New York State Bar Association

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ENVIRONMENTAL AND ENERGY LAW SECTION

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New York State Department of Environmental Conservation
Remediation Bureau
625 Broadway
Albany, New York 12233-7253

Proposed Stakeholder Revisions to 6 NYCRR Part 375 DEC Regulatory Provisions

The Environmental and Energy Law Section ("EELS") of the New York State Bar Association wishes to thank the Department of Environmental Conservation ("Department") for the opportunity to comment on its proposed revisions to 6 NYCRR Part 375. We respectfully request that the Department consider these comments in promulgating its final Part 375 regulations. EELS is available to meet with the Department to discuss the comments below and any new draft regulations before promulgation.

I. Affordable Housing Project Issues – Statutory Mandate at § 375-3.2(a) and Fee Waiver at § 375-3.5(g)(3)

Tangible Property Credit Component Eligibility - ECL § 27-1405(29) states that for an affordable housing project to demonstrate eligibility for the tangible BCP tax credits, "…the project must present a certification of compliance or other evidence of eligibility by a federal, state, or local government affordable housing agency that such project is an affordable housing project." ECL § 27-1407(1) states: "[a]n applicant may request an eligibility determination for tangible property credits at any time from application until the site receives a certificate of completion pursuant to section 27-1419 of this title …" The stakeholders contend that the following proposed regulatory amendments would satisfy these requirements without the need for any statutory amendments:

§ 375-3.2(a)(3) An Affordable Housing Project under this subdivision may also include a project that demonstrates the project is the subject of a determination by a federal, state or local government housing agency that all or a portion of the project or site will qualify for benefits, including but not limited to real property taxation exemptions, is or will be eligible under an affordable housing program which requires that a percentage of residential rental or home ownership dwelling units be dedicated to tenants or homeowners at a defined maximum percentage or percentages of area median income based on the occupants' households annual gross income. Such federal, state or local affordable housing program shall confer a benefit to the project. For the purposes of this subdivision, the term "benefit"-shall be broadly construed, and shall include, but not be limited to, tax benefits, including real estate tax benefits, tax credits, bond financing, subsidy financing, and zoning variances or waivers. To demonstrate eligibility under this subdivision, the project must present **to the department either:**

(i) a certification of compliance or other evidence of eligibility by a federal, state, or local government affordable housing agency that such project is an affordable housing project**, or**

(ii) a certification from an authorized signatory for the applicant that the applicant has entered into an agreement to with a federal, state, or local government affordable housing agency for assistance from such agency in exchange for entering into a legally binding contractual obligation to construct residential rental or home ownership dwelling units dedicated to tenants or homeowners at a defined maximum percentage or percentages of area median income based on the occupants' households annual gross income on the brownfield site. This certification is made solely for the benefit of the Department to assist in its determination that the site is conditionally eligible for tangible property tax credits of the Brownfield Redevelopment Tax Credit under the environmental conservation law section 27-1405(29) and 27-1407(1) and shall be made in reliance upon this certification provided by the applicant demonstrating that the planned development will comply with the requirements of the New York State Real Property Tax Law section 421-a or any future similar affordable housing statutory program. The Department shall issue a certificate of completion indicating all or a portion of the project or site will qualify for benefits, including but not limited to real property taxation exemptions or will be eligible under an affordable housing program and therefore will be eligible for the tangible property credit component, subject to a condition that the applicant submit either a final regulatory agreement or a certification of compliance from the appropriate affordable housing agency to the department. Until such time that the applicant submits any such final regulatory agreement or certificate of compliance to the department, the condition of the certificate of completion shall be deemed not to have been met and the applicant will not be deemed eligible for the tangible property credit component.

Fee Waiver Criteria - The stakeholders appreciate the proposed eligibility criteria for the fee waiver for 100% affordable housing projects. The stakeholders propose the following revision to those criteria to ensure that affordable housing projects that are sponsored by non-profit entities are eligible for the waiver, even if the project entity itself is not a non-profit for tax purposes. Very few, if any, of the project entities developing affordable housing are non-profits themselves, but many have non-profit sponsors that have very tight budgets, especially at the time of the BCP application. The revised language acknowledges the reality of how non-profits structure their affordable housing development entities.

§ 375-3.5(g) The applicant shall submit with every brownfield cleanup agreement a non-refundable program fee of $50,000 unless the applicant is eligible for a program fee waiver. An applicant will only be eligible for a program fee waiver if:
(1) The applicant and department agree to a provision in the brownfield cleanup agreement which states that the applicant will develop the brownfield site with the dedication of 100 percent of the residential rental or home ownership units in an affordable housing project to tenants or homeowners at a defined maximum percentage of area median income based on the occupants' households annual income;
(2) The applicant and department agree to a provision in the brownfield cleanup agreement which states that the applicant, which is otherwise eligible for tangible property tax credits, waives its eligibility for tangible property tax credits under Section 21 of the Tax Law;
(3) **Either** the applicant **or the entity with the largest ownership interest in applicant at the time of the application** is exempted from taxes under articles nine, nine-a, twenty-two or thirty-three of the tax law; or
(4) More than half of the brownfield site is within a disadvantaged community and the applicant demonstrates, through submittal of third party attestations or certifications that, but for the program fee, the remediation and redevelopment of the brownfield site would not be financially viable for the applicant and economically viable in the disadvantaged community.

II. Cover System Regulations §§ 375-3.2(e) and 375-3.6(f)

Recommended New Cover System Definition - This revision is intended to simplify the definition of cover system to acknowledge that cover systems encompasses a variety of media contemplated in the definition of engineering control in the ECL.

§ 375-3.2(e) Remedial action cover systems are engineering controls comprised of physical barriers employed to actively or passively contain, or stabilize contamination, restrict the movement of contamination to ensure the long-term effectiveness of the remedial program, or eliminate exposure pathways to contamination, and may include:

(1) soil cover systems in landscaped or exposed soil areas, which must:

(i) be comprised of soil or other unregulated material as set forth in Part 360 of this title and otherwise complies with applicable regulations; and

(ii) not exceed the applicable soil cleanup objectives for use of the site pursuant to applicable regulations; or

(2) hardscape cover systems which shall be defined as a physical layer of solid impervious material such as concrete, asphalt, or other hard surfaces, and which are designed to serve a remedial purpose by creating a physical barrier between remaining contaminated media and an exposure pathway notwithstanding that the hardscape cover system may also serve another purpose for building construction or end use of the Site such as foundation slabs, parking lots or sidewalls, and shall be included in the remedial action and not the tangible property for:

(i) a Track 3 or 4 site if residual soil exceeds any applicable soil cleanup objectives; or

(ii) a Track 1, 2, 3 or 4 remedial action site if the remedial action cover system is required for monitoring, or to prevent exposure to area-wide or remaining contaminated groundwater; or

(iii) a Track 1, 2, 3 or 4 remedial action site if soil vapor mitigation or monitoring is required due to an exceedance of an applicable soil vapor concentrations established by the commissioner of health pursuant to guidance or regulation or as otherwise required by the commissioner of health, and therefore, soil vapor mitigation methodologies such as a vapor barrier or a passive or active sub slab depressurization treatment system including a vapor barrier as a sealing layer, either ex-situ or in-situ, is required to be covered by or integrated into the hardscape cover system.

The thickness of a hardscape cover system that meets the remedial action cover system requirements must be at least one foot thick at sites where the use is commercial or industrial and or two feet think at sites where the use is residential, and must otherwise meet the requirements of the Building Code of New York State, and New York State Department of Transportation Standard Specifications, if applicable, and be certified by a licensed Professional Engineer.

Calculation for Cost of a Remedial Cover System

Recommendation to Delete Proposed Regulation § 375-3.6(f)

§ 375-3.6 (f) ~~Where a site cover is an element of the remedial program, and components as defined in Section 375-3.2(e) are used at sites accepted into the Brownfield Cleanup Program on or after July 1, 2015, the cost of the equivalent soil cover system described in 375-3.2(e) must be calculated and included in the Remedial Action Work Plan. With the exception of the incremental cost of the installation of a vapor barrier, cover related costs in excess of this figure shall not be considered necessary to implement a site's investigation, remediation or qualification for a Certificate of Completion pursuant to section 21 of the Tax Law.~~

Recommendation to Replace Proposed Regulation § 375-3.6(f) with text as follows:

For purposes of Tax Law section 21(b)(2), where an element of such remedial action cover system is enclosed within a building constructed or to be constructed on a qualified site or consists of a concrete slab, "cover system requirements" shall consist only of the portion of the building foundation that serves as an engineering control as determined in the Final Engineering Report and approved by the department, which shall consist of a minimum of twelve inches of the concrete slab materials, part of which may include gravel

subbase material, for a commercial or industrial project or a minimum of twenty- four inches of concrete slab materials, part of which may include gravel subbase material, for a residential project, multiplied by each square foot by surface area of such element. To the extent a site has unique cover system requirements, the engineer of record shall justify a request for a deeper remedial action cover system with geotechnical and other field specific data, which shall be evaluated by the department and either approved or rejected, compared to any requirements in applicable local law, and the final depth of the approved remedial action cover system shall be presented in the final engineering report pursuant to subdivision two of section 27-1419 of the environmental conservation law and approved by the department.

III. Termination Provisions - § 375-1.5(b)(6) Department authority to terminate agreements; § 375-3.5(c)(4): Termination of BCAs due to non-approved work and § 375-1.9(e)(1)(iv) – Revocation of Certificate of Completion Due to Tax Credit Misrepresentation

We recommend that the Department withdraw or modify the language in § 375-1.5(b)(6) and 375-3.5(c)(4), which would give the Department overly broad authority beyond that provided in ECL § 27-1409(5) to terminate orders, agreements, and State assistance contracts. To the extent the intent of this new regulations is to further define the circumstances when a party has substantially failed to comply with a BCA, we recommend the following amendments to these draft regulations:

§ 375-1.5(b)(6) Department authority to terminate agreements

(6) Termination of orders, agreements and State assistance contracts. The department may terminate orders, agreements and State assistance contracts for **good** cause including, but not limited to, if the remedial party fails to substantially comply with the order, agreement, or the contract terms and conditions, including, without limitation, the failure to initiate, proceed with, or complete the remedial program in accordance with the approved schedule **prepared by the volunteer or participant in relation to a site that has been deemed a significant threat and provided that dispute resolution has not been commenced pursuant to section 375-1.5(b)(2)**, or the failure to pay State costs described in paragraph (3) of this subdivision **for a substantial period of time and after an opportunity to cure has been provided and receipt of such notice has been acknowledged by the volunteer or participant**.

§ 375-3.5(c)(4): Termination of BCAs due to non-approved work

(4) Nothing herein shall preclude the department from terminating an agreement **after the volunteer or participant has been provided with a final decision describing** ~~in less than 30 days' notice if the~~ **a** department determin**ation**~~es~~ that the applicant performed work as part of a remedial program that was not detailed in a department-approved Work Plan **and was not approved by the engineer of record or was not otherwise required to address an emergency in the field or spill or release condition**. Prior to terminating an agreement pursuant to this paragraph, the department shall give the applicant written notice, indicating the reason for the termination, ~~and~~ an opportunity to demonstrate that the work performed as part of the remedial program was detailed in a department-approved Work Plan**, and an opportunity for dispute resolution pursuant to section 375-1.5(b)(2).**

§ 375-1.9(e)(1)(iv) – Revocation of Certificate of Completion Due to Tax Credit Misrepresentation

Draft regulation § 375-1.9(e)(1)(iv), which allows for the revocation of a Certificate of Completion due to a tax credit misrepresentation related to "elements thereof of the brownfield tax credits" is particularly problematic and exceeds the scope of specific statutory language set forth in the ECL. It is also unclear why this regulation is in Part 375-1 (General Remedial Program Requirements) when the edits are based solely on the BCP tax credits. We recommend that this regulation be amended to be consistent with ECL § 27-1419(5)(b) and because (a) (b) and (d) already provides the grounds for revocation of a COC and includes a catchall "good cause" provision:

(iv) there was a misrepresentation of material fact tending to demonstrate that the applicant or the site met the criteria for the tangible property credit component~~, and/or elements thereof of the brownfield redevelopment tax credit~~ **pursuant to section 21(a)(3) of the tax law and section 27-1416(5)(b) of the environmental conservation law;**

IV. New Off-Site Obligations for Volunteers Destroy one of the Primary Benefits of this Program; namely minimal Off-Site Obligations for Volunteers - §§ 375-3.8(b)(2)(i), 375-1.8(d)(1)(iii), 375-1.8(d)(2)(ii)(*c*) and 375-3.8(f)(4)(ii)

Draft regulation § 375-3.8(b)(2)(i) requires volunteers to perform off-site *Quantitative* Assessments, which is inconsistent with ECL §§ 27-1411(1) and 27-1415(2)(b) that state volunteers are only required to perform a property boundary *qualitative* assessments. Moreover, for significant threat sites, ECL §27-1411(5) is clear that the Department is obligated to investigate and remediate off-site. In addition, since this work is being requested to be performed outside of the BCP site, it is unclear if the costs incurred would be eligible for tax credits since they are not being incurred on the BCP Site. If this provision is not deleted, which we think it should be, we recommend the following clarifying amendments:

§ 375-3.8(b)(2)(i) – a volunteer shall perform a qualitative exposure assessment of the contamination that has migrated from the site in accordance with ECL 27-1415(2)(b) and department guidance. **If the Department determines based on the qualitative exposure assessment performed by the volunteer that** off-site field investigation and sampling may be required to identify and sample any potential areas of contamination to support the exposure assessment ~~including~~ **in order to make a significant threat determination, the Department shall contact the adjacent property owners to determine if they are willing to allow access within the next thirty days from receipt of a written communication for the following work**:

(*a*) evaluation and sampling of nearby structures for soil vapor intrusion;
(*b*) sampling of off-site soil vapor;
(*c*) sampling of off-site groundwater if there is a potential off-site exposure pathway; and (*d*) sampling of off-site soil if there is a potential off-site exposure pathway.

If access is allowed within the thirty days, the Department shall perform the off-site field investigation work in order to make its significant threat determination and to evaluate if any additional remediation is required by the volunteer on the brownfield site to prevent off-site migration. If access is not allowed within thirty days, no further off-site investigation shall be required in order to prevent any delays in the remediation of the brownfield site.

Draft regulation § 375-1.8(d)(1)(iii) first clarifies that Volunteers are only required to address on-site sources of groundwater contamination and to prevent further migration off-site, but the new phrase "at the site boundary" should be omitted because there are several remedial technologies that may address the source of the contamination and prevent off-site plume migration but that are not required to be implemented "at the site boundary."

§ 375-1.8(d)(1)(iii) - plume containment/stabilization. All remedies shall, to the extent feasible, prevent the further migration of groundwater plumes, whether on-site or off-site~~; provided, however that~~. However, a volunteer in the Brownfield Cleanup Program shall ~~only be obligated~~address, to ~~evaluate~~ the ~~feasibility of containing~~extent feasible, the ~~plume~~ on-site plume and prevent the further migration of any site-related plume off-site ~~**at the site boundary**~~. The development of alternatives will include an evaluation of feasible remedial alternatives that can achieve groundwater plume containment/stabilization.

Draft regulation § 375-1.8(d)(2)(ii)(*c*), under the heading "Off-site source of groundwater contamination with no on-site source (or contribution)" adds into this revised subsection an obligation for volunteers to eliminate or mitigate any health impacts from off-site contamination entering a BCP Site. However, for soil vapor entering a site, this obligation is unfair to volunteers who have fully remediated their own site to Track 1 and 2 levels and then

must continue to address off-site groundwater or soil vapor emanating onto their Site as the basis for concluding that unconditional Track 1 or 2 cannot be achieved. A new provision has been added to clarify that off-site groundwater or soil vapor entering a remediated BCP cannot be used as the reason to not achieve an unconditional Track 1 or 2 remedy. The reference to "environmental or" should also be omitted because it conflicts with § 375-1.8(d)(2)(ii)(a).

§ 375-1.8(d)(2)(ii)(*c*) - ~~identify a~~ include in the remedy ~~for the site~~actions which ~~eliminates~~eliminate or ~~mitigates~~mitigate on-site environmental or public health exposures, to the extent feasible, ~~the impact of~~resulting from any off-site contamination entering the site**; however, for those sites that have achieved a soil cleanup program that would otherwise conform with the soil remediation requirements necessary to qualify for Track 1 or Track 2, the volunteer or participant shall still achieve a Track 1 or 2 remedy even if the site's owner is required to perform additional groundwater remediation to address off-site migration entering the site or maintenance of the soil vapor mitigation remedy, whether in the form of a vapor barrier system or a passive or active sub slab depressurization treatment system, either ex-situ or in-situ, and even if the site owner is required to impose an environmental easement on the site created and recorded pursuant to title thirty-six of article seventy-one of this chapter**.

Similar edits are needed in § 375-3.8(f)(4)(ii) to omit the words "at the site boundary" in the first sentence. Additionally, this regulation should also be revised to clarify that a volunteer need not prevent soil vapor emanating beyond the edge of a plume and that its efforts should be address the plume itself.

§ 375-3.8(f)(4)(ii) - (ii) To the extent feasible, a volunteer shall address ~~, to the extent feasible,~~ the on-site plume and prevent ~~the further~~ migration of any plume off-site ~~**at the site boundary**~~ **but shall not be responsible for addressing any off-site soil vapor emanating from the groundwater plume**. This requirement includes ~~such~~ actions to maintain and monitor any stabilization of the plume.

V. New BCP Site Eligibility Regulations Not Consistent with the Statute and Non-Appealable Caselaw - §§ 375-3.3(a)(3)-(5) and 375-3.4(d) :

Draft regulation § 375-3.3(a)(3) would require an investigation report to potentially state that a site is eligible for the BCP because it "requires remediation" for "the reasonably anticipated end use of the site." ECL § 27-1407(1), however, only requires an investigation report to show only that a site "requires remediation in order to meet the remedial requirements of this title." While this may seem like a subtle difference, most Phase II reports simply summarize the contamination found in exceedance of the standards but do not make definitive statements about whether remediation is required for a proposed use.

§ 375-3.3(a)(3) - An investigation report submitted with the application must demonstrate that the site requires remediation in order to meet the **remedial** requirements **for article 27 title fourteen of the environmental conservation law** ~~**the reasonably anticipated end use of the site**~~.

Draft regulation § 375-3.3(a)(4) would give DEC subjective authority to determine, based on a list of five factors, if the "magnitude" of exceedances and concentrations is sufficiently enough for the site to "require remediation", which contradicts the definition of an eligible BCP site in ECL § 27-1405(2), as simply a site with contamination "at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance." If there are exceedances of cleanup standards the site requires remediation for the applicable proposed use because there are exceedances present. To be consistent with the discretion provided to the Department in the NY Court of Appeals decision in *Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Envtl. Conservation*, 14 N.Y.3d at 177, 897 N.Y.S.2d 693, 924 N.E.2d 801, which upheld the lower court's decision that can be found in Westlaw at 2007 WL 5540594, we recommend this draft regulation to read as follows:

§ 375-3.3(a)(4) In determining ~~eligibility~~whether the site requires remediation, the department may **in its discretion** consider:

(i) ~~determine~~**the number of samples that** ~~contiguous properties~~ **if the** exceed**ances of the** applicable standards, criteria or ~~parcels,~~guidance, as presented in the investigation report **are so minimal and remote that contamination is not sufficiently present to require remediation and the department will provide the applicant with the liability limitation in article 27 title 14 section 1421 so it can run with the land**;

~~(ii) the magnitude by which the concentrations exceed the applicable standards, criteria or only a portion of any proposedguidance;~~

~~(iii) the magnitude by which the concentrations exceed the site, meets the statutory definition specific background concentrations;~~

~~(iv) the potential for human or ecological exposure to contaminants present in any media; and/or~~

~~(v) the potential for a contaminant to migrate within or off of brownfield the site, and may approve contiguous properties or parcels or only a portion or to partition into other media.~~

Draft regulation §375-3.3(a)(5) sets forth a non-exhaustive list of five factors for determining eligibility based on the "reasonably anticipated use of the site." However, pursuant to ECL § 27-1407(1), the department must "determine eligibility and the current, intended and reasonably anticipated future land use of the site pursuant to Section 27-1415 of this title." ECL § 27-1415(i) in turn sets of forth a non-exhaustive list of sixteen factors for making this determination. This regulation should be revised to reflect ECL §§ 27-1407(1) and 27-1415 as shown below.

§ 375-3.3(a)(5) In determining the reasonably anticipated use of ~~a~~the site ~~for participation in the Brownfield Cleanup Program;~~, the department shall **determine eligibility and the current, intended and reasonably anticipated future land use of the site pursuant to Article 27 title 14 section 27-1415 subpart (i) ~~consider, without limitation~~**:

~~(ii) request performance of a subsurface investigation (commonly referred to as a Phase II) in accordance with current applicable industry standards and guidance if the department is unable to determine whether the site is a brownfield site based upon the information contained in the application.~~

~~**(i) current use and historical and/or recent development patterns; (ii) applicable zoning laws and maps, including whether such zoning anticipates single family housing structures or agricultural uses;**~~

~~(ii) **applicable comprehensive community master plans, local waterfront revitalization plans as provided for in EL article 42, or any other applicable land use plan formally adopted by a municipality;**~~

~~(iii) **any approved redevelopment plan; and**~~

~~(iv) **natural resources, including proximity of the site to important federal, State or local natural resources, including waterways, wildlife refuges, wetlands, or critical habitats of endangered or threatened species.**~~

The stakeholder group thanks the Department for deleting draft regulation 375-3.4(d), which alters the existing regulation regarding the "Public interest consideration" basis upon which the Department may reject a BCP application.

VI. Elimination of Conditional Track 1 remedies - § 375-3.8(e)(1)(iii)(*b*) and*(c)*:

Elimination of Conditional Track 1 remedies is inconsistent with the ECL § 27-1415(4) Track 1 definition, which states "that volunteers whose proposed remedial program for the remediation of groundwater may require the ***long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved*** but whose program would otherwise conform with the requirements necessary to qualify for Track 1, shall qualify for Track 1." (Emphasis added.) The legislature understood that despite a Track 1 soil source removal and groundwater remedy, some residual groundwater contamination may remain present for a long time, and allowed for long term, not short term, groundwater engineering controls to be in place. This regulation eviscerates a party's ability to achieve a Track 1 remedy if in the Department's discretion "the volunteer has not demonstrated to the department's satisfaction that there has been a bulk reduction in groundwater contamination to asymptotic levels at the time the certificate of completion is issued". Even more random is if a soil and groundwater remedy have achieved the Track 1 SCOs and groundwater standards but there is residual soil vapor contamination post five years. Article 27 Title 13, which was promulgated before soil vapor became an issue, is silent with respect to soil vapor and the soil vapor guidance implementation to date by the DOH has been highly inconsistent. Instead of converting a valid Track 1 remedy into a Track 2 remedy if there is any residual groundwater or soil vapor contamination, which will discourage the implementation of Track 1 remedies, and is therefore, contrary to the overall intent of the program to achieve a permanent remedy as stated in ECL § 27-1403, this regulation should define what it means to achieve asymptotic conditions since it is rarely possible to achieve drinking water standards in an urban environment and even if achieved, there may still be some on or off-site vapor. Moreover, there is no mechanism in the Tax Law (which would have to be simultaneously amended to accommodate this regulation) to give a party additional tax credits years later if they are earned after a party's cleanup status changes from a Track 2 to a Track 1. Tax and Finance can claw back credits far more easily under the current conditional Track 1 approach than to retroactively authorize additional tax credits. The conditional Track 1 approach has been used by the Department for a number of years without issue and should continue to be implemented. This approach should be codified in regulations.

(*b*) ~~**and when the**~~ **a** volunteer has ~~**not**~~ demonstrated ~~**to the department's satisfaction**~~ that there has been a bulk reduction in groundwater contamination to asymptotic levels at the time the certificate of completion is issued **if after four rounds of annual groundwater sampling no further reduction levels have been achieved and the residual groundwater contamination levels on the site are similar to area-wide background levels, in which case the volunteer shall maintain a Track 1 remedy. The volunteer shall also maintain a Track 1 remedy if it has achieve the Track 1 soil cleanup objectives and the bulk reduction of groundwater contamination as defined above but soil vapor contamination remains present after a soil vapor evaluation due to remaining area-wide off-site contamination even if the volunteer is required by the department or the department of health to continue to mitigate soil vapor on-site pursuant to section 375-1.8(d)(2)(ii)(*c*).** ~~, t~~**T**he volunteer shall **only** receive a Track 2 certificate of completion, as described in paragraph (2) of this subdivision **if it does not demonstrate the bulk reduction in groundwater as described herein within five years after issuance of the certificate of completion**. The volunteer may petition the department for a modification of the certificate of completion at any time up until five years after issuance of a certificate of completion. ~~I~~**i**f the volunteer **can** demonstrate~~s~~ **in less than five years** that there has been bulk reduction in groundwater contamination to asymptotic levels~~**, a modified Track 1 certificate of completion will be issued**~~.

~~(vi) **The department will consider the site to have achieved a Track 2 cleanup from the date the certificate of completion is issued until such time as a modified Track 1 certificate of completion is issued.**~~

~~(vii) **The department will consider the site to have achieved a Track 1 cleanup from the date that the modified Track 1 certificate of completion is issued.**~~

~~**(*c*) the remedial program can include the use of institutional or engineering controls to achieve remedial objectives for soil vapor. In such instances, the volunteer shall receive a Track 2 certificate of completion, as described in paragraph (2) of this subdivision. The volunteer may petition the department for a modification to the certificate of completion at any time up until five years after issuance of a certificate of completion. If the volunteer**~~

~~demonstrates that the remedial objectives for soil vapor have been~~ achieved ~~and the institutional or engineering controls are no longer~~ necessary, ~~a modified Track 1 certificate of completion will be~~ issued to ~~the volunteer.~~

~~(1) The department will consider the site to have achieved a Track 2 cleanup from the date the certificate of completion is issued until such time as a modified Track 1 certificate of completion is issued.~~

~~(2) The department will consider the site to have achieved a Track 1 cleanup from the date that the modified Track 1 certificate of completion is issued~~

VII. Definition of Change of use and Associated Work Plans - 375-1.2(e), 375-1.11(d):

The statutory intent of a Change of Use notice pursuant to ECL § 27-1425(3)(b) is to "adequately apprise the department of the contemplated change of use of such site and how such change of use may affect the site's proposed, ongoing, or completed remedial program" and therefore a 60-day prior notice is required. However, the proposed Change of Use definition, which mostly tracks the statutory definition in ECL § 27-1425(3)(a), adds the phrase: "any change to the tax lot designation or boundary." It is unclear how a tax lot change impacts the remediation and why a 60-day notice is required. We recommend limiting the definition to the statutory definition, preferably by reference to the statutory section, rather than repeating the statutory definition in the regulation as shown below.

§ 375-1.2(e) - *Change of use* **shall have the same definition as provided in article 27 title 14 section 27-1425 subparagraph 3.** ~~**means the transfer of title to all or part of the site, any change to the tax lot designation or boundary, the erection of any structure on such site, the creation of a park or other public or private recreational facility on such site, or any activity that is likely to disrupt or expose contamination or to increase direct human exposure; or any other conduct that will or may tend to significantly interfere with an ongoing or completed remedial program at such site or the continued ability to implement the engineering and institutional controls associated with such site. Change of use does not include work performed under a department approved work plan**~~.

§ 375-1.11(d) Work Plans Required for All Changes of Use

(1) At least 60 days before a change of use at a site, [as defined in sections 375-2.11, 375-3.11 and 375-4.11 of this Part,] the person proposing to make such change of use shall provide written notification to the department.

(2) The notice shall include a Work Plan to be approved by the department or identify the approved Work Plan or portion of the approved site management plan that covers this activity. **Notwithstanding the foregoing, a Work Plan shall not be required for a change of use consisting of the transfer of title to all or part of the site or any other** change of use **that** does not involve any physical alteration of the site~~**, then the department may waive the requirement for a Work Plan**~~. The notice shall advise the department of the contemplated change, including, but not limited to, explaining how such change may affect the site`s proposed, ongoing, or completed remedial program.

VIII. Certification of FERs by PEs in same firm as in other site work - § 375-1.6(c)(4)(ii)-(iii):

It is our understanding that the Department is justifiably seeking to increase the quality of submissions to prevent parties from conducting unverifiable work and/or inappropriately certifying engineering work that results in FERs which do not provide the information necessary to accurately document remedial activities.

We feel that the recent update to the proposed revision § 375-1.6(c)(4)(ii) is appropriate, subject to minor revisions set forth below, in that it limits the engineering certification to "engineering work required for the implementation of the remedial program or completed the engineering work required for the implementation of the remedial program." This is an important clarification and we agree with the revision, with the proviso that the Department acknowledge that New York State Education Law Article 145, Section 7208 identifies several persons exempt for the professions of engineering and land surveying when they are undertaking certain activities that have been designed by a professional engineer. This is essential as a professional engineer must rely on the actions of many others during the implementation of their remedial design, including but not limited to excavation, disposal, trucking, installation of borings, sampling of various media, air monitoring, testing, supervising, surveying, and reporting to successfully implement a remedial program. Section 7208(h) specifically acknowledges this reality by exempting from professional engineering work the actions of contractors or others to execute, supervise and inspect work designed by a professional engineer or land surveyor. Furthermore, there is no indication in the law or otherwise that such contractors or inspectors be employed by the engineer(s) who designed said work. This is consistent with the long-standing industry practice and Department guidance in DER-10. Accordingly, the Stakeholders recommend § 375-1.6(c)(4)(ii) be revised, as follows and that the extra language added in § 375-1.6(c)(4)(iii) be deleted because subparagraph (v) already says "all activities described in this report have been performed in accordance with the remedial program and any subsequent changes as agreed to and approved by the department",

~~(ii) such party is the individual who had primary direct responsibility for the implementation of the subject remedial program;. The certifying engineer is not required to have direct supervisory control, within the corporate structure of the firm implementing the project, but must be the person in the firm with direct responsibility for personnel engaged in the inspection and engineering provided by the same firm to assure the implementation of the project was in accordance with the approved remedial design and/or remedial action work plan, including the engineering review of all contractor submittals and field changes approved for the project;~~

(ii) such party is a professional engineer (sole proprietor) or is a professional engineer employed by an engineering firm with an appropriate Certificate of Authorization issued by the NYS Department of Education to practice engineering; and

(a) (1) such party either directly supervised all engineering work required for the implementation of the remedial program or completed the engineering work required for the implementation of the remedial program in accordance with State Education Law, Article 145; or

(2) such party delegated or subcontracted the engineering work required for the implementation of the remedial program to other persons provided that such persons are qualified by license, education, or experience in accordance with State Education Law, Article 145; and

(b) such engineering work required for the implementation of the remedial program referenced in (a)(1) and (a)(2) above, shall not inhibit practices or activities conducted by professionals and/or contractors executing work designed by an engineer in accordance with State Education Law, Article 145 § 7208 and § 7208-a, et seq.

X. Department authority to determine appropriate land use - §§ 375-1.8(g)(2)(ii)(*a)(2*), 375-1.8(g)(6) and new 375-1.8(g)(2)(ii)(*c*) and 375-1.8(g)(2)(ii)(*d*):

The stakeholder group contends a few suggested edits are in order in relation to the proposed land use regulations, particularly 375-1.8(g)(6) that would give the Department the authority to determine the appropriate land use category for a site as opposed to the existing regulation that allows the remedial party to determine the land use of their site. Recently, the Department made a determination that a prospective health care facility with 24/7 overnight care was more akin to a commercial use as opposed to a 24/7 residential project. The current commercial use definition, which is a use "for the primary purpose of buying, selling or trading of merchandise or services", does not support this conclusion. The land use categories also do not cover schools. Therefore, the following amendments are suggested:

§ 375-1.8(g)(2)(ii)*(a)(2)* - single-family housing unless the land beneath the structures on the site remains commonly owned in perpetuity **or the site has achieved a track 1 remedy and no longer requires long term site management controls.**

§ 375-1.8(g)(2)(ii)(*c*) - includes schools and other educational facilities without any overnight residential accommodations;

§ 375-1.8(g)(2)(ii)(*d*) - includes medical or health care facilities with overnight residential – type accommodations;

§ 375-1.8(g)(6) - For purposes of determining the appropriate land use category, **the remedial party** ~~department~~ will consider the nature of the uses and the activities which are occurring, or may occur, at the site:

X. New Regulations that Make it even Harder to Remediate a Superfund Site in the BCP -§§ 375-3.2(j), 375-3.3(b)(2), 375-3.4(b)(1) and 375-3.8(c)(5):

The first three of these new and revised regulations to require applicants to conduct potentially responsible parties ("PRPs") searches should be omitted because these proposed regulations go beyond what is required in ECL § 27-1405(2)(a) and it is frankly unclear why such a search is needed if the party is volunteering to remediate a Superfund site. Applicants do not have as much access to information as the Department does in order to perform PRP searches, nor do applicants have the ability to conduct generator or transporter searches at all and cannot determine if a party is able to pay for a remediation such as the State can with access to financial information not available to a private party. Therefore, at a minimum, the arranger and transporter requirements must be deleted. Further, applicants already submit information regarding historical owners and operators in connection with their BCP applications, which is already one of the most onerous components of a BCP Application.

§ 375-3.2(j) - PRP Search means a search to identify potentially responsible parties (PRP) **to the extent feasible using available on-line databases and publicly accessible information** who may be legally liable for contamination at a particular property, including, but not limited to the current owner/operator, the owner/operator at the time of disposal of hazardous waste/substances~~**, persons who arranged for the disposal or treatment of hazardous waste/substances, and persons who transported and chose the disposal location of hazardous waste/substances**~~.

§ 375-3.3(b)(2) – (2) on the Registry as class 2, unless:

(ii) the property is owned by a volunteer as defined in section 375-3.2(c)(2) of this Subpart or under contract to be transferred to a volunteer; and

(iii) the department, utilizing the PRP search submitted by the requestor in addition to other available information, has not identified any responsible party for that property that **is viable or the department has not determined any responsibility party** has the ability to pay for the remedial program.

[These edits assume the proposed edits above to the PRP Search definition are made as suggested].

§ 375-3.4(b)(1) - (1) An application will be deemed complete when the department determines that it contains sufficient information to allow the department to determine eligibility and the current, intended and reasonably anticipated future land use of the site. For an application seeking a determination that real property either on the Registry as a class 2, or a hazardous waste treatment, storage or disposal facility having interim status, is an eligible site, such application will not be deemed complete until the requestor submits a PRP search and the department determines there are no responsible parties that have the ability to pay for the investigation and remediation of the site.

[Acceptance of these edits assume the proposed edits above to the PRP Search definition are made as suggested as well as the proposed edits to § 375-3.3(b)(2)].

With respect to draft § 375-3.8(c)(5), which would require feasibility studies, to be added to the otherwise prescribed BCP remedial program process, this would add substantial costs and delays, and would only serve to further discourage the Superfund sites in the BCP. In addition, this draft regulation would strip Volunteers from proposing remedies consistent with BCP projects. If a volunteer has decided to bring a Class 2 site into the BCP as a "Brownfield Site" pursuant to ECL § 27 1405(2)(a), it should be entitled to utilize the BCP remedial selection process instead of the more onerous and time-consuming Superfund process in section 375-2.8(e) because the Volunteer is likely planning a project for the site, and should have some ability to select a remedy consistent with the proposed project.

§ 375-3.8(c)(5) - ~~For class 2 sites admitted to the Brownfield Cleanup Program where:~~

~~(i) a Record of Decision has been issued, the Brownfield Cleanup Program applicant will implement the on-site elements of the selected remedy, subject to~~ department approval ~~of what constitutes the on-site elements of the remedy; or~~

~~(ii) the site remedy is to be developed under the Brownfield Cleanup Program, a feasibility study pursuant to section 375-2.8(c) of this Part will be required in place of the alternatives analysis and the remedy will be selected by the department in accordance with section 375-2.8(e) of this Part.~~

XI. Definition of "underutilized" remains too narrow - § 375-3.2(m):

The Department's definition of underutilized remains problematic and it has effectively eliminated this gate from the statute, as only a handful of sites have qualified for the gate since the term was adopted. This overly narrow definition also is not encouraging the reuse of NYC Site to remain industrial and commercial. To align this definition to the legislative intent, we recommend that the Department revise the definition as follows, which was proposed in EELS' BCP Extender and Omnibus Proposal:

§ 375-3.2(m) "underutilized" shall mean, as of the date of application,

(a) a Site on which no more than fifty percent of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zoning or as a non-conforming use for at least three years prior to the application, which zoning has been in effect for at least three years; or

(b) the proposed future use is at least seventy-five percent for industrial or commercial uses; or

(c) the proposed development project on the Site could not take place without substantial government assistance, as certified by the municipality in which the Site is located, and for purposes of this provision, substantial government assistance shall mean a substantial loan, grant, land purchase subsidy, land purchase cost exemption or waiver, or tax credit, from a governmental entity; or

(d) a Site on which one or more primary structures have been condemned, or presently exhibits documented structural deficiencies, as certified by a professional engineer; or

(e) a Site on which there are no structures or the buildings have not been occupied or used for at least twelve months; or

(f) an industrial or commercial Site that is no longer functional for its initially intended use due to factors such as functional obsolescence that affects the Site itself or the Site's relationship with other surrounding property, and for purposes of this provision functional obsolescence means that the Site is unable to be used to adequately perform the function for which it was intended due to a substantial loss in value resulting from factors such as overcapacity, changes in technology, deficiencies in design, lack of demand for this type of use such as office space due to a pandemic, or other similar factors that affect the Site itself or the Site's relationship with other surrounding real property.

XII. Soil Cleanup Objective Amendments - § 375-6.8 –

A large number of soil cleanup objectives ("SCOs") are listed as being amended. The draft regulations do not state when these new SCOs will become effective or if they will retroactively apply. We respectfully request that new SCOs become effective one year after the final regulations are promulgated so that parties and projects can effectively plan for the changes. In addition, it would be helpful for the Department to disclose the methodologies and rationales used to determine the new SCOs.

New Emerging Issues -

PFAS Remediation – Where are we Going?

Volunteers have been investigating and finding PFAS above the drinking water standards of 10 ppt for PFOA and PFOS for the last several years and for some sites it appears that certain DEC Project Managers are now requiring off-site investigations at sites with the PFAS substances over 100 ppt and or remediation. The stakeholders and regulated community need to understand what the PFAS exceedance levels will trigger remediation for PFAS in order to make future decisions.

Soil Vapor – Inconsistent and Untimely DOH Decision Making

DOH has not updated its soil vapor guidance document in 15 years since 2006. There have been no statutory or regulatory provisions added specifically addressing soil vapor. Some of the edits we have offered will help to clarify some of the issues that have been arising but there are still many issues that remain including when the cost of a vapor barrier is remedial and when it is not. DOH is often the reason projects are delayed and then at the eleventh hour seemingly inconsistent decision making related to when soil vapor mitigation is or is not required, when a soil vapor evaluation can and cannot occur and when off-site soil vapor investigations are or are not required remains a site by site mystery until the DOH PM finally makes a decision. The stakeholders would like to discuss some new soil vapor regulations with the Department along the lines included in the EELS ' BCP Extender and Omnibus Proposal.

Responsible Party Contribution Costs

ECL 27-1421 (4) allows for cost recovery from responsible parties to assist in the payment of costs for highly costly remediation projects: "The provisions of this title shall not affect an action or a claim, including a statutory or common law claim for contribution or indemnification, that an applicant has or may have against a third party." This provision was included in the original BCP Law because for large and / or highly contaminated brownfield sites, often contribution from responsible parties is required in order for the brownfield project to proceed. However recently, Tax & Finance is claiming that BCP parties who receive these funds are obtaining a windfall if they are able to claim tax credits on these funds. First, the statute allows a party to obtain cost recovery and earn tax credits because where a party in the BCP obtains money for remediating a site is irrelevant. The cost to obtain such cost recovery, which sometimes requires litigation, but is certainly not a simple cost free process, is not included in the tax credits calculation because this is a completely separate and independent process, which is largely independent of the State. It is unrealistic of the Department and Tax & Finance to think that the private sector alone can fund the most expensive remediation projects without the help of the polluters and the stakeholders contend that the State should not care where the BCP parties obtain their money to remediate sites. These parties contend that once the Department understands the facts associated with these projects, they will better understand why these parties are not obtaining a windfall.

Renewable Energy Facility Site Definition

The originally proposed language in the Governor's budget bill in ECL § 27-1405(33) defined a "Renewable energy facility site" as "a site that is *primarily* used for a renewable energy facility as described in subparagraph (C) of paragraph (7) of subdivision (b) of the tax law. The final definition in the statute, however, was altered by the Assembly over an apparent fear that the definition above would somehow be abused by fossil fuel facilities and now reads: "Renewable energy facility site" shall mean real property: (a) that is used for a renewable energy system, as defined in section sixty-six-p of the public service law; or (b) any co-located system storing energy generated from such a renewable energy system prior to delivering it to the bulk transmission, sub-transmission, or distribution system." The Public Service Law (PSC) § 66-p definition is "renewable energy systems" means systems that generate electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity."

After asking DEC if battery energy storage facilities coupled with several solar panels would be able to be sited on NYC brownfield sites in order to obtain the 5% bump up and qualify for the tangible tax credits, the response was "no", because the Department will evaluate whether the primary purpose of the redevelopment of the site is the generation of renewable energy through technologies described in PSC § 66-p, and this list does not include energy storage batteries.

While there is a "co-location" requirement for energy storage that is considered part of a renewable energy facility site, the word "primary" was actually removed in the final statute. It is unclear why the DEC is making such a strict interpretation because the "or" (b) provision is not actually being interpretated by DEC independently. If the "or" (b) provision is read by itself, it would seem that an energy storage facility that has some renewable energy generation capacity should qualify.

Therefore, the stakeholders suggest the following edits to the Department proposed revisions to this important definition. First, the Department's reference to simply section sixty-six of the Public Service Law appears to be a typographical error and should be changed to specifically reference subsection sixty-six-p.

Second, the focus on "such facility" is in conflict with the statute, which focuses on a "facility *site*." (Emphasis added.) A "site" may be larger than a "facility." The proposal therefore could have the effect of ignoring how the entirety of a site is used. The narrowed definition could, among other things, improperly exclude consideration of how areas outside of a building are used. For example, battery storage in otherwise empty space might be excluded. There is a growing need for battery storage to meet the important goals of the Climate Leadership and Community Protection Act and New York City Local Law 97.

Finally, the term "primarily" is not in the statute. Moreover, there is no indication in the statute that "energy generation" should be prioritized above "co-located system[s] storing energy." That would be particularly problematic in New York City, where space limitations may make significant energy generation difficult, but energy storage is feasible. By way of example, a 5 MW energy storage systems can be constructed on small infill brownfield sites but a 5 MW solar facility requires over 25 acres of flat land. Therefore, in order for NYC to participate at all in the achievement of CLCPA goals, energy storage systems must be eligible for the BCP and these renewable energy facility benefits. To address this issue, our proposal below recognizes that either "energy generation" or systems storing such energy may be a primary use and still fit within the statute. Additionally, the proposal recognizes that there may be more than one "primary" use of a site. Our proposal also includes text to address the potential concern that the definition should not include sites that have as a primary use the production of fossil fuel-based energy.

§ 375-3.2(l) – "Renewable energy facility site" shall mean real property that **has as a primary use ~~is used~~** for: (1) a renewable energy system, as defined in section sixty-six**-p** of the public service law; or (2) any co-located system storing energy generated from such a renewable energy system prior to delivering it to the bulk

transmission, sub-transmission, or distribution system. **~~Such facility shall be used primarily for energy generation.~~** **"Renewable energy facility site" shall not include real property that has as a primary use the production of fossil fuel-based energy.**