party does not have the financial resources to comply with the requirements of the COC.

### Section 375-1.10 -- Citizen Participation

1.10(a) -- This section states that all remedial plans shall include citizen participation plans that include "public notice with a prescribed comment period at select milestones, with meetings and informational sessions." This seems to be an open-ended requirement for citizen participation. Instead, we suggest that NYSDEC consider simply referencing the specific requirements for citizen participation set forth in subparts 375-2 and 375-3.

1.10(f) -- Since IRMs are short-term actions designed to address more immediate risks posed by contamination, it does not always make sense to require full-fledged citizen participation for such actions since the permanent remedy will be subject to citizen participation. Nonetheless, NYSDEC should not short-change public participation by use of IRMs. At the very least, NYSDEC should have discretion to waive full-fledged citizen participation for time-critical IRMs. There may also be circumstances where fact sheets could be appropriate for time critical IRMs where NYSDEC determines that this would not unduly delay implementation of the IRM.

### Section 375-1.11 -- Miscellaneous

1.11(c) -- This section, which provides that NYSDEC can require financial assurances for ICs/ECs, should clarify the circumstances when NYSDEC intends to impose such a requirement. NYSDEC should track the financial assurance mechanisms allowed for RCRA. In addition, NYSDEC should provide guidelines on how to calculate the amount of the financial assurance. NYSDEC should also consider clarifying that the financial assurance amount should be for maintaining the controls and not the cost to remediate the impacts of the failure of such controls. We believe that the Legislature did not intend to create a RCRA corrective action financial assurance, just a mechanism to make sure that the IC/ECs are maintained. Any remediation required by the failure of an IC/EC could be addressed through a reopener.

1.11(d) -- The nature of transactions oftentimes does not allow for written notice 60 days prior to a change in ownership. This provision may result in the submission of numerous and potentially unnecessary and confusing notices to NYSDEC, particularly if a pending transaction does not close. We suggest that the change in use requirement resulting only from a change in ownership require written notice within 60 days of the change.

### Part 375-1.12 -- Permits

1.12(c) -- NYSDEC is proposing that state or local permits may be waived if the permit would substantially delay the project or present a hardship. We believe that NYSDEC may not have the statutory authority for this provision, and it may unduly infringe on the prerogatives of local jurisdictions. We suggest that NYSDEC clarify the basis of its authority to waive local permitting requirements.

1.12(e) -- It is unclear why provisions of the PBSA and CBSA are included in Part 375, and we suggest NYSDEC clarify why these provisions are relevant to the Part 375 remedial programs. This section proposes to regulate all tanks regardless of size or contents and regardless if they were properly closed in accordance with the requirements in effect prior to the promulgation of 612-614 and 596-599. We believe that NYSDEC does not have the authority to require a new owner who does not use an old tank on property that was closed in accordance with the requirements of the time to register or close the tank since the new owner would not be an owner or operator of that tank.

### **Part 375, Section 2**

#### Part 375-2.2 -- Definitions

2.2(b) -- The definition of contaminant should be deleted from this subpart. Changing the definition to fit this subpart can only lead to confusion and is unnecessary. ECL 27-1301 applies only to hazardous wastes (which now includes hazardous substances).

2.2(c) -- Same comment as above. Furthermore, the list of media in which contamination can occur should be broadened to include "sediment."

2.2(d) -- The definition of "cost" should include only "reasonable expenses" for the listed items.

#### Part 375-2.3 -- Municipal Eligibility for State Assistance

2.3(a) -- Because of the existence of subpart 4, this subsection can be confusing. We suggest that NYSDEC explain that subsections 3 and 4 are intended to apply to the 1986 EQBA and not ECL 56-0101.

2.3(e) -- Eligible costs should be those that are incurred consistent with the NCP. We suggest that NYSDEC consider adding language that compliance with the requirements of the program shall carry a presumption that the costs were incurred in compliance with the NCP.

2.3(f) -- Ineligible costs should be those that are incurred not consistent with the NCP.

#### Part 375-2.5 -- Orders and State Assistance Contracts

2.5(a)(3)(i) -- We believe that parties carrying out remedial obligations under the 1986 EQBA are not required to indemnify the state. These provisions are based on ECL 27-1409.4, applicable only to the Environmental Restoration Program. If NYSDEC is going to track the requirements of the ERP, subsections 3-5 should be deleted and addressed by subpart 375-4.

### Part 375-2.7 -- Significant Threat and Registry Determinations

2.7(a)(3)(vii) -- Since the term "contaminants" is applicable only to Title 14, we suggest NYSDEC replace this term with "hazardous wastes".

2.7(a)(3)(x) -- The phrase "areas of critical environmental concern" is undefined. DER-10 refers to "Significant Habitat". We suggest NYSDEC use a defined term to eliminate ambiguity and vagueness.

2.7(b) -- NYSDEC eliminated the reference to "inconsequential amount" of hazardous wastes. We suggest NYSDEC consider restoring this term or clarifying the significance of its omission.

2.7(b)(8)(i) -- Disregarding cleanups that have been done prior to site classification is not only arbitrary and capricious but is also inconsistent with the NCP. By way of contrast, EPA will take into account remedial actions implemented after a Preliminary Assessment/Site Inspection has been performed but before the HRS is calculated.

2.7(e)(4) -- NYSDEC should delete "or areas or structures" after the word "site". Parties should be able to delist portions of properties as they are remediated. This section should also be revised to clarify that a site may be delisted once OM&M is approved and implemented. This section should also address how a change in use may affect a previous delisting decision.

2.7(f)(2)(i) -- This sentence should be amended to allow a portion of a site to be delisted.

2.7(f)(2)(iii) -- This sentence should refer to change of use.

2.7(f)(5)(b) -- What does "a significant degree of public interest exists" mean? NYSDEC deleted references to the Part 624 administrative procedures. Will NYSDEC be implementing a Part 375-2 process for adjudicating delisting disputes?

### Section 375-2.8 -- Remedial Program

2.8(a) -- The draft rule states that the goal of Title 13 remedial programs is "to restore that site to pre-disposal conditions, to the extent feasible." We wish to point out that the existing regulatory language indicates that that this goal only applies "where authorized by law." We suggest that NYSDEC restore the original language or clarify the meaning of this change.

### Section 375-2.9 -- Certificate of Completion

2.9(a) -- This section states that the liability relief is limited to NYSDEC. Liability relief under ECL 27-1301 should apply to the State of New York and not just NYSDEC.

2.9(b) -- While a document clarifying the completion of a remedial project is advisable, it is unclear that NYSDEC has the statutory authority under Title 13 for NYSDEC to issue a COC. NYSDEC should consider clarifying its authority to issue COCs.

### Section 375-2.10 -- Citizen Participation

2.10(f) -- For the reasons set forth in our comment to Part 1-10(f), NYSDEC should have the discretion to dispense with full public participation for IRMs where appropriate, depending on the exigencies of the situation.

### **Section 3 – Brownfield Cleanup Program**

General Comment: Under general administrative law principles, statutory language that does not require further interpretation of key words, phrases or concepts, cannot be changed by subsequent regulation. Therefore, during the regulatory revision process, we strongly suggest that NYSDEC remove any language that would create potential inconsistencies between the underlying statutes and the regulation (e.g., the difference between the definition of “brownfield site” as set forth in the statute and as proposed in the regulations).

### Section 375-3.2 -- Definitions

3.2(f) -- This provision adds a new term, “requestor”, which is defined as an applicant prior to eligibility determination. This new term does nothing to clarify—and may in fact add confusion to—the administration of the program.

### Section 375-3.3 -- Eligibility

The eligibility criteria in proposed subsection 375-3.3(a) further confuse NYSDEC’s already opaque practices for granting entry into the program. Reasonably enough, subsections 375-3.3(a)(1) and (2) closely follow the statutory definition of “brownfield” (with the addition of a “reasonable basis to believe” criterion for sites at which contamination is unconfirmed). However, NYSDEC has informed the public in its “roll out” presentations that it intends to follow its March 9, 2005 eligibility guidance, which adds an array of technical, commercial and economic factors not included in the statute. See the Environmental Law Section’s November 19, 2004 Comments on Proposed Site Eligibility Revisions to the Draft New York State Brownfield Cleanup Program (BCP) Guide (“Eligibility Comments”). In addition, proposed subsection 775-3.3(d) would allow NYSDEC to deny entry to a “brownfield” site for public interest considerations other than those set forth in ECL 27-1407.8 [sic; should be ECL 27-1407.9].

These proposed changes add new layers of uncertainty to the voluntary cleanup process, which the Brownfield Cleanup Act was designed to eliminate. Site owners and developers will be reluctant to commit significant upfront time and money to preparing applications if they do not have a clear understanding of their prospects for admittance.

Particularly troublesome is the still-undefined “public interest” criterion. NYSDEC previously proposed to include many of the criteria in the current BCP Program Guide under the heading of “public interest.” This Section commented that doing so was inappropriate, considering the proposed factors had nothing to do with the very specific list of “public interest” criteria set forth in the statute, all of which focus on the applicant’s identity or prior bad acts. In response, NYSDEC relocated many of these criteria into its interpretation of the “brownfield” definition.

It is now unclear what “public interest” considerations NYSDEC will use. Is this provision intended to cover the commercial and economic considerations in the BCP program guide? Or is it intended to address something else? If something else, NYSDEC should explain what it is, and should be guided by the legislature’s narrow definition of “public interest.” Otherwise, the regulation will invite ad hoc and inconsistent determinations, which will undermine faith in NYSDEC and the Brownfield Program.

Also unclear is how NYSDEC intends to apply its current guidelines regarding the definition of a brownfield for purposes of determining site eligibility. NYSDEC has not subjected—and apparently does not intend to subject—its eligibility criteria to rulemaking. NYSDEC’s decision in this regard is not only inconsistent with SAPA; it also deprives NYSDEC of an opportunity to clarify—and for the public to understand—how it will apply these criteria to sites on a going-forward basis.

We recommend that NYSDEC incorporate some or all of its guidance document principles into these regulations or develop a separate “complicating the development” criterion to create transparency on site eligibility determinations.

NYSDEC’s view that it can determine that only a portion of a site meets eligibility requirements is consistent with existing practice; however, it creates several complicating factors with respect to the issuance of COCs and their benefits. If a site is bifurcated, how does it impact liability protection (what happens to the rest of the site?) and tax credits (how can tax credits be apportioned if a development straddles the border of an eligible portion of a site?)? NYSDEC should attempt to provide clarification on these issues.

Limiting eligibility to a site that is the source of contamination [Section 3.3(a)(2)(iii)] has no basis in the statute and is inconsistent with NYSDEC’s goal of reducing sprawl and loss of open space, improving and protecting natural resources and the environment, and enhancing the health, safety and welfare of the people of the state as set forth in the declaration of policy of the enacting statute. The source of the contamination impacting a site is important; however it does not alleviate the complications associated with redeveloping such a site.

3.3(a)(2)(iii) -- Requiring source area identification prior to the application stage is inconsistent with the brownfield site definition. A brownfield, as defined by statute is, “any real property, the redevelopment or reuse of which *may be* complicated by the presence or *potential presence* of a hazardous waste, petroleum, pollutant, or contaminant.” The statute requires source areas be remediated, not identified upon application.

If only source areas are deemed eligible, what is “off-site”? NYSDEC should not limit eligibility to small portions of a site and simultaneously require applicants to investigate beyond their property boundaries to determine if off-site contamination is impacting portions of the property that are not in the program.

If NYSDEC excludes portions of a defined parcel, then the boundary investigation requirements should be limited to the extent of the smaller brownfield site, not the parcel’s complete metes and bounds description. NYSDEC should provide, in writing, an explanation of why it believes

the development of the remaining portions are not complicated by contamination on the other portion.

Section 3.3(a)(2)(ii)- this provision allowing NYSDEC to require a Phase II ESA prior to determination of eligibility is not consistent with the statutory definition of a brownfield. As stated above, a brownfield is defined by the statute as, “any real property, the redevelopment or reuse of which *may be* complicated by the presence or *potential presence* of a hazardous waste, petroleum, pollutant, or contaminant.” Thus, the statute contemplates that sites where contamination has not been confirmed are eligible for the program. Note also that the cross-reference to the ASTM standard in this section is incorrect. It should be E1903-97.

The criteria applied to ineligible parties should be revised so parties are not deemed ineligible solely for being named as a defendant (even without basis) in a suit for contribution under Article 12 of the Navigation Law. For consistency with ECL §27-1407(4), we suggest that a claim must be made by the Fund to render a person ineligible for participation in the program.

NYSDEC determinations on site eligibility and site boundaries should explicitly be made subject to dispute resolution under 375-1.5(b)(2).

The implementation of stringent eligibility criteria has left many sites in New York State without the ability to be remediated under state supervision. If denied eligibility, a site that does not qualify as either a Superfund site or a petroleum site is in regulatory limbo—there simply is no applicable state program under which to conduct a cleanup. Such a situation not only potentially damages site owners who may need state signoff for business, insurance or financing purposes; it also allows for cleanups without any regulatory supervision or public participation—a result that the Legislature cannot possibly have intended. Accordingly, we strongly urge NYSDEC to develop a new program, akin to the old Voluntary Cleanup Program, that is open to all sites requiring some form of environmental investigation and/or cleanup.

#### Section 375-3.8 -- Remedial Program

NYSDEC claims the authority to require remedial action to minimize risks of contamination from offsite, even for volunteers. Compare Section 3.3, which deems a site not eligible as a result of contamination from an offsite source. These two provisions are inconsistent.

The requirement in Section 3.8(d) that the selected remedy must eliminate or mitigate recontamination from offsite sources is not derived from the statute. This concept is inconsistent with the statutory provision in ECL 27-1411 with respect to volunteers, which imposes the burden on NYSDEC through cost recovery to deal with off-site contamination emanating from the site [“Within six months of the determination that a site poses a significant threat, in the event that the applicant is a volunteer, the Department shall bring an enforcement action against any parties known or suspected to be responsible for contamination (other than such volunteer) at or emanating from the site according to applicable principles of statutory or common law liability.”]

If no site cleanup objective exists for a contaminant, NYSDEC may require an applicant to develop one [Section 3.8(e)(v)]. If a regulated contaminant is discovered onsite, developing a site-specific cleanup objective is logical. However, requiring an applicant to develop a soil

cleanup objective that applies to all sites is an inappropriate delegation of regulatory authority. The provision should be clarified accordingly. Moreover, an applicant should be able to use a TAGM 4046 standard as a default for a contaminant that is not one of the 86 contaminants covered by the new tables.

The use of Track 2 cleanup standards as applying generally only to the top 15 feet of soil, and that ground level use, and use below ground level to 15 feet, is determinative of land use for purposes of Track 2 cleanups, are reasonable and realistic approaches for purposes of brownfields cleanups.

Section 3.8(f)(3)(iv)-The provision that even if there is no significant threat determination, NYSDEC can require a Track 2 cleanup anyway under certain circumstances defeats the purpose of offering a Track 4 cleanup and performing the significant threat determination. Under the statute, if there is no significant threat, the remedial program track is the applicant's choice.

3.8(a)(3) -- The draft rule states that remedial programs shall be selected upon "consideration" of the requirement that a site does not exceed a 1-in-1 million cancer risk and a hazard index of 1 for non-cancer risks. Title 14 establishes these as required risk levels for all final remedies (with limited exceptions under Track 4) and appears inconsistent with the draft rule.

3.8(e)(1)(iii) -- Under Track 1, the only allowable use of long term institutional or engineering controls is to address groundwater issues in limited circumstances, and short term (less than 5 year) controls only if the remedy "includes an active treatment system" (term undefined). The provisions should address whether a Track 1 cleanup could include vapor intrusion mitigation systems.

3.8(e)(2)(ii)(a)(2) -- Under Track 2, the draft rule states that where groundwater standards are being contravened, the soil objective for protection of groundwater must be used "unless . . . a groundwater restriction is employed." However, this provision says nothing about how such restrictions are to be "employed," and by what criteria NYSDEC would approve use of such restrictions. The provision should specify whether any such restrictions have to be included in an environmental easement, as provided for in other sections of the rule.

3.8(e)(3)(iii) and (iv) -- Under Track 3 cleanups, the statute allows for development of remedial action objectives using Track 2 methodologies and site specific data. These provisions of the draft rule unduly limit opportunities to employ site-specific data.

3.8(e)(3) thru (4) -- ECL 27-1415.4 explicitly states that NYSDEC's "regulations shall provide that groundwater use in Tracks 2, 3 or 4 can be either restricted or unrestricted." We note that the draft rule makes no mention of restricted use of groundwater as part of Track 3 or 4 cleanups.

The soil cleanup criteria and attendant "look up tables" set out in Subpart 375-3 are purportedly intended to apply only to the BCP. However, we recommend the application of these criteria as applicable or relevant and appropriate requirements ("ARARs") to cleanups performed under other remedial programs. The difference in jurisdiction may be the result of timing, or factual circumstances, rather than any data or other technical evidence.

NYSDEC should clarify whether vapor mitigation systems will be categorized as engineering controls. If NYSDEC deems a vapor mitigation system an engineering control, parties that otherwise qualify for Track 1 cleanups cannot meet the Track 1 engineering control criteria.

### Section 375-3.9 -- Certificate of Completion

3.9 -- This provision requires notice and hearing to parties prior to revocation of a COC. We commend NYSDEC for considering and incorporating past comments made by the Section on this topic.

375-3.9(b) and (c) incorporate the factors listed in subsection 375-1.9(e)(1) as bases by which NYSDEC will curtail the liability protections afforded to parties who receive a Certificate of Completion and the reasons to modify or revoke Certificates of Completion, respectively. As applied to the BCP, the articulated reasons largely track ECL 27-1419.5, but additional layers of detail have been incorporated (e.g., failure to manage controls or monitoring; intentional violation of the terms of an environmental easement). While these additional details are helpful, the proposed subsection does not distinguish between factors that justify modification of a Certificate of Completion, and those that would justify its revocation. Such a distinction would be helpful. Moreover, the proposed regulations do not flesh out what constitutes “good cause” for modification or revocation. We believe NYSDEC should define “good cause” to situations involving: (1) intentional or willful violation of the terms of the COC, (2) culpable conduct (negligence, gross negligence, recklessness, intentional misconduct) that causes a release or threatened release that poses a risk of imminent and substantial endangerment to human, environmental or natural resource exposure; or (3) a showing of financial incapacity such as where a party has filed for bankruptcy and does not have adequate resources to maintain any ongoing institutional or engineering controls, or NYSDEC has determined that the party does not have the financial resources to comply with the requirements of the COC.

ECL §27-1421(2) and the form Brownfield Cleanup Agreement preserve NYSDEC’s authority to “reopen” and require changes to a remedy. Modification of the remedy, accompanied by corresponding modifications of a COC, should be the procedure for handling most issues that arise after the issuance of a COC. Revocation of a COC carries severe consequences, including permanent loss of liability protections and forfeiture of brownfield tax credits. As we discussed in our comment to sub-section 1.9, we believe that modification or revocation of a COC for good cause should be used only in extremely egregious situations since NYSDEC has the ample authority to reopen COCs under a variety of circumstances.

3.9(d) -- This provision states that the COC entitles the applicant to file for brownfield cleanup and redevelopment tax credits. Note that draft 375-1.9(a)(2) says that entities receiving NYSDEC "no further action" determinations also qualify for the COC, implying that – contrary to statute – that they too would be eligible for tax credits. This inconsistency needs to be addressed in the final rule.

The liability protections in ECL 56-0509, referenced in draft regulations 375-4.5(c) and 375-4.9(a) become effective when the municipality’s Bond Act application is approved, not when the remediation is completed. In contrast, the liability protection in the BCP does not become effective until the COC is issued and only then make the liability protections retroactive to the

date of application approval. NYSDEC should consider revising this section to be consistent with the statute.

### **Incorporation of Guidance Documents into the Part 375 Regulations**

The proposed Part 375 regulations contain numerous instances where consideration of guidance is made a mandatory component of NYSDEC's decision-making process. Under Subpart 375-1, the general requirements that are applicable to all three regulatory programs governing site cleanup, guidance documents must be considered in the preparation and approval of work plans and reports, in the development of groundwater protection measures and, perhaps most importantly, in remedy selection.

The relevant requirement governing work plans states that work plans shall “*consider NYSDEC guidance* determined, after the exercise of engineering judgment, to be applicable on a case specific basis.” (375-1.6(a)(1)(ii), emphasis added). The other provisions refer only to “guidance”, but not specifically to NYSDEC guidance. The regulations governing remedy selection mandate consideration of guidance “determined, after the exercise of scientific and engineering judgment, to be applicable.” [375-1.8(f)(2)(ii)]. Presumably, the “scientific and engineering judgment” referred to is NYSDEC's judgment.

The extensive reliance on guidance raises concerns about due process and compliance with SAPA. ECL Section 3-0301-(2)-(z), enacted in 1996, gave NYSDEC the statutory authority to “issue and amend guidance memoranda and similar documents of general applicability which are to be relied upon by NYSDEC personnel” in the implementation of NYSDEC's mandates under the ECL. This statutory provision may provide sufficient authority for NYSDEC to rely on its own guidance documents in implementing remedial programs under Part 375. However, the issuance of those guidance documents must still fully comply with SAPA and due process requirements, which is not always the case with NYSDEC guidance documents. But the reliance on guidance set out at various points in the proposed Part 375 is not limited to NYSDEC guidance (except in the single instance of submission and approval of work plans). It is not clear that NYSDEC has the right to impose obligations created by other agencies' guidance documents in its implementation of the regulatory programs addressed by the proposed Part 375.

### **The Aviall Decision and Proposed Part 375**

#### Aviall's Impact on Recoverability of Cleanup Costs

A fundamental purpose of the New York Brownfield Act of 2003 is to provide incentives to the cleanup and redevelopment of brownfields. These incentives include the liability relief and contribution rights of remedial parties as clarified by the Legislature in the Act. The Legislature did not, however, create new state law causes of action for recovery of, or contribution to, the cost of a remedial program incurred by a remedial party. Thus, in New York, parties seeking to recover or allocate the costs of cleanup remain bound to the federal cost-recovery and contribution causes of action authorized by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, *et seq.* (“CERCLA”).

Subsequent to the enactment of the Brownfield Act, however, the U.S. Supreme Court issued a decision in Cooper Industries, Inc. v. Aviall Services, Inc., 112 S. Ct. 577 (Dec. 13, 2004),

holding that CERCLA section 113(f) precludes a party from filing an action for contribution unless a civil action under CERCLA section 106 or 107 has been commenced against the party or the party has resolved its liability to the state or federal government in an administrative or judicially approved settlement. In so doing, the Court created real limits to contribution rights of parties that enter into voluntary cleanup programs, such as the BCP, and it created significant uncertainty regarding the rights of remediating parties to obtain contribution rights and protection. This uncertainty has a negative affect on potential entrants to the BCP as described below.

Responding to the Aviall decision, federal courts sitting in New York, including the Second Circuit Court of Appeals, have concluded that a party remediating a site pursuant to NYSDEC's orders or voluntary cleanup agreements does not have a right of contribution from other responsible parties when those orders and agreements address and resolve state law -- but not CERCLA -- claims. See Consolidated Edison Co. of New York v. UGI Utilities, 2005 WL 2173585 (2<sup>nd</sup> Cir., Sept. 9, 2005) (state settlement that fails to expressly resolve CERCLA claims fails to trigger CERCLA section 113(f) right to contribution, although CERCLA Section 107 cost claims recovery may be available for PRPs); W.R. Grace & Co. v. Zotos Int'l, Inc., 2005 WL 1076117 (W.D.N.Y., May 3, 2005); Benderson Dev. Co., Inc. v. Neumade Prods. Corp., 2005 WL 1397013 (W.D.N.Y., June 13, 2005); see also Cadlerock Properties Joint Venture v. Schilberg, 2005 WL 1683494 (D. Conn., July 19, 2005) (state order expressly resolving claims based on state statute is not action pursuant to CERCLA section 106 or 107 and does not trigger right to contribution under CERCLA section 113(f)).

Unless the State modifies the scope of orders, agreements and State assistance contracts provided by Part 375 to address and resolve a remediating party's liability to the State under CERCLA, there will remain a strong disincentive to enter into these programs for fear that contribution from responsible parties will be unavailable. Further, it is not clear that without explicit language, a party in a BCA can take advantage of the contribution protection produced by CERCLA Section 113(f)(2). The USEPA and U.S. Department of Justice have proposed to include specific language in Administrative Order on Consent to clarify that these orders are administrative settlements arising under CERCLA and give rise to contribution rights and protection. See Memorandum, *Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)* (USEPA/DOJ) (Aug. 3, 2005).

NYSDEC should similarly clarify the contribution rights and protection of a party entering into an order, agreement or State assistance contract pursuant to Part 375. We would recommend adding new subsection 375-1.5(c) as follows:

(c) Contribution.

Each order, agreement and State assistance contract shall include terms addressing claims for contribution and protection therefrom, providing as follows:

1. NYSDEC and the remedial party agree that this [order, agreement, or State assistance contract] constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. §9613(f)(2), and that the remedial party is entitled, as of the effective date of this

[order, agreement, or State assistance contract], to protection from contribution actions or claims as provided by Section 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§9613(f)(2) and 9622(h)(4), for matters addressed in the [order, agreement, or State assistance contract]. The matters addressed are the remedial program as defined in this [order, agreement, or State assistance contract].

2. NYSDEC and the remedial party agree that this [order, agreement, or State assistance contract] constitutes an administrative settlement for the purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. §9613(f)(3)(B), pursuant to which the remedial party has, as of the effective date of the [order, agreement, or State assistance contract], resolved its liability to the State for the remedial program as defined in this [order, agreement, or State assistance contract] and is therefore authorized to pursue contribution claims thereunder.

NYSDEC also should advocate to the Legislature statutory amendments to the Brownfields Act to provide express state statutory rights to cost-recovery or contribution as well as contribution protection for parties remediating sites under the BCP.

We also strongly urge NYSDEC to enter into a Memorandum of Understanding under 42 U.S.C. 9628 or a cooperative agreement with USEPA under 42 U.S.C. §9604(d)(1)(a), so as to remove any doubt that settlement with the State qualifies the settling party to pursue a contribution action under §9613(f)(3)(B).

#### Aviall's Impact on BCP 375-3.3 Eligibility

Parties and sites are deemed ineligible for participation in the BCP if either the site or the party is subject to any other on-going state or federal environmental enforcement action related to contamination at or emanating from the site.

Currently, the Aviall decision, along with the eligibility provisions of the BCP regulations and the bar to federal enforcement found at 42 U.S.C. §9628 for sites entered in eligible state programs, may place a party in the position of choosing between participation in the BCP or gaining the rights and protections provided by CERCLA. A party ostensibly must wait for an enforcement action to be commenced against it, so that it might seek contribution under CERCLA section 113 -- thereby forfeiting the ability to participate in the BCP under the current eligibility criteria -- or, if it is not yet subject to enforcement, choose to enter the BCP and voluntarily remediate the site -- possibly losing its right to contribution from other PRPs. Thus, the eligibility provision, in light of the uncertainty created by Aviall, and coupled with the bar to federal enforcement found at 42 U.S.C. §9628, could discourage participation in the BCP by creating a perverse incentive to wait for enforcement. The eligibility provision also should be clarified with respect to enforcement actions that are completed (not on-going) or merely threatened.

Thus, to ensure that Part 375 allows for contribution rights and contribution protection, NYSDEC should modify the eligibility requirements so that the mere existence of or potential for an enforcement action is not a bar to entry into the BCP program. Entry into the program may be appropriate when the enforcement action or threat of action is stale or has not given rise to remediation and redevelopment of the site or where the respondent is not responsible for the

release of hazardous substances. A more flexible approach to program eligibility will provide a greater incentive to clean up and redevelop brownfield sites.