New York State Bar Association
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September 26, 2024

VIA ELECTRONIC MAIL
derweb@dec.ny.gov

NYS DEC – Division of Environmental Remediation
Attn: Ms. Jennifer Dawson
625 Broadway
Albany, New York 12233-7012

Re: Comments on Proposed Revisions to CP-51

Dear Ms. Dawson:

The Environmental and Energy Law Section ("EELS" or the "Section") of the New York State Bar Association wishes to thank the New York State Department of Environmental Conservation ("Department") for the opportunity to comment on its proposed revisions to Commissioner's Policy No. 51 (the "Policy" or "CP-51"). As stated in the introduction to the Policy, it is intended to clarify how the soil cleanup objectives ("SCOs") originally promulgated in 6 NYCRR Part 375-6.8 for the Brownfield Cleanup Program ("BCP") will be applied to the Inactive Hazardous Waste Disposal Site Remedial Program (known as the "State Superfund Program" or "SSF"), Environmental Restoration Program ("ERP"), Spill Response Program of the Navigation Law ("SRP"), and the Resource Conservation and Recovery Act ("RCRA") Corrective Action Program. The Policy also addresses how Supplemental SCOs ("SSCOs") are to be applied to the Department's remedial programs, including the BCP. We respectfully request that the Department consider these comments in issuing the final revised Policy.

CP-51 has been a valuable resource for the Department, the regulated community, and practitioners of environmental law when it comes to understanding the Department's general approach to considering soil cleanup activities for regulated programs, and has been particularly useful for the Spills program since the list of the Table 2 and Table 3 guidance levels includes some substances not present in the Part 375 regulations. As such, EELS appreciates the Department's attention to

addressing revisions to update this guidance document, especially given that it is not a formal rulemaking.

The Section has several comments on the draft revisions to CP-51, which are set forth below. We are providing these comments recognizing how important it is for New York State—a jurisdiction that enshrined the rights of its residents to a clean and healthful environment, and one with enormous legal, technical, and economic resources—to succeed in protecting our environment, while fostering a vibrant and growing economy.

EELS is available to meet with the Department to discuss the comments below and any new draft Policy revisions before being issued. If further discussion is appropriate, please contact the Director of Government Relations for the New York State Bar Association at (518) 487-5748 or via email to mpennello@nysba.org to arrange.

As far as general comments[1] are concerned, we recommend the following inquiries and suggestions:

- To the extent CP-51 creates additional obligations on regulated parties, we stress that the Department must adopt new regulations to enforce such obligations through the formal rulemaking process. A guidance document is not the appropriate mechanism for doing so, as recognized by the United States Supreme Court, the Federal courts, and New York State Courts interpreting the application of guidance pursuant to administrative law.[2]

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[1] We note that on various pages, CP-51 indicates that guidance is provided "for the purposes of this discussion…." *See, e.g.*, CP-51, at p. 7. We suggest that the word "discussion" is changed to "guidance" universally throughout the document, as there are instances where this change has already been incorporated by the Department.

[2] Courts in New York have addressed the issue of "legislating by guidance" and acting as a "fiscal watchdog." *See HCPA v NYSDEC*, 65 Misc. 3d 832 (Alb. S. Ct 2019) (holding that a disclosure program promulgated by the DEC "constitutes a "rule", that was not implemented in compliance with SAPA," and was therefore, "null and void."); *See also In the Matter of Wythe Berry, LLC v. NYSDEC et al.*, 188 A.D.3d 1225 (2d Dep't 2020) (holding that NYSDEC "is not tasked with acting as a fiscal watchdog") (c*iting Destiny USA Dev. LLC v. New York State Dept. of Envtl. Conservation*, 2008 WL 2368085 at *16 (Sup. Ct. Onondaga Co. 2008) (aff'd as modified 63 A.D.3d 1568 (4th Dep't 2009) "[A]n agency, by law, is not allowed to 'legislate' by adding 'guidance requirements' not expressly authorized by statute.").

Federal courts have similarly addressed the problematic nature of legislating by guidance. "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). See also *Azar v. Allina Health Servs*., 587 U.S. 566, 574 (2019)(" Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. On the contrary, courts have long looked to the contents of the agency's action, not the agency's self-serving label, when deciding whether statutory notice-and-comment demands apply"); *GE v EPA*, 290 F.3d. 377, 384-85 (2002)(vacating "EPA PCB Risk Assessment Review Guidance" because on its face the Guidance

In one example, the use of informal guidance to impose binding obligations in the form of SSCOs on applicants remediating sites in the BCP is particularly problematic. As the Department is aware, the Brownfield statute requires the Department to promulgate SSCOs through formal rulemaking following the State Administrative Procedures Act ("SAPA"). The Department is not authorized by the statute to issue SSCOs or other cleanup standards without going through a formal rulemaking process. Moreover, the CP-51 SSCOs listed in Tables 1 – 3 do not take land use into account. The Table 1 numeric levels only lists new protection of groundwater and protection of ecological resources and the Table 2 and Table 3 numeric levels have been converted to Unrestricted Use SCOs ("UUSCOs"), some of which are different than the existing applicable Part 375 UUSCOs.

- The purpose of CP-51 when it was initially drafted in October 2010 was to address other remedial programs' congruence with SCOs consistent with the BCP, but existing BCP requirements are already clearly addressed by statute and a formalized regulatory structure. Accordingly, we recommend Section IV. B. discussion on the BCP should be deleted in its entirety, and all other references to the BCP in the Policy should be eliminated.

- The Department's use of the "least restrictive use category feasible" for the purpose of selecting soil cleanup levels for sites being remediated under the SSF, ERP, Navigation Law, and RCRA is inconsistent with the Department's authority under those statutes, and we feel is therefore *ultra vires*. It is also not consistent with the fact that the promulgated SCOs allow a remediating party to choose the cleanup track based on current and/or proposed future land use. We believe to require otherwise would be a significant deviation from the promulgated SCOs that cannot be done without undergoing formal notice and comment procedures under well-recognized concepts of administrative law.

- Given that the Resource Recovery and Conservation Act ("RCRA") Corrective Action Program is risk-based, we believe that the State should not be implementing this program primarily through processes consistent with the State Superfund program and CERCLA, including utilizing presumptive remedial standards (*i.e.* the SCOs) in remedy determination, and not appropriately focusing on human health, ecological, and other risk-based considerations in the remedy determination process.

Document imposes binding obligations upon applicants and as applied by the agency in a way that indicates it is binding.); Robert A. Anthony, " *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public*?, 41 DUKE L.J. 1311, 1328-29 (1992).

More specific general comments follow below.

Sections I through III:

- **Section I [Summary] – Second Bullet Point:** This section should be clarified to indicate that sources of contamination are to be addressed consistent with the hierarchy provided in 6 NYCRR 375-1.8(c) "taking into account site considerations" and other associated factors, and continue to reference a distinction when considering RCRA Corrective Action Program requirements, which are separate from the utilization of presumptive SCOs. *See* CP-51, at p. 1.[3]

- **Section I [Summary] – Fourth Bullet Point:** We request that language be added to clarify that impacts to adjacent residential properties and similar areas must be evaluated "if and to the extent needed and/or called for under the specific remedial program." In our experience, on-site investigations may make clear that the need to evaluate adjacent properties/features is unnecessary, and this potential should be recognized.

  Moreover, in the Department's 2006 Response to Technical Comments ("RTC") when the Part 375 regulations were promulgated, it was stated that the "TSD made it clear that the unrestricted SCOs, the residential SCOs and the restricted residential SCOs are inherently protective of adjacent residential uses. For commercial or industrial uses, the Department will select a remedial program that will include measures to mitigate offsite transport of residual contaminants from the sites to adjacent residential properties." We believe that in the BCP context, the reference to "adjacent residential uses" has the potential of expanding the obligations of BCP volunteers (should the Department continue to apply the Policy to BCP sites) and therefore, *ultra vires* as inconsistent with the BCP law. Accordingly, we recommend the phrase "adjacent residential use" should be deleted.

- **Section II. [Purpose, Benefits, and Background] – Third Sentence:** We would suggest that the purpose and the intent of CP-51 is not to specifically supplement the SCOs, but rather, to provide guidance on how the corresponding regulations and standards are to be considered on a programmatic basis, subject to the understanding that certain programs, such as the RCRA Corrective Action Program and State Superfund Program, are distinct from the Department's general approach. We suggest that the Policy be clarified to identify exactly which programs to which it does and does not apply. *See* CP-51, at pp. 1-2.

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[3] Citations to sections and/or page numbers refer to those of the PDF document published by the Department in June 2024, entitled "Red-line Strike-out Document of Comparing October 2010 issued CP-51 versus June 2024 Proposed Revisions", available at https://dec.ny.gov/sites/default/files/2024-06/rlsocp512010vs2024.pdf.

- **Section III. [Policy] – First Paragraph:** The Policy states that the Department's preference is that permanent remedies result in no future land use restrictions. The only remedial program that allows the Department to take land use into account is the BCP, as the Department is not statutorily authorized under the SSF, ERP or SRP to require remedies to achieve no land use restrictions. A preference for no future land use restrictions is also inconsistent with the RCRA Corrective Action Program, which regularly utilizes containment strategies and engineering controls for facilities, which typically have industrial or commercial zoning in place and may be subject to specific operating requirements in issued permits allowing for the long-term management of such controls. Accordingly, we recommend this sentence should either be deleted or clarified. *See* CP-51, at pp. 2.

  The Department also deleted the sentence stating: "However, some of DEC's remedial programs are predicated on future land use." We recommend that this sentence be restored since it correctly states the limits of the Department's remedial authority. *Id.*

- **Section III. [Policy] Final Paragraph:** The Policy includes language stating that remedy selection should include "special emphasis on preventing or minimizing migration onto adjacent residential properties" to the extent feasible. If the Department elects to retain Section IV.B. (BCP), we suggest this paragraph be amended to clarify that BCP volunteers will not be required to implement remedies at adjacent residential properties since this language could be an expansion of the regulatory obligations of such parties. Alternatively, the Department could amend its definition of "remedial party" to exclude BCP volunteers and limit the term to potentially responsible parties.

Section IV:

- **Section A. [General Approaches to the Selection of Soil Cleanup Levels: Approach 1]**: The Department proposes to informally establish soil cleanup levels for contaminants of concern for which it has not promulgated regulatory SCOs. ECL § 27-1415(4) requires the Department to develop SCOs through regulation. As such, the Department is not authorized to issue new SCOs or SSCOs without going through the formal rulemaking process and any SCOs developed for the BCP are supposed to be based on various land uses and ecological or groundwater impacts. Any attempt to create and impose any such SCOs or SSCOs absent this process would be *ultra vires*. Moreover, the development of informal SCOs or SSCOs would create binding obligations on remedial parties. As stated in the general comments section, the New York courts, along with the United States Supreme Court and other federal courts have held that it is a violation of basic principles of administrative law for agencies to use guidance documents to establish binding obligations on regulated parties. Thus, we feel any soil cleanup levels that the Department develops must be promulgated through formal notice and comment rulemaking.

As the Policy states: "[t]his guidance is not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial proceedings with DEC" (*See* CP-51, at p. 2), to the extent DEC intends to mandate the use of the SCOs and SSCOs in this Policy, this statement is highly problematic since it appears to deprive a remedial party of their right to exercise administrative remedies. The United States Supreme Court has said that "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. On the contrary, courts have long looked to the contents of the agency's action, not the agency's self-serving label, when deciding whether statutory notice-and-comment demands apply."[4] Because the DEC intends to use the Policy to impose legally binding obligation on remedial parties, we recommend this statement should not be used to avoid having to comply with notice and comment requirements.

- **A. [General Selection; Approach 3]**: Per the comment above in regard to Approach 1, SCOs should not be revised absent formal rulemaking, or in the case of programs such as the RCRA Corrective Action Program, in applicability.

  The phrase "for example, inhalation dispersion terms, fraction of organic carbon in soil, etc." should be modified to read, "(*i.e.*, inhalation dispersion terms, fraction of organic carbon in soil, etc.)." *See* CP-51, at p. 7.

- **B.1. [State Superfund]:**

  - **First Paragraph**: The struck language in the first paragraph ("considered to be") should be reinstated. Furthermore, clarifying language should be added that a party should have the ability to demonstrate conditions are "pre-disposal" (*i.e.*, in the context of naturally occurring metals), notwithstanding identified conditions being in excess of potentially applicable SCOs. *See* CP-51, at p. 7.

  - **Section B.1(b)**: The Department proposes that SSF soil cleanup levels use the "least restrictive use category feasible," and that remedial parties consider residential use, which would then be followed, as appropriate, by restricted residential use, commercial use, and then industrial use. While the Department has historically considered land use in the SSF when a cleanup to pre-disposal conditions is not feasible, requiring the "least restrictive use" category is inconsistent with Part 375-1.8(f)(9)(iii), the National Contingency Plan ("NCP"), and the U.S. Environmental Protection Agency ("EPA") Land Use Guidance, which requires evaluation of the "reasonably anticipated future use of the site," and not all potential land uses, much less using the least restrictive land use. Notably, the Department's current SSF regulations provide that the Department "may" approve a remedy that achieves a cleanup that is more stringent than the

[4] *Azar v. Allina Health Servs.*, 587 U.S. 566, 575 (2019).

current, intended, and reasonably anticipated future land uses of the site and its surroundings, but does not require a more stringent land use, such as the "least restrictive use category." Responsible parties seeking to cleanup commercial or industrial sites should not be required to consider and/or utilize residential use SCOs, where the local zoning does not permit such use and there is not a clear basis to assume such an anticipated future land use. Doing so, we feel, would be *ultra vires*.

Instead, we suggest that this paragraph specifically reference 6 NYCRR § 375-2.8(c), and provide that "the remedial party shall evaluate alternatives to remediate the site to the greatest extent feasible." In addition, the phrase "for purposes of this discussion" we recommend should read, "for purposes of this guidance."

- **B.2 [Brownfield Cleanup Program]:** We ask that the Department reconsider its position that CP-51 apply to the BCP. The purpose of the Policy is to clarify how regulatory SCOs would apply in other remedial programs; they are already imbedded, along with the cleanup track process, by regulation to the BCP. In effect, this section just repeats existing regulatory concepts and only serves to potentially confuse regulated parties and regulators alike as to whether CP-51 policy considerations should apply to a site. *See* CP-51, at p. 8. To the extent the Department intends to use the Policy to establish SSCOs for the BCP, and we believe such an act would be *ultra vires*.

  The Environmental Conservation Law ("ECL") is clear in the express obligations of the Department as it applies to SCOs relative to the BCP. ECL § 27-1415(4) specifically directed the Commissioner of the Department to promulgate by regulation contaminant-specific soil cleanup objectives based on a site's current, intended, or reasonably anticipated future use. ECL 27-1415.6 describes the requirements for SCOs. ECL 27-1415.6(c) requires the Department to update the SCO tables at least every five years. The statute does not permit the Department to establish and enforce remedial objectives for soil through guidance. In our opinion,, inclusion on the basis of the relevance of the SSCOs is inapplicable.

  Of note, the BCP enabling legislation did not specify the contaminants for which SCOs were to be developed. The Department proposed as an initial list of contaminants for which SCOs might be developed based on a Target Compound List ("TCL") and a Target Analyte List ("TAL"), including some commonly found petroleum chemicals ("TCL/TAL Plus"). From the TCI/TAL Plus list, the Department developed a sub-list called the "Initial Soil Cleanup Objectives Priority List," which consisted of contaminants commonly found at sites based on staff experience and in consideration of the EPA's "Common Chemicals Found at Superfund Sites" list. We understand that the Department promulgated SCOs for 84 contaminants in 2006 in its Initial Soil Cleanup Objectives Priority List, and stated that those that were considered, but not included, would be developed on an as needed basis.

Since 2006, there have been substantial changes in the toxicity data for numerous priority soil contaminants, and in the methods and data used to estimate soil-related exposures.[5] Thus, the Department subsequently requested that the New York State Department of Health ("DOH") update its health-based SCOs in anticipation of proposing revisions to the 6 NYCRR Part 375 regulations. As a result, the Department recently revised health-based SCOs for 81 contaminants and new SCOs for 7 additional priority contaminants.[6]

While the Section recognizes that developing new SCOs is time and resource intensive, the fact that it is hard to establish new SCOs is not a legitimate reason to ignore the express statutory directives of the Legislature. Using SSCOs for the BCP in lieu of promulgated SCOs would violate ECL §§ 27-1415(4) and (6). It also represents a deviation from the policy enunciated in the Department's 2006 RTC when the Part 375 regulations were promulgated. The Department expressly stated it would develop additional SCOs if necessary through formal rulemaking.[7] The Department also said that if a site-specific SCO was developed for a site under the Track 3 process that was not included in the SCO tables of Part 375, it would include the new SCO in the next five year review required by ECL 27-1415.6(c).[8] We believe that under principals of administrative law, an agency has to use notice-and-comment procedures to issue new interpretation of regulation that deviate significantly from one previously adopted.[9]

- **B.2 [Tracks 1 and 2]:** As it applies to the deletion of the references to institutional and engineering controls ("IC" and "EC", respectively), we would suggest that such changes should not be implemented until after the new Part 375 regulations have been promulgated, as CP-51 should be consistent with regulations governing the same topic.

- **B.2 [Track 2]**: This particular section ends with "and to ensure that any buffer zone protecting adjacent residential use sites or ecological resources is maintained." This language is overbroad and potentially risks expanding the obligations of BCP volunteers for several reasons. First, it is unclear what constitutes a "buffer zone," as this term is undefined in the Policy, as well as the Part 375 regulations. The only regulatory program the Section is aware of where this term is used is in the wetlands program. Second, as set forth in the TSD

5 New York State Brownfield Cleanup Program Development of Soil Cleanup Objectives Technical Support Document 2020 Addendum (the "2020 TSD Addendum").

6 Those changes and their derivation are described in the 2020 TSD Addendum.

7 See Response to Comment 8.102 at D54 0f 85 (June 2006 RTC).

8 *See* Response to Comment D.8.98 (June 2006 RTC).

9 *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) (interpretive rules cannot effect a substantive change in the regulations and was void because Secretary failed to issue the guideline in accordance with the notice-and-comment procedures).

applicable to the program, the unrestricted SCOs, the residential SCOs and the restricted residential SCOs are "inherently protective of adjacent residential uses." Protection of adjacent residential use is only relevant for the commercial and industrial land uses. For commercial or industrial uses, the Department policy is to select a remedial program that will include measures to mitigate offsite transport of residual contaminants from the sites to adjacent residential properties.[10]

- **B.3 [Environmental Remediation Program]:** We feel that the Department should provide its statutory authority for the statement that "the remedy selected shall eliminate or mitigate all significant threats to public health and to the environment presented by contaminants disposed at the site through the proper application of scientific and engineering principles." It should be noted that ECL § 56-0505(3) provides that a "remediation project shall meet the same standard for protection of public health and the environment that applies to remedial actions undertaken pursuant to section 27-1313 of this chapter." The phrase "application of scientific and engineering principles" is of particular import here.[11]

- **Voluntary Cleanup Program ("VCP") (Removed):** We recognize that the VCP is no longer in effect, subsequent to a prior State Supreme Court decision and the Department's winding down of the program. We would note that the Department be mindful that the Court's determination in nullifying the VCP was principally based on the fact that rulemaking is required for appropriate State remedial programs that it is to administer.

- **B.4. [Petroleum Spill Program]:** We recognize the Department's goal of returning properties to pre-spill conditions. As practitioners, we would suggest a feasibility standard be incorporated, giving priority to environmental protection, recognizing that in many contexts remediation to pre-spill conditions is not feasible, practical, or would result in greater harm and/or limited value to ecosystems and surrounding properties than benefits achieved.

  We ask that the Department provide its statutory authority for the phrase "giving priority to minimizing environmental damage."

  Finally, the requirement that "[t]he remedial party shall achieve, to the extent feasible, the unrestricted SCOs for petroleum-related contaminants listed in 6 NYCRR Table 375-6.8(a)" raises concerns. Likewise, the phrase "when considering restricted use soil

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10 *See* Response D.8.163 Page D79 of 85 (June 2006 Response to Comments or RTC).

11 The phrase appears in 6 NYCRR § 375-4.8(b), but this language is untethered to statutory text. The Department received many comments about the language during the 2006 rulemaking that the proposed language was inconsistent with both the SSF and BCP, but opted not to make any changes to this text. *See* Response to Comment E.8.1 (page E3 of 4).

cleanup levels, the remedial party should apply the least restrictive use category feasible" would seem inconsistent with fuel storage/dispensing facilities. We understand that the Department may have proposed the "least restrictive use category" because it believes this would incentivize brownfield development since there is an exclusion for tangible tax credits for sites that were previously remediated to the then-current use. However, the potential future development should not be used to impose more onerous requirements on current owners or operators of an active petroleum fuel storage/dispensing facility with a current commercial zoning.

- **B.5. [RCRA]:** As noted under the general comments, RCRA is a Federally derived program built on risk-based corrective action considerations. Accordingly, the RCRA Corrective Action Program should not seek to meet the unrestricted use standards, but the overarching goals of the Federal statutory, and by adoption of those regulations under State law, State requirements. This comment explicitly applies to the Department's language in subsections (a) and (b) of B.5.

  B.5 states that the goal of the RCRA Corrective Action Program is to "eliminate risks to public health and the environment by cleaning the site to unrestricted use or that control said risks by cleaning the site or unit(s), to the extent feasible, to the lowest possible SCO regardless of site use." This statement is inconsistent with RCRA performance standards, which encompass technology-based standards and risk-based approaches. We note that the Department's remedial authority is to "clean up or return to its original state" any area where hazardous wastes were disposed of or possessed. The phrase "the original state of the area" means the "reasonably ascertainable condition of the property immediately prior to the unlawful act or if impracticable to determine such condition, the cleanup or restoration shall be done in a manner to restore the area to a reasonably sound environmental condition."[12] Most RCRA Corrective Action Program sites are industrial or commercial in nature. Restoring RCRA sites to their "original state" does not mean the Department can compel cleanups to unrestricted use or the lowest possible SCOs in these contexts. In addition, the corrective action standards for facilities, such as treatment, storage, or disposal facilities ("TSDFs") and those otherwise subject to RCRA permits, simply require that corrective action shall be protective human health and the environment.[13] The added language is also inconsistent with RCRA performance standards, which encompass technology-based standards and risk-based approaches. This is largely because the media cleanup levels rely on assumptions on current and reasonably anticipated land use(s), and RCRA remedies often use containment technologies, as well as institutional controls.

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12 ECL § 27-0916(1).

13 *See* ECL §§ 27-0911(2) and 0913(1-a).

As previously stated in regard to various other remedial programs, including a reference to using residential standards as being the least restrictive standard to apply to a RCRA Corrective Action Program site we feel is not appropriate and *ultra vires*.

Finally, we appreciate the Department recognizing that regulatory cleanup levels or enforceable permits would apply over the CP-51 guidance. We would recommend that the guidance should also note that there should be specific reference to these standards being subject to consideration of human health, ecological, and other risk-based considerations, along with other applicable programmatic aspects, in determining appropriate cleanup levels. We believe this is more consistent with the general intent of the RCRA program.

- **C. [Ecological Resource SCOs]:** As a preliminary matter, we feel this section creates confusion in the regulated community as to what constitutes "potential impacts to ecological resources." The breadth of this category invites disagreement, especially when one considers that ecological resource considerations are determined differently amongst various remedial programs, and conducted through a different division of the Department. We would therefore suggest providing additional clarity regarding how these SCOs are to be considered and applied based on the assessments to be determined. For example, by clarifying the terms "potential impacts" and/or "ecological resources" through reference to existing law or the Department's interpretation of such laws, the regulated public can better understand the resources the Department intends to protect through regulation, along with the general considerations associated with when and how. *See* CP-51, at p. 11.

  The reference to "VCP" in the second paragraph should be deleted, consistent with its removal from the guidance document. *See id.*

- **E. [Supplemental SCOs]**: As a general matter, the Section believes the Department does not have the authority to impose legally binding SSCOs through guidance. As previously stated, ECL §§ 27-1415(4) requires the Department to establish SCOs through formal notice and comment rulemaking, and ECL §§ 27-1415(6) requires the Department to revise its SCOs every five years. The Department last revised the SCOs in 2020. The only current SSCOs should be those developed by remedial parties through the Track 3 process since 2020, to the extent there is an unusual chemical on their site. A remedial party should not be forced to develop SCOs as stated in this Section "when a remedial party is seeking a Track 1 cleanup and non-SCO/SSCO contaminants are present and may not be satisfactorily addressed by the remedial activities. The creation of an SCO for a given contaminant pursuant to the TSD is a very complex technical process whereby experts, including toxicologists, may need to be hired, and this is beyond the role the average remedial party would need to engage in to simply remediate a site. Accordingly, the Section urges that all SSCOs be formally promulgated through notice and comment rulemaking during the 2025 five-year SCO revision.

- **E. [Supplemental SCOs] - First Bullet Point:** It is our recommendation the Department re-evaluate the removed SSCOs pursuant to formal notice and comment rulemaking.

- **E. [Supplemental SCOs] – Second Bullet Point:** The Department proposed deleting the word "predominant" from the text explaining when it would ask a remedial party to establish an SCO for contaminant of concern. If the Department has not determined it is necessary to promulgate an SCO for a contaminant of concern, a remedial party should only be required to go through the cost and time of developing a new SSCO if the particular contaminant poses a significant risk or threat of risk at the site. The mere presence of a contaminant at a site that is not subject to an SCO or SSCO should not trigger the need of developing a new SSCO.

- **F. [SCOs and SSCOs as Screening Tool]:** The reference to the BCP in Paragraph 2 should be deleted since this potentially establishes eligibility criteria for admission to the BCP outside of the Part 375 regulations.

- **G. [Soil Cleanup Levels for Nuisance Conditions]:** It is our belief that the concept of "nuisance" is controlled by common law. As such, it is not clear as to whether the Department is attempting to make a *per se* determination as to what constitutes a nuisance. If so, we feel this would be *ultra vires*. And more importantly, the Section has difficulty understanding how certain circumstances, such as mere staining (as is listed as an example), can be considered a public nuisance, which requires "substantial interference" with a right common to the general public under common law. We would recommend the Department reconsider inclusion of this section in the guidance, and if it is to remain, make significant clarifications as to what is being determined, the standard, and how it is to be considered.

- **H. [Subsurface cleanup of PAHs]:** The new text states: "*Based on experience with manufactured gas plant (MGP) tar and petroleum, soil that contains greater than 500 parts per million (ppm) of total PAHs should be considered 'grossly contaminated media' as defined in DER-10 for all subsurface soil and must be addressed accordingly.*"

  This criterion should not be included in the Grossly Contaminated Media ("GCM") definition. The current definition, as set forth under 6 NYCRR § 375-1.2, is already unclear and has led to significant cost increases at sites where inconsistent remedy decisions have been made on differing areas of focus from field observations. The assertion that 500 ppm is a threshold derived principally from "experience with MGP tar and petroleum," does not clarify the broader applicability of the revisions to the GCM definition, and suggests that the 500-ppm threshold lacks a solid basis, given the significant differences in PAH concentration and composition between MGP tar and petroleum. Additionally, the term "total PAH" is undefined, and in most cases varies widely (ranging from 16 to 34 PAHs). Such a term is typically used to assess risk, which

would not apply here unless the Department adopts risk-based analysis such as that used at the federal level. Establishing a GCM threshold based on an undefined concentration of PAHs does not appear to be based on rigorous scientific studies, subjecting the position to challenge. Instead of re-establishing such a concentration metric, the updated CP-51 should promote advancements in science by focusing on site-specific and remedy-specific risk-based evaluations. *See* CP-51, at p. 15.

The following text was also removed from the Policy: "*The 500-ppm soil cleanup level is in lieu of achieving all of the PAH-specific SCOs in 6 NYCRR 375-6*…." We suggest that the specific use of the 500-ppm threshold in this context as a reference point, particularly in areas with historic fill, has proven useful at many sites, especially legacy industrial sites with no other remedial drivers besides urban fill. We strongly believe that the removal of this language should be reconsidered. *See* CP-51, at p. 15.

- **I. [PCBs]:** Although this particular section appears to have been revised to reflect changes in federal law (*i.e.,* the revised EPA PCB regulations that became effective in February of 2024), it is not clear to us that the revisions to CP-51 has achieved that goal. The EPA PCB program allows remediation to be done under a Self-Implementing Plan, Risk-Based or Performance-Based Standard, which appears to be inconsistent with this section of the Policy. Other examples include: (1) the Department's proposal to apply the presumptive remedies for pre-1978 spills, which are not included in the Toxic Substances Control Act ("TSCA") spill policy; and, (2) delineation of 1 ppm, even if the site is commercial or industrial is inconsistent with risk-based approaches.

  As it pertains to TSCA, the Department lists critical information that must be provided to EPA. This statement is confusing since the TSCA PCB program is not a delegated program. The Department should explain why this information is required. For instance, is the Department contemplating entering into a Memorandum of Understanding ("MOU") with EPA to implement PCB cleanups? Is the Department planning on seeking EPA concurrence for all PCB cleanups performed under its supervision? Under the EPA PCB TSCA regulations, only persons seeking to implement risk-based cleanup and disposal must obtain approval from EPA, making this a major change in policy.

  Finally, the proposed cleanup levels in this section are inconsistent with those outlined in 40 CFR 761.61 for low occupancy areas. Specifically, the updates to Section I (3) suggest that the 25 ppm cleanup standard aligns with EPA's criteria for low occupancy cleanup, which requires limited access and occupancy restricted to less than an average of 6.7 hours per week. However, Section I (3) does not incorporate two additional low occupancy cleanup options outlined by EPA in 40 CFR 761.61:
    - Bulk PCB remediation wastes (*e.g.*, soil) may remain at a cleanup site at concentrations greater than 25 ppm and up to 50 ppm if the site is secured by a fence and marked with a sign displaying the ML mark.
    - Bulk PCB remediation wastes may remain at a cleanup site at concentrations greater than 25 ppm and up to 100 ppm if the site is covered with a cap that meets the requirements of paragraphs (a)(7) and (a)(8) of 40 CFR 761.61.

To better align CP-51 with EPA regulations, it is recommended that Section I.(3) be updated to include these additional cleanup options for low occupancy areas and address further consistency with Federal standards. [14]

- **I.1 [PCBs; Non-BCP Sites]:** The Section questions the Department's rationale for including separate categories for non-BCP and industrial use sites. To truly conform to the EPA PCB program, the Department should change the categories to Industrial and Non-Industrial, with this section being re-titled Non-Industrial.

- **I.1- [PCBs BCP Sites]:** For the reasons discussed above, this section discussing BCP sites should be deleted. The Department has promulgated SCOs for PCBs. While not being necessary, the proposed language creates inconsistencies among the BCP, EPA and other Department remedial programs. For example, paragraph IV.I.2.c. provides for a Track 4 cleanup (1 ppm for surface and 10 ppb for subsurface soils), which is the same for non-BCP sites of Section IV.I.1. However, this section also provides for SCOs for industrial uses of 1 ppm for surface and 10 ppb for subsurface soils, while the SCO for the Industrial Sites is 25 ppm unless it does not meet low occupancy. In other words, the Department is proposing different SCOs for industrial sites depending on if they are enrolled in the BCP. Moreover, the Department has not linked its PCBs SCOs with the EPA high and low occupancy scenarios. This is problematic. If the Department insists on retaining this BCP section, then "industrial" must be removed from this section. In addition, Track 2 and 3 now require 1 ppm for subsurface for commercial use - the same as residential without considering if the commercial property is a low or high occupancy scenario.

- **I.3 [PCBs Industrial Sites]:** The Section would note that the EPA PCB cleanup standards range from 1 ppm to 99 ppm, depending on site-specific factors.

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[14] EPA's TSCA PCB regulations establish four general waste categories: bulk PCB remediation waste, non-porous surfaces, porous surfaces, and liquids. Cleanup levels are based on the kind of material and the potential exposure to PCBs left after cleanup is completed. 40 CFR 761.61. For example, for SIP cleanups of high occupancy areas, the EPA PCB Remediation Waste cleanup level is 1 ppm without further conditions, but PCB remediation waste may remain at concentrations >1 ppm and ≤10 ppm if covered with a TSCA-complaint cap. For low occupancy areas, the cleanup level for PCB remediation waste is ≤25 ppm, but may remain at concentrations >25 ppm and ≤50 ppm if the site is secured by a fence and marked with a sign cap, or between >25 ppm and ≤100 ppm if the site is covered with a TSCA-compliant cap, 40 CFR 761.61(4)(a)(i) . While we presume that CP-51 will not apply to PCB-contaminated building materials, we would ask that the Department clarify this point. We also note that EPA distinguishes between PCB remediation waste (*e.g.*, soil and sediments contaminated from PCB spills) and bulk product waste (waste derived from products manufactured to contain PCBs in a non-liquid state at 50 ppm or greater such as caulk, paint, and sealants). EPA has different cleanup and disposal requirements for PCB remediation waste and bulk product waste. We suggest that the Department consider borrowing concepts from the 2006 EPA guidance document "Polychlorinated Biphenyl (PCB) Site Revitalization Guidance Under the Toxic Substances Control Act (TSCA)" regarding this topic.

Inconsistencies between the application of state and federal standards regarding PCBs is likely to create confusion.

- **J. [PFAS]:** The Department declined to adopt SCOs for PFAS during its recent proposed regulatory revisions to the Part 375 regulations, but instead appears to be attempting to adopt SSCOs using guidance. For the reasons previously stated, this section feels adopting legally binding obligations on remedial parties by guidance is *ultra vires*. We recommend that the Department should delete this section and promulgate SCOs for these contaminants as part of its five-year SCO revision. Finally, to the extent the Department does not intend to delete these standards and is relying on literature-based materials for the determination of its proposed value-based guidance levels, we ask that such information be shared so it can be reviewed and considered by appropriate technical experts, offering the opportunity for comment on the standards.

- **L. [Other Considerations]:** We suggest that BCP volunteers be excluded from the obligation to "prevent[] or minimiz[e] migration onto adjacent residential properties or into ecological resources," as such exclusion will encourage more parties to participate in the BCP.

- **Tables:** We feel the revised tables would appear to create further confusion. Table 1 includes numeric values of substances not listed in the Part 375 regulations where only protection of groundwater and protection of ecological resources numeric standards have been proposed. If a prior residential standard was previously included it has been deleted, with no use-based standards being present. Table 2 has been renamed "Unrestricted Soil Cleanup Objectives for Gasoline Contaminated Soils" and Table 3 has been renamed "Unrestricted Soil Cleanup Objectives for Fuel Oil Contaminated Soils," respectively. These two tables list some contaminants that already have UUSCOs in Part 375, which are different than the new UUSCOs in this table. For example, here are some discrepancies between the Part 375 UUSCO and the new CP-51 UUSCOs:

Contaminant	Part 375 UUSCO	CP-51 UUSCO
n-Butylbenzene	12.0 ppm	18.0 ppm
sec-Butylbenzene	11.0 ppm	25.0 ppm
1,3,5-Trimethylbenzene	8.4ppm	3.1 ppm
Fluoranthene	100 ppm	85 ppm

If there is a discrepancy between the regulations and this guidance document, to the extent the regulations are not updated, there will be significant confusion in the regulated community. All contaminants that already have Part 375 promulgated SOCs should be deleted from Table 2 and Table 3. This should be addressed.

In addition, we ask that the Department provide further rationale as to the nature and bases for the revised standards that have been applied to the tables, along with clarification as to how the Department will consider "site-specific values" for the various

cleanup criteria for which the double-asterisk has been applied in various residential standard contexts. This will allow for the opportunity for technical experts to review and provide comment on the standards.

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In conclusion, the Section requests that the Department consider the comments included herein, along with all other comments submitted pursuant to the public comment period.

We thank the Department for the ability to provide commentary and welcome the opportunity to discuss any questions further.

Sincerely,

The Environmental and Energy Law Section of the New York State Bar Association