ENVIRONMENTAL & ENERGY LAW SECTION EXECUTIVE COMMITTEE
AGENDA
May 8, 2024

1. Welcome

2. Approval of Minutes from January Executive Committee Meeting (S. Russo) Page 2

3. Budget Report (J. Poarch) Page 4

4. Law School Initiative (J. Rigano)

5. Fall Meeting (M. Hecker) Page 5

6. Committee Updates

   a. Hazardous Waste/Site Cleanup/Brownfield Committee (A. Reichart/D. Freeman/L/Schnap/M. Sinkman) Page 6

   b. Diversity & Inclusion Fellowship (C. Leas/V. Robbins)

   c. Environmental Justice (J. Almanzar/I. Norman) Page 7

   d. Other

7. Section Journal (J. Simpson/M. Barry)

8. Future programming (A. Kendall)

9. New Business

10. Motion to Adjourn

New York State Bar Association

Environmental & Energy Law Section

EXECUTIVE COMMITTEE MINUTES

January 18, 2024 – 1:30 PM

Present: Y. Hennessey; M. Hecker; A. Kendall; S. Russo; A. Jasiewicz; J. Almanzar; M. Bogin; K. Healy; Z. Knaub; C. Leas; H. Mauch; J. McClymonds; M. McDonald; K. Mintzer; W. Mugdan; J. Parker; G. Port; V. Robbins; J. Simpson; M. Sinkman; N. Ward-Willis; M. Weider. A. Stolorow, A. Knauf, C. Howard, D. Krainin, I. Norman, J. Kublick, J. Rigano, J. Martin, K. Mitzner, K. Healy, K. Reilly, L. Shaw, M. Baker, P. Bousquet, R. Kafin, S. Lobe, F. Eisenbud, D. Freeman, T. Putsavage, H. Tollin, D. Mussio, A. Legland, H. Carlock, J. Stravino, J. Brooks, K. Mintzer, R. Knoer, A. Reichhart, K. Kuh, M. Valle, D. Richmond, C. Braymer, J. Cavaluzzi, N. Robinson, K. Lang, L. Lefkowitz, D. Quist

Welcome- Y. Hennessy.

Approval of Minutes: All in favor. Approved, with revision noting James McClymonds abstention on vote approving Section letter to Governor Hochul.

Budget: (M. Hecker): The Section is $15,000 in the red compared to the budget due to the funding of an additional diversity fellowship, previously approved by the Executive Committee. Membership in the Section is up overall, but down in paid members. The Section needs to renew its focus on law firm fund raising for the diversity fellowships.

Government Attorney NYSBA Membership: (N. Ward-Willis). NYSBA is not amenable to creating a different pricing structure for membership for government attorneys, even though bar associations in New Jersey, Connecticut and California as well as other states do so. The association sticking with current rule providing a 25% discount for members who make less than $75,000 per year. Yvonne Hennessey noted that for this year the section agreed to provide free section membership to government attorneys who join NYSBA, which offers modest relief. The Committee discussed ongoing efforts to get the association to broaden its due relief program so that it could benefit government attorneys. Nick Ward-Willis reported that the association is changing its pricing structure in 2025 to a subscription plan where attorneys are charged monthly, or one per year with a 10% discount. Members will get two section memberships included in the price and no longer have to pay separately for section membership, and free access to online CLE programs. For members with more than seven years admitted to the bar and who pay all at once the dues increase will be a modest $10 dollars per year.

Law School Initiative (J. Rigano): Report on status of scheduling additional in-person conferences with law students, including a program, food and EELS swag. Last Fall we did a program at Buffalo Law School. There is a plan to move forward in the near future with New York Law School, Pace and St. Johns.

Foundation Grant Initiative: (M. Hecker): Mike Hecker reported that the request for a grant from NYSBA Foundation in the amount of $10,000 is still pending. We should know whether we get it in the next month or so. If we do receive it we have to renew the application yearly if we want to continue to pursue the funding.

Fall Meeting: (A. Kendall): Planning is underway for the Fall Meeting, including the half day CLE program. Fall Meeting will be held at the Equinox in Manchester, Vermont on September 25-26.

Committee Updates.

Diversity Committee: (C. Leas/ S. Lobe): Christine Leas reported on the now final effort to update the criteria for fellowship selection (now posted on website) and also reported that this year's two recipients were both from NYU Law School. Continued discussion about efforts to fundraise, targeted at law firms, to ensure that sufficient money is raised to support two $10,000 fellowships each year.

Global Climate Change: ((V Robbins): Kevin Healy and Ginny Robbins announced the upcoming webinar.

Enforcement and Compliance Committee: (M. Sinkman): Announced that free one hour webinars to be held on March 14 and March 21, with the first program on federal civil enforcement and the second one focusing on federal criminal enforcement.

Environmental Justice: (J Almanzar/I. Norman): The chairs thanked the group of Section members including John Parker, Dan Ruzow and Karen Mintzer who assisted on the comment letter the Section submitted on DEC's draft guidance on analysis of disproportionate impacts on disadvantaged communities, mandated by the CLCPA. It was an extensive effort. The EC was asked to boost attention to the program on the availability and use of federal IRA grant money for municipalities addressing EJ issues.

Affordable Housing: (D. Richmond): Update provided on preparation of a white paper focused on potential revisions to SEQRA and financial incentives aimed at boosting the development of affordable housing. This is an extensive effort across sections involving 10-20 attorneys, with the hope to finalize it next month.

Legislative Forum: (J. Parker): Legislation Committee gave a report on upcoming Legislative Forum this spring. The Committee wishes to propose a two-day event rather than meeting successive weeks for the oil spill symposium and then the legislative forum the following week, which is how the section has scheduled these events in the past. Instead, the committee proposes to hold the oil spill symposium event in the afternoon and then the Legislative Forum the next day. There are constraints as to dates, but the committee is looking to do it either May 7-8 or May 14-15.

Section Journal: (J. Simpson): Report on recent articles in the journal with a solicitation for work on additional topics. The last issue came out late in 2023, featuring the DEI fellowship and Section Chair Yvonne Hennessey. Next deadline is March 1st.

Future Programming: (A. Kendall): Amy Kendall solicited the help of Section standing committees to help with panels, or to develop free-standing one hour CLE programs. It is important if a committee begins an effort to develop a program that it alert the cabinet first.

New business: None.

Next meeting: May 2024

New York State Bar Association
624 - Environmental Law Section
For the period ending March 31, 2024

	2024 Budget	March	2024 March YTD	Percent	2023 Budget	2023 March YTD	Percent	2022 March YTD	2021 March YTD	2020 March YTD
Income										
Dues	27,000.00	1,260.00	22,445.00	83%	28,000.00	23,455.00	84%	24,325.00	24,635.00	25,503.34
Meetings	27,500.00	-	8,537.50	31%	25,850.00	6,150.00	24%	13,600.00	9,831.25	7,715.00
Sponsorship	44,500.00	-	23,600.00	53%	25,000.00	14,000.00	56%	4,975.00	13,500.00	7,900.00
Newsletters	-	145.00	725.00		600.00	580.00	97%	-	540.00	270.00
Prior Years Surplus Used	12,000.00	-	-	0%	18,000.00	-	0%	-	-	-
Total Income	**111,000.00**	**1,405.00**	**55,307.50**	**50%**	**97,450.00**	**44,185.00**	**45%**	**42,900.00**	**48,506.25**	**41,388.34**
Expenses										
Postage & Shipping	500.00	281.94	281.94	56%	500.00	594.24	119%	4.15	130.11	440.63
Awards & Grants	6,000.00	-	2,201.46	37%	5,500.00	2,293.96	42%	1,684.32	1,937.01	4,120.62
Train Travel	-	-	33.50		-	45.00	0%	-	-	-
Tolls, Parking & Cabs	-	-	25.00		-	17.50	0%	-	-	-
Lodging	-	-	400.55		-	289.23	0%	-	-	-
Meals	-	-	21.92		-	72.37	0%	-	-	-
Misc Travel Costs	500.00	-	-	0%	2,000.00	-	0%	-	-	295.97
Diversity	20,000.00	-	-	0%	500.00	-	0%	-	-	-
Membership Initiative	1,250.00	-	-		750.00	1,892.10	252%	-	-	680.00
Meeting Rooms	10,000.00	-	-	0%	2,000.00	-	0%	-	-	-
Catering & Banquets	40,000.00	8,738.19	19,243.69	48%	42,000.00	19,019.43	45%	-	-	24,570.61
Beverage Service & Receptions	10,000.00	8,406.04	8,406.04	84%	18,000.00	6,667.00	37%	2,967.25	2,172.10	5,380.00
Speaker & Guest Expense	1,000.00	-	300.71	30%	750.00	-	0%	-	-	466.10
Audio/Visual Expense	4,000.00	4,904.57	4,904.57	123%	12,000.00	7,153.84	60%	-	-	8,893.97
Promotional Costs	1,000.00	-	-	0%	-	-	0%	-	-	-
Activities & Entertainment	500.00	-	-	0%	500.00	-	0%	-	-	-
Section Executive Committee Meetings	3,000.00	6,759.80	6,759.80	225%	4,000.00	3,419.65	85%	-	-	9,850.47
Officers Expense	-	-	-		250.00	-	0%	-	-	-
Miscellaneous Meeting and Program Costs	2,000.00	-	-	0%	2,000.00	946.73	47%	-	-	726.88
Section Subcommittee Meetings	500.00	-	-	0%	1,500.00	-	0%	-	-	-
Newsletters	5,000.00	94.25	94.25	2%	3,700.00	285.49	8%	882.59	4,273.21	3,291.26
Graphic Department Allocations	1,500.00	-	162.63	11%	1,500.00	82.96	6%	-	-	995.04
Total Expenses	**106,750.00**	**29,184.79**	**42,836.06**	**40%**	**97,450.00**	**42,779.50**	**44%**	**5,538.31**	**8,512.43**	**59,711.55**
Net Income over Expense	**4,250.00**	**(27,779.79)**	**12,471.44**		**-**	**1,405.50**		**37,361.69**	**39,993.82**	**(18,323.21)**

Accumulated Surplus (Deficit)

NYSBA Environmental & Energy Law Section

Environmental & Energy Law Section Fall Meeting 2024

September 25-26, 2024

The Equinox, Manchester , VT

CLE Credits TBD

Save the Date

New York State Bar Association

The Equinox is a luxury golf & spa resort in Manchester, VT featuring elegant accommodations & fantastic onsite dining in Vermont's picturesque Green Mountains.

Join the Environmental & Energy Law Section at the Fall Meeting and enjoy this beautiful setting for a great getaway, timely CLE programming, and the opportunity to connect with your colleagues.

Sponsorship opportunities available.

Check the Section's web site for registration and programming details in spring 2024.

Tuition Assistance: NYSBA.ORG/TUITIONASSISTANCE
Accommodations for Persons With Disabilities: NYSBA.ORG/ADA
Additional Policies and Cancellation Info: NYSBA.ORG/POLICIES
For questions please contact Amy Jasiewicz, Section Liaison at 518-487-5682 or ajasiewicz@nysba.org.

For More Info:

NYSBA.ORG/ENVIRONMENTAL

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MEMORANDUM

TO: NYSBA Environmental & Energy Law Section (EELS)

FROM: Hazardous Waste/Site Cleanup/Brownfield Committee

RE: Draft Comments Regarding NYSDEC's 2024 Proposed Changes to 6 NYCRR Part 375

DATE: May 6, 2024

Below is a complete and compiled draft of comments to be submitted to DEC's proposed regulatory amendments.

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 newest proposed revisions to 6 NYCRR Part 375. We respectfully request that the Department consider these comments in promulgating its final Part 375 regulations. As we have discussed with the Department, the EELS is available to meet with the Department to discuss the comments below and any new draft regulations before promulgation.

GENERAL COMMENTS

As noted in response to the 2022 proposed revisions to 6 NYCRR Part 375, the New York State Brownfield Cleanup Program ("BCP") is one of the most vibrant programs of its kind in the nation, serving to advance the goals of protecting the State's natural resources, enhancing public health and welfare, and encouraging economic development. The Program depends on a collaborative relationship between the State and the private sector, and we submit these comments with that collaborative relationship in mind.

Noticeably absent from the Department's proposals are timeframes or deadlines to be imposed on the Department. It is important that the Department and parties in all remedial programs understand the relevant timeframes and have a degree of certainty before deciding whether to participate in a program.

Each of §§ 375-3.4(c), 375-3.4(c)(1), 375-3.4(c)(2), and 375-3.6(b) obligate the Department to use "all best efforts" to respond within specified periods of time. That phrase has real meaning in law. We recommend that language should be added to those Sections addressing situations in which the Department will not comply with those obligations.

We propose the following: "In the event the Department is unable to reply within the required period of time, the Department shall provide written notice to the Requester/Applicant at least five days prior to the expiration of the period outlining the good cause reason why additional time is required for Department review."

Additionally, we understand that, at some sites, the Department is already implementing the substance of these proposed regulations on a case-by-case basis. We urge that, consistent with settled principles of administrative law, the Department refrain from putting these regulations into effect unless and until they are formally adopted pursuant to this rulemaking process.

We note that the Department incorporated several of the EELS' comments on the 2022 proposed revisions to 6 NYCRR Part 375 and we look forward to continuing to work with the Department to build on the successes of the BCP and to further incorporate the EELS' new comments below. As practitioners who are "in the trenches" in helping to implement the BCP, we know that it is a complex program that is often challenging to administer, but the overall intent of the program is to encourage especially Volunteers to participate.

Many of our comments support the proposed changes. Other comments suggest improvements that can be made to help strengthen the program or to avoid negative results.

COMMENTS ON SPECIFIC PROPOSALS

6 NYCRR Subpart 375-1

- **§ 375-1.2(ad): Revised Definition of "Off-site contamination" -** The proposed revision of the definition of "[o]ff-site contamination" to include soil vapor and sediment should be accompanied by other new regulations that clarify what it means to remediate soil vapor migrating onto a remediated BCP site from off-site and how that could impact achieving the various remedial Tracks. It would be inconsistent with the intent of the BCP to eliminate a Volunteer's ability to achieve a Track 1 or 2 cleanup because of off-site soil vapor migration, since a Volunteer generally does not have off-site remedial obligations, *see, e.g.*, ECL § 27-1411(2), and given that there are no promulgated soil vapor standards.

- **§ 375-1.2(c): Definition of "Brownfield [S]ite [R]emedial [P]rogram" -** The added language in the proposed definition, "pursuant to a brownfield site cleanup agreement," should be withdrawn and replaced with "in conformance with § 375-1.6."

- **§ 375-1.2(e): Definition of "Change of use" -** The proposed Change of Use definition tracks the statutory definition in ECL § 27-1425(3)(a), except that it adds: "any change to the tax lot designation or boundary." We recommend limiting the definition to the statutory definition, preferably by reference to the statutory section, rather than repeating the statutory definition in the regulations, in order to ensure that the term remains consistent with the statute in the event of statutory amendments.

  The statutory intent of Change of Use notices 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 sixty-day prior notice is required. Recently, there have also

been other instances when the Change of Use form has been required such as when there is a change of site address, the remedial parties change, demolition commences, or a Real Property Tax Law § 421-a foundation element installation needs to be commenced at a BCP site. However, the events described above that are not otherwise specified in the statutory definition do not affect the site's proposed, ongoing, or completed remedial program and it is unclear why sixty days advanced notice is required. Broadening the term and the events to which the sixty-day notice applies exceeds the statutory intent. We agree that other circumstances also call for notice to the Department, but the proposed broadening of the statutory term far exceeds the statutory intent. Perhaps a new defined term that more closely reflects the category of events intended to be covered should be added to address the most common events that trigger the need to notify the Department of a change in facts or circumstances with a different mechanism than the Change of Use form and with shorter notice periods appropriate to such changes.

If the Department does expand the regulatory definition of a Change of Use to include changes to tax lot designations or boundaries, we recommend that the advance notice of Change of Use should be submitted to the Department once the tax map office notifies the applicant that it has tentatively approved an application to change a tax lot. Doing so would set an unambiguous timeline that generally is at least sixty days before a tax map is updated, so this would provide meaningful advance notice.

- **§ 375-1.2(as) and § 375-2.2(a): Definition of "Responsible party" -** The proposed regulations would contradict statutory authority by defining "[r]esponsible party" in proposed § 375-1.2(as) and removing the definition of that term from § 375-2.2. The proposed definition would apply to all Part 375 programs, including the State Superfund Program, and would include within that definition parties that engage in certain activities relating to "contaminant[s]", which is defined in § 375-1 to include petroleum. However, the definition of "[h]azardous waste" in the Superfund Program statute, ECL § 27-1301, and the corresponding definition of "contaminant" in § 375-2, which the Department proposes to delete, specifically exclude petroleum. We urge the Department to forgo this change and leave the definitions currently included in Subpart 375-2 as is. The statutory provisions that apply to the Superfund Program, the Spill Program under the Navigation Law, and the Brownfield Cleanup Program are distinct and the regulations must maintain the nuanced differences applicable to both.

- **§§ 375-1.5(b)(3)(i) and (vi): Payment of and Objections to Department Invoices -** The proposed revision provides that Department invoices are payable within the timeframe specified on the invoice or associated order or agreement, and that the default period of forty-five days after receipt an invoice still applies. We recommend that the time frame for payment and submittal of objections be no less than forty-five days after receipt of an itemized invoice, unless otherwise specified in the associated order or agreement. State cost invoicing procedures often create significant and unnecessary burdens that warrant a different payment schedule. Specifically, while it

is generally the intent of the Department to issue invoices on a regular schedule, remedial parties are rarely advised of that schedule, and often receive a copy of invoices long after they are issued, which has the effect of shortening the time to arrange for payment of sometimes very large amounts in less time than commercial "payment within 30 days" terms.

- **§ 375-1.5(b)(3)(ii)(c): Requirement to Itemize Department Invoices -** We recommend that the Department withdraw its proposal to remove the categories of expenses that currently must be specified in Department invoices to remedial parties. We also recommend that a new item be added to provide that invoicing for outside contractor services must be accompanied by a description of the work performed by such contractor, providing sufficient detail to confirm the remedial party's responsibility for such costs.

- **§ 375-1.5(b)(6): Termination of Orders, Agreements, and State Assistance Contracts -** We recommend that the Department withdraw or modify its proposal, which would give the Department overly broad authority to terminate orders, agreements, and State assistance contracts "for cause", including a failure to complete a remedial program in accordance with a pre-determined schedule. For example, in the BCP, the Department has been provided with statutory authority to terminate a BCA if a party "substantially" fails to comply with BCA terms and conditions, not if a party fails to meet a non-mandatory scheduled date. *See* ECL §§ 27-1409(5), (12). Merely falling behind a proposed schedule does not rise to the level of a failure to substantially comply with the terms of a BCA. The proposal goes against the spirit of voluntary cleanups and may chill lenders' willingness to finance the cleanup and redevelopment of contaminated sites. Tethering program participation to a contemplated remedial schedule ignores the reality of project construction and remediation. BCP projects are complicated and can have schedule changes for a variety of reasons, particularly affordable housing projects which are only funded at specific times each year. Coordinating a remedial project concurrently with a redevelopment project, which often includes local land use approvals and complex financing, is a formidable undertaking, with numerous intangible variables that require flexibility. If not withdrawn, the Department should revise its proposal to account for the flexibility necessary for parties making good faith efforts to comply with schedules and BCA terms and conditions.

- **§ 375-1.6: Definition of "Work Plan" -** "Work Plan" is not a defined term, but it is essentially defined in § 375-1.6. Additionally, the term has been capitalized in §§ 375-1.11(d) and 375-3.5(c), even though the term is not formally defined. The term is also used in §§ 375-3.6, 375-3.8, 375-3.11, 375-4.8, and 375-4.11, but it is not capitalized in those provisions. We suggest that the Department either define the term in § 375-1.2 or un-capitalize the term throughout the regulations, replacing it with "work plan, as that term is used in 375-1.6."

- **§ 375-1.6(a)(3): Qualified Environmental Professionals On-Site During Remedial Activities -** We support this proposal.

- **§ 375-1.6(c)(4)(ii): Certification of Final Engineering Reports -** This new regulation was partially modeled after recommendations by the Bar Association to preserve the ability of smaller firms to subcontract the services of a third-party professional engineer to certify Final Engineering Reports (FERs). However, certain key language still needs to be modified and amended. Under State Education Law Article 145 § 7208(f), the certifying engineer must either directly supervise all engineering work required OR such engineer can "employ[] or supervis[e]" the engineering work required for the implementation of the remedial program in accordance with. The latter "or" provision was left out and has been clarified from the Bar's comments on the Department's prior regulatory proposals. Without this language, small firms, which do not have in-house professional engineers (PEs), would not be able to participate in the BCP any longer. Small firms have successfully hired outside PEs to supervise their work, therefore, this additional provision is intended to continue this successful trend and should be added in these new regulations.

- **§ 375-1.7: Site Classification and Administrative Designations -** Adding the administrative classifications used internally by the Department, but which have no statutory basis and are used nowhere else in the regulations, has the potential to cause great confusion and impact the marketability of sites across the state. In addition, seeing that there is no other reference anywhere in the proposed changes to the administrative designations, it seems that adding them to the proposed regulations serves no substantive purpose other than the Department's internal use of these classifications. Accordingly, we strongly urge the Department to remove the administrative designations from the proposed regulations.

  In the alternative, the following issues must be addressed in the proposed text:

  "No Further Action at the Time" implies that further action may be required at another time, but there is no language elsewhere in the regulations regarding that issue. For each of the circumstances outlined in § 375-1.7(a)(3)(i)-(iv), the sites should simply be removed from the electronic database rather than being classified as an "N" site.
  Lastly, the site characterization activities applicable to a "P" site should be transparent and detailed in the regulations. The new definition of "site characterization" in § 375-1.2(au) is overly broad and does not clarify this issue. Also, if a "P" site enters the BCP, the "P" designation should be removed from the Department's electronic database.

- **§ 375-1.8(d)(1)(iii): Efforts by Volunteers to Address Off-Site Contamination -** We support the proposal to clarify that Volunteers are required to address only "the

on-site plume" of groundwater contamination and to prevent further migration of ***"any site-related plume off-site"*** (emphasis added), but the added phrase "at the site boundary" should be omitted. Several remedial technologies are available 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." Note that there is also a provision in the Subpart 3 Brownfield Program regulations at § 375-3.8(f)(4)(ii), which states that to the extent feasible, a Volunteer shall address the on-site plume and prevent migration of ***any plume*** off-site at the site boundary. Section 375-3.8(f)(4)(ii) should be amended to align with the language in § 375-1.8(d)(1)(iii) to state that a Volunteer shall prevent migration of "any site-related plume."

- **§ 375-1.8(d)(2)(ii)(c): Actions Addressing Off-Site Contamination -** It makes sense that a Volunteer must include actions which would eliminate or mitigate any on-site "public health exposures" as part of a remedy. However, it is not clear what is meant by the phrase "environmental exposures" or by the proposal that remedial parties, including Volunteers, must eliminate or mitigate on-site "environmental exposures" attributable to an off-site source of groundwater contamination. Moreover, Volunteers should not be required to remediate off-site contamination causing the "environmental exposure", since this would contradict proposed § 375-1.8(d)(1)(iii), which would clarify that a Volunteer is not required to address an off-site groundwater plume emanating onto its site or beyond the borders of its site. Requiring Volunteers to address off-site "environmental exposures" would seem to eviscerate the statutory protections absolving Volunteers from addressing off-site contamination. As such, this proposed section is *ultra vires* and should be deleted.

  Moreover, the regulations in Part 375-1 and/or Part 375-3 should clarify that if a Volunteer has achieved a Track 1 cleanup, that level of cleanup will not be lost because of a need to mitigate public health exposures from off-site groundwater or vapor contamination migrating onto the BCP site. Such a result would be unjust, and parties would be disincentivized from attempting to achieve Track 1 cleanups.

- **§ 375-1.8(g)(2)(i) and § 375-2.8(f): Use of Institutional or Engineering Controls at Residential Use Sites -** These proposals together provide that at residential use sites, groundwater use may be restricted but no institutional or engineering controls are allowed relative to applicable soil cleanup objectives ("SCOs"), except "in limited instances where the department determines the remediation is not technically feasible or the remedial benefit is outweighed by other factors".
  These proposals appear to contradict the proposal in § 375-3.8(e)(2)(iii), which would give the Department discretion for all Track 2 cleanups "*other than* Residential" (emphasis added), to allow contamination below 15 feet at levels exceeding the protection of groundwater SCOs if the contamination is being addressed by an on-going groundwater remedy.

It is unclear if the inconsistencies described above are intentional. We recommend that the Department strike "other than Residential" from proposed § 375-3.8(e)(2)(iii).

- **§ 375-1.8(g)(2)(ii): Describing "Restricted-residential use" -** We support the concept of this proposal to clarify that restricted residential uses prohibit single-family housing unless the land is commonly owned in perpetuity. However, we note that some Tax Law amendments may be needed in order for single-family projects to take advantage of associated tax credits and clarification of the "common ownership in perpetuity" requirement is required. If a "horizontal" condominium for single-family homes is the concept that was contemplated by this phrase, it is unclear what type of real property interest must be held in common for perpetuity, e.g. would a fee title be required or would a perpetual tenancy in common suffice? Alternatively, would an indefeasible and perpetual fee title ownership of the land be required by a "common owner"? If so, what property interest would the single-family-home owner's interest have in the land? EELS is willing to work with the Department to flesh out the details needed to make this new positive comment work effectively.

- **§ 375-1.8(g)(6): Department Determination of Appropriate Land Use -** We object to the proposed amendment to the extent that it would give the Department the authority to determine the appropriate land use category for a site. And therefore, the proposed change should not be made.

- **§ 375-1.8(h)(2)(iii): Environmental Easement Unnecessary in Some Circumstances -** We support the clarification that an environmental easement is not needed where the only restriction imposed by the easement would be a restriction on using groundwater, and there is already a local prohibition in place.

- **§ 375-1.9(e)(1)(iv): Revocation of Certificate of Completion in Some Circumstances -** We object to this proposal because it exceeds the scope of specific statutory language set forth in the ECL. It is unclear why this regulation is in Part 375-1 (General Remedial Program Requirements) when the edits are based solely on the BCP tax credits. Moreover, we recommend that this regulation be deleted since ECL § 27-1419(5)(a-d) already provides the grounds for revocation of a COC and includes a catch all "good cause" provision. This draft regulation goes far beyond the statutory provision specifically in ECL § 27-1419(5)(b), which permits the Department to modify or revoke a certificate of completion ("COC") if an applicant for a New York City site makes a misrepresentation of a material fact relating to one of the eligibility "gates" pursuant to 27-1407(1-a) for the "tangible property credit component of the brownfield redevelopment tax credit". In contrast, the proposed regulation would allow the Department to modify or revoke a COC for any applicant who makes any misrepresentation related to "elements thereof of the brownfield redevelopment tax credit." The proposed language suggests that the COC can be revoked based on any disagreement between an applicant and the Department

regarding any component of a tax credit claim, a result which we believe would be unjustifiably punitive since a party that has earned a COC has completed the remediation on the Site.

In addition, the proposed change indicates that a taxpayer who is eligible for the tangible property credit component (under ECL 27-1407 subd 1-a or otherwise) and whose claim is adjusted downward on audit could have their COC revoked or modified. There is no authority for COC revocation or modification in the ECL or the Tax Law, and the Tax Law contains a well-understood set of rules for audit adjustments, including where applicable the imposition of penalties, interest, and other sanctions for taxpayer errors, understatements, or misrepresentations when calculating their tax (or tax credits). The change should be rejected. Doing so would align the regulation with the statutory authority to revoke. If not withdrawn completely, we recommend that the language in this proposal be revised to mirror the language of ECL § 27-1419(5)(b).

- **§ 375-1.11(d)(2): Work Plans Required for Changes of Use, But Waivers Available -** ECL § 27-1425 is clear that this regulation is meant to be only a notice provision only, yet the Department's proposal would require a Work Plan for *any* change of use, except that "the department may waive the requirement" if the change of use would "not involve a physical alteration of the site". Under the proposal, it appears that parties will have to request a waiver even before submitting a change of use form to determine if a work plan will be required, adding unnecessary time for certain change of use scenarios which should be "as of right," including change of ownership, tax lot changes and address changes.

  We recommend that the proposal be clarified such that no Work Plan will be required *unless* the proposed change of use would involve a physical alteration of the site. Neither a Work Plan nor a waiver process should be required for a change of use involving non-physical changes, including: (1) transfer of title to all or part of the site; (2) any change to the tax lot designation or boundary; and (3) address changes. These non-physical changes should also not be subject to the 60-day notice requirement because more often than not these property related changes are not known to be occurring 60 days beforehand.

  These proposed changes would mitigate the time and administrative burden on both the Department and remedial parties for changes of use that clearly do not involve a physical alteration of the site and merely require notice and perhaps a BCA Amendment as contemplated by the statutory language.

  Moreover, for changes that do involve a physical alteration of the site, the regulations should clarify which substantive elements will be required in a work plan subject to Department approval. For example, our understanding is that the Department does not "approve" work plans related to issue such as asbestos or lead paint removal, demolition or support of excavation installation, but rather the Department is seeking to review and approve work plan elements such as the implementation of community

air monitoring, equipment decontamination procedures and other health and safety measures designed to prevent off-site impacts arising from the physical alteration.

- **§ 375-1.11(d)(3): Work Plans Required for Changes of Use After a Certificate of Completion ("COC") is Issued -** The proposal provides that after a COC is issued, a "Change of Use notice is not required if the person complies with the notification requirements of the Site Management Plan." We recommend that the work plan requirement should not apply to Track 1 COCs that do not have Site Management Plans, given that such sites pose no threat to human health or the environment.

  Separately, the existing regulation sets forth the entire procedure to follow when there is a change of ownership of a Site. The Department's own website confirms this procedure is the one to follow. *See* "Post Notification for Changes in Ownership" at https://dec.ny.gov/environmental-protection/site-cleanup/brownfield-and-state-superfund-programs/finalizing-remedial-projects/change-of-use-notifications. Notwithstanding the express language in § 375-1.11(d)(3) and the summary on the Department's website, the Department has been imposing an additional requirement for Brownfield Sites when there is nothing more than a change of ownership: the filing of a Request to Amend a Brownfield Cleanup Agreement. By requiring an amendment to the BCA for a change of ownership, the Department is disregarding its own established regulations, and doing so without following proper rulemaking procedure. Given the express provision in the existing regulation regarding change of ownership, there is no practical need (and perhaps no legal authority) to require a separate BCA amendment to cover that issue. The BCP statute requires including in the BCA a provision only describing the ***boundaries*** of the property (*see* ECL §27-1409[1]); there is no requirement to include a provision identifying the ***owner*** of the property. If it is not statutorily required to include the identity of the owner in the original BCA, there is no justification to amend the BCA when the owner of the property has changed.

- **§ 375-1.12(a)(1): Permit Exemptions/Terminology -** This proposal would extend the Department's authority to exempt the requirement to obtain certain State and local permits for "investigation and/or remediation of contamination on or emanating from a site which the department is handling." We note that the Department has sometimes used the phrase "migrating" rather than "emanating," and we suggest using the term "migrating" here.

6 NYCRR Subpart 375-2

- **§ 375-2.7(e)(4)(ii)(b)(2): Department May Delist a Site When Soil Vapor Intrusion Measures Are in Place -** We support this change to provide that a site may be delisted in certain circumstances even if there are engineering controls in place to address potential soil vapor intrusion.

- **§ 375-2.7(e)(1)(iv): Notifications Regarding the Delisting of a Site -** The proposal provides that notification of the reclassification of a site should be made to "local governments of jurisdiction" within ten days. The proposal should be revised to clarify who should provide this notice (e.g., the Department or responsible parties).
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6 NYCRR Subpart 375-3

- **§ 375-3.2(e): Definition of "Cover system or site cover" -** The addition of a hardscape cover definition was largely recommended by the Bar Association and is a positive amendment compared to the prior draft regulations at § 375-3.6(f), which had included an unworkable 1-2 foot cost equivalent of a soil formula to be calculated for any cover system, and which prevented any hardscape cover system from counting toward the site preparation tax credits in conflict with Tax Law § 21(b)(2), which contemplates that part of the cost of a foundation where required as a cover system should count as part of the site preparation tax credits. The Bar Association had further recommended a formula to take the guesswork out of what would be the thickness of the hardscape cover system that would count as remedial in nature, but this formula was not adopted. Essentially, based on the revised definition, it will now be up to the BCP party and its engineer of record to describe in the RAWP the required thickness of a hardscape remedial cover system as required by the local building code since the State building code only includes the minimum thickness for residential houses.

  However, we do recommend the following edits:

  - First, the phrase in clause (2), "where such component already exists or are a component of the redevelopment" should be eliminated. The reference to existing materials and to "the redevelopment" unnecessarily blur the distinction between the physical structures that serve the purpose of an engineering control (EC) and those that do not. Some hardscapes may become "a component of the redevelopment" while others, such as an asphalt or concrete surface, may precede or otherwise exist independently from any redevelopment project.

  - Second, the statement that the required thickness of hardscape systems "must otherwise meet" applicable building code appears to be intended to state what is already the law – i.e., that regardless of the thickness needed to serve the EC function, they must also meet building code. The phrasing may confuse readers into equating building code compliant thicknesses with EC requirements. We would suggest removing the reference to the building code to avoid such confusion. The reference to the building code in EELS' last set of regulatory comments was intended to advise the Department that even a residential home is required to have at least a one foot thick foundation.

- Third, the last sentence in clause (2) should be deleted because the description of any EC (including a site cover or cover system) is strictly within the environmental purview of NYSDEC and is not subject to any provision of the Tax Law. The relationship between this definition and the brownfield redevelopment tax credits described in section 21 of the tax law – and in particular, the definition of "site preparation costs" – lies in the fact that site preparation costs include eligible costs incurred by an applicant for remediation of a brownfield site after execution of a BCA, including, where applicable, the cost of site cover systems.

  The last sentence of Tax Law section 21(b)(2) provides simply that "[s]ite preparation costs shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site." The description of "hardscape cover systems" in clause (2) of this definition – and in particular the thickness required to serve an EC purpose – is an environmental determination, not a tax determination. Therefore, instead of asserting (incorrectly) the primacy of the Tax Law, the regulation should contain this cross-reference: "For the definition of "site preparation costs" used in the calculation of the brownfield redevelopment tax credit, see section 21(b)(2) of the New York Tax Law."

- Finally, and of critical importance to the implementation of this definition in practice, clause (2) should clarify that applicants should describe in an approved work plan any planned hardscape ECs and their composition, structure, and thickness(es) needed to serve the EC function to eliminate exposure pathways – a determination that necessarily must be based on site conditions. That clarification would ensure that applicants understand, through the RAWP and FER, the "cover system requirements in the regulations applicable to the qualified site" when they receive their COC and are calculating their site preparation costs under Tax Law section 21(b)(2).

- **§ 375-3.2(k): Definition of "PRP Search" -** The Department should withdraw the proposal to require applicants to conduct searches for potentially responsible parties ("PRPs") because the proposal contradicts ECL § 27-1405(2)(a). Additionally, 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. Further, applicants already submit information regarding historical owners and operators in connection with their applications to be accepted into the BCP.
  Additionally, we note that this proposal, along with proposed revisions to § 375-3.3(b)(2)(ii) and § 375-3.8(c)(5), make it unreasonably difficult and expensive for Volunteers to get Superfund sites admitted into the BCP. This is contrary to BCP policy to remediate such sites.

  If the Department insists on retaining this requirement, this section should be amended so that an applicant should be deemed to have satisfied this requirement by

performing a historical investigation in accordance with ASTM E1527 environmental site assessments.

- **§ 375-3.2(l): Definition of "Renewable energy facility site" -** The proposed definition mirrors the statutory definition, except it: (i) adds a requirement that the referenced uses are "a primary use" at a site; (ii) adds a requirement that "[s]uch facility shall be used primarily for energy generation"; and (iii) provides that the definition "shall not include real property that has a primary use for the production of fossil fuel-based energy."

  We support the first proposal, but we make an alternative suggestion. The Legislature added this definition to the statute so that remedial parties would receive enhanced tax credits for renewable energy projects under Tax Law § 21(a)(5)(B)(vi). The Legislature also added this definition so that remedial parties in New York City would have an additional way to obtain the tangible property credit component ("TPCCs") of the brownfield redevelopment tax credit pursuant to ECL § 27-1407(1-a)(e). The Legislature clearly intended to incentivize renewable energy projects throughout the State, and particularly in New York City. However, it is reasonable that in order to obtain tax credits for such projects, there should be a requirement that the referenced uses are "a primary use" at a site, and not just a minor use. Additionally, the proposed reference to "a primary use" implies that a site may have more than one primary use. That makes sense. As an alternative to the "primary use" proposal, it would be equally sensible for the Department not to require that renewable energy projects are a "primary use" at a site, and instead award TPCCs in proportion to the amount of a site that is used for such projects.
  We also support the third proposal. It is logical that the definition excludes sites at which the "production of fossil fuel-based energy" is a primary use. Allowing such sites to qualify for tax credits would undermine the Legislature's goal of incentivizing renewable energy sources, as opposed to fossil fuel-based energy sources, which emit greenhouse gases and contribute to climate change. Indeed New York State and New York City have very ambitious goals to increase the use of renewable energy sources, in order to combat the negative effects of climate change. *See* New York State Climate Leadership and Community Protection Act; New York City Climate Mobilization Act.

  We strongly disagree with the second proposal, which provides that "[s]uch facility shall be used primarily for energy generation". The preference for renewable energy generation over storage of such energy is contrary to the statute and to sound public policy. The statute defines a "Renewable energy facility site" as real property that is used "(a) . . . for a renewable energy system" "***or*** (b) any co-located system storing energy generated from such a renewable energy system". (Emphasis added.) The statute does not provide any preference for renewable energy generation over storage of such energy.

  There also is no logical basis for a preference of renewable energy generation over storage of such energy. Storage and generation both will be needed in order to meet

the State's and the City's ambitious climate goals. And in New York City, where there is little space for renewable solar and wind energy generation projects, storage will be essential, and the demand for storage is expected to increase significantly.

The Department's preference for renewable energy generation over storage appears to reflect a concern about an over-availability of TPCCs for renewable energy storage projects in New York City. However, that concern is misplaced for two reasons: (i) the Department's proposal already would restrict such tax credits to sites where a renewable energy project is a "primary" use. Thus, only significant energy storage projects would qualify for the tax incentive. Alternatively, as noted above, the Department could award TPCCs in proportion to the amount of a site that is used for renewable energy projects; and (ii) Under the statute and the Department's proposed regulation, an energy storage system qualifies for the tax incentive only if it is a "co-located system storing energy generated from such a renewable energy system" (i.e., storage must be paired with a renewable energy generating system). The Department's proposal could seriously undermine the Legislature's goals for renewable energy projects in New York City. The Department should withdraw its preference for renewable energy generation over storage.

- **§ 375-3.2(o): Definition of "Underutilized" -** 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. To align this definition to the legislative intent, we recommend that the Department revise the definition as proposed in EELS' BCP Extender and Omnibus Proposal, the relevant portion of which is attached hereto as Exhibit 1.

- **§ 375-3.3(a)(1): BCP Site Eligibility – Reference to Contamination On-Site -** The statutory definition of a brownfield site requires only that "*a contaminant* is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance . . ." ECL § 27-1405(2) (emphasis added). The Department's proposal would seem to require contamination site-wide with the use of the phrase "contamination on-site" as opposed to an area on the site where a contaminant is present. We recommend that the Department align the regulatory language with the statutory language.

- **§§ 375-3.3(a)(3)-(4): Eligibility for the BCP Based on an Investigation Report Showing a Site "Requires Remediation" -** The Department's proposal would require an investigation report to show 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, requires an investigation report to show only that a site "requires remediation in order to meet the remedial requirements of this title." The Department's proposal should be modified to track the applicable language of ECL § 27-1407(1).

The proposal appears to be an attempt to narrow the broad statutory definition of what constitutes a "Brownfield site", which only requires that "a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance". ECL § 27-1405(2). The proposal also appears to be an attempt to overturn the *Lighthouse Pointe* decision, wherein the Court of Appeals provided the Department with some discretion to deny an application into the BCP if there were only a few exceedances, but did not contain such narrowing language as propose in this regulation. *See In re: Lighthouse Pointe Prop. Assoc. LLC v. N.Y. State Dep't of Envtl. Conserv.*, 14 N.Y.3d 161 (2010). We recommend that these regulatory proposals, which would further narrow eligibility, be omitted.

- **§ 375-3.3(a)(5): Determining the Reasonably Anticipated Use of a Site -** The proposal sets forth a non-exhaustive list of five factors for determining eligibility based on the "reasonably anticipated use of the site." Pursuant to ECL § 27-1407(1), however, 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." Section 27-1415(i) in turn sets of forth a non-exhaustive list of sixteen factors for making this determination. The Department's proposal therefore should be revised to reflect Section 27-1407(1) and Section 27-1415.

- **§ 375-3.3(b)(2)(ii): Requiring BCP Applicants to Conduct PRP Searches -** See the comment above regarding § 375-3.2(k).

- **§ 375-3.3(b)(5): Adding Interim Status Facilities to the Categories of Eligible Brownfield Sites -** We support this proposal.

- **§ 375-3.3(f): Request for Determination of Eligibility for Tangible Property Tax Credits ("TPCCs") -** The proposal does not solve the Real Property Tax Law § 421-a problem, whereby TPCCs are available for an "[a]ffordable housing project" if an affordable housing regulatory agreement is submitted to the Department before a COC is issued, but such agreements are not finalized until after a project is constructed.

  The Department has created a "work around" for § 421-a sites, in which the Department will accept BCA amendment applications seeking TPCCs, provided the applicant submits an affidavit from an authorized representative attesting that the site is being developed and will be operated under the requirements of 421-a and other requirements are met. It is unclear from the Department's proposed § 375-3.3(f) if this "work around" process is intended to remain in place and if so, why the regulations do not simply codify the work-around process.

- **§ 375-3.4(b)(1): Date of Completeness of Applications for Class 2 and Other Sites -** We object to the proposal that an application would not be considered "complete" until the Department completes its PRP viability determination.

Brownfield projects are time-sensitive, and this proposed approach could cause undue delay, which in turn would delay the start of the public notice period. Instead, we propose that applications be deemed complete with submittal of PRP search results, if the Department requires applicants to conduct such searches.

- **§ 375-3.4(c)(3): Notification of Eligibility for TPCCs -** The Department's proposal does not make sense as written, since an application for TPCCs may occur independently of and later than the BCP application. We recommend that this proposal be modified so that it applies "when applicable".

- **§ 375-3.5(c)(4): Termination of Brownfield Cleanup Agreements -** As discussed above regarding proposed § 375-1.5(b)(6), this proposed regulation is *ultra vires* because ECL § 27-1409(5) only provides the Department with authority to terminate a brownfield cleanup agreement at any time during the implementation of such agreement if the applicant fails to *substantially comply* with such agreement's terms and conditions. As drafted, this provision would allow the Department to terminate a BCA for minor deviations from Department-approved work plans or for conducting other work that may have been conducted in accordance with the remedial program requirements, but, due to exigent or unknown conditions, could not feasibly have been added into an approved work plan. ECL § 27-1409(3) entitles applicants to a process for resolving disputes arising from the evaluation, analysis, and oversight of the implementation of a work plan. By eliminating the ability to participate in a dispute resolution process for minor work plan issues, the Department would deprive applicants of due process without an opportunity to cure. Therefore, this provision is a breach of the applicants' rights under the prescribed terms required in a BCA pursuant to ECL §§ 27-1409(3) and (5). Finally, this provision is vague and would provide the Department with so much unfettered discretion if it were to be adopted that it alone could discourage lenders from providing financing for brownfield transactions since the Department could eliminate the contractual agreement with the applicant based on acts of third parties such as their consultants or contractors. Minor deviations in the field occur every day during active remediation, which is the purpose of the existing required communication provisions, including daily reports of in-field activities. Therefore, there should be no legitimate reason to terminate a BCA if something unusual occurs or has to be implemented in the field, for instance as the result of an emergency.

- **§ 375-3.5(g): Brownfield Cleanup Agreements Fees/Waivers -** We support this proposal.

- **§ 375-3.8(b)(2)(i): Requirement for Volunteers to Perform Off-Site Quantitative Assessments -** This proposal would require Volunteers in some instances to conduct potentially significant off-site investigation and sampling activities. The proposal is inconsistent and therefore *ultra vires* with ECL § 27-1411(1), which provides that

Volunteers are required to perform only qualitative assessments off-site. *See also* ECL 27-1415(2)(b) (a qualitative exposure assessment may require only "[s]ome" off-site activities "to support the exposure assessment"). The proposal would undermine one of the fundamental protections afforded to Volunteers by the statute, namely minimal off-site obligations. *See* §§ 375-1.8(d)(1)(iii), 375-3.8(b)(2)(i), and 375-3.8(f)(4)(ii). 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 unless this is made clear in the regulatory language.

Moreover, for significant threat sites, ECL § 27-1411(5) clearly obligates the Department to investigate and remediate off-site contamination if it cannot compel responsible parties to do so. The Department also has the authority, which private parties lack, to gain access to off-site areas. It is time-consuming for private parties to attempt to gain access to off-site areas, and owners of such areas generally reject such requests. All of the foregoing could unnecessarily delay the Volunteer's project. We recommend the Department omit this proposal.

- **§ 375-3.8(c)(2): Standard for Participants Addressing Contamination Migrating Off-Site -** The Department's proposal provides that a BCP Participant must implement an off-site remedy in order to, "at a minimum, address exposures related to site contamination to allow for residential use of the property unless the use of the property is limited to a more restrictive use (e.g. commercial or industrial)." It is unclear if this proposal would require Participants to address off-site soil vapor intrusion. The term "exposure" is not defined, nor is the phrase "address exposures". Moreover, the Department refers to "environmental exposures" in § 375-1.8(d)(2)(ii)(c). The Department should use one consistent and defined term. In particular, it is not clear if the proposal could require a Participant to implement an engineering control at an off-site property.

  We recommend that the Department either withdraw the proposal or clarify Participants' obligations.

- **§ 375-3.8(c)(5): Feasibility Studies Required for Class 2 Sites -** We object to this proposal because it is inconsistent with ECL § 27-1413(4), which provides that for significant threat (Class 2) sites, the Department "shall select the remedy from a department-approved alternatives analysis". Requiring feasibility studies would add substantial costs and delays for BCP projects and would only serve to further discourage the redevelopment of these sites.

  A Volunteer is entitled to bring a Class 2 site into the BCP as a "Brownfield Site" pursuant to ECL § 27-1405(2)(a). However, this proposed regulation appears to be designed to continue to treat a Superfund Site admitted into the BCP as if it remained a Class 2 site in the Superfund program. For Class 2 sites admitted into the BCP before a remedy has been selected, this new provision states "the remedy will be selected by the department in accordance with section 375-2.8(e) of this Part." If a

Volunteer has decided to bring a Class 2 site into the BCP, it should be entitled to utilize the BCP process instead of the more onerous and time-consuming Superfund process in section 375-2.8(e). In addition, a Volunteer bringing a Class 2 site into the BCP is likely planning a project for the site, and the Volunteer should have some ability to select a remedy consistent with the proposed project pursuant to the BCP remedy selection process. In contrast, the Superfund process is not driven by project-based remedies. While the Department does have the final remedy selection authority for significant threat sites in the BCP pursuant to ECL§ 27-1413(4), it is unclear why the Superfund process must be utilized.

To the extent there is a concern that, in the event a Class 2 site leaves the BCP and returns to the Superfund program a Feasibility Study would need to be drafted to support the selected remedy, that would have been required had the site never entered the BCP, and it would have been the responsibility of the potentially responsible party and/or the Department regardless. The Department and/or the potentially responsible party would have benefited from the work undertaken by the BCP Volunteer regardless of whether the site made it through remedy implementation. A BCP Volunteer should not be treated as a Superfund potentially responsible party simply because of the potential for the site to transition back to the Superfund program.

- **§ 375-3.8(e)(1)(iii): Elimination of Conditional Track 1 Remedies -** Elimination of conditional Track 1 remedies is inconsistent with ECL § 27-1415(4) 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 remedy, some residual groundwater contamination may remain, and allowed for long term groundwater engineering controls to be in place. The reason for this is that it is extremely difficult to achieve New York State drinking water standards in an urban environment, and the Legislature wanted to encourage parties to achieve Track 1 soil cleanups to eliminate the sources of groundwater contamination.

  The Department's proposal would eviscerate 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".

  DEC's proposed language converts a valid Track 1 remedy into a Track 2 remedy if there is any residual groundwater contamination, which will discourage the implementation of Track 1 remedies and is contrary to the overall intent of the program to achieve a permanent remedy as stated in ECL § 27-1403. Instead, 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. Moreover, there is no mechanism in the Tax Law 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. The Tax Law would have to be amended to accommodate this regulation, and there is no guarantee that a statutory amendment can be accomplished. The Department of Tax and Finance can claw back credits far more easily under the current conditional Track 1 approach than it can retroactively authorize additional tax credits, since it does not currently have this statutory authority. 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.

At a minimum, the Department's proposed regulation should have a phase-in period so that it does not apply to sites that have already been accepted into the BCP and for which remedial parties are implementing (or about to implement) conditional Track 1 remedial programs. The remedial parties at such sites have made significant investments in their respective projects. They are implementing remedies pursuant to Decision Documents issued by the Department and Work Plans approved by the Department. The Department's proposal, if enacted, could cause such parties to suffer significant and unjustified economic harm.
Additionally, the proposal provides that in order to obtain a Track 1 cleanup, there must be a "bulk reduction in groundwater contamination to asymptotic levels *at the time the certificate of completion is issued*." (Emphasis added.) That is not consistent with the statute, which does not require achievement of the final groundwater remedy when the COC is issued and which does not include a timeframe in which to achieve the groundwater remedial goals. *See* ECL § 27-1415(4).

Further, proposed § 375-3.8(e)(1)(iii)(c) provides that a conditional Track 1 cleanup cannot be obtained if there are institutional or engineering controls being used to achieve remedial objectives for soil vapor. This proposal also is inconsistent with ECL § 27-1415(4). In an urban environment in a brownfield neighborhood, a party who has implemented a Track 1 soil and groundwater remedy should not lose a Track 1 cleanup because of off-site area-wide soil vapor. To the extent that soil vapor remedial objectives are being added to the Department's regulations, if contaminated vapor is emanating onto the site from an off-site source, there should be a carve-out and the party who has otherwise achieved a Track 1 cleanup should be able to keep their Track 1 status even if on-site vapor mitigation is required to address an off-site source of vapors impacting the site.

In addition, since the overall intent of the BCP program is to achieve a permanent remedy as stated in ECL § 27-1403, as noted above 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.

To address the concerns raised here, the Department may want to adopt a media-based approach for determining Track 1 status much like the operable unit (OU) approach frequently employed in the federal and State Superfund approach. Under the Superfund programs, sites are often broken into OUs based on media. Applying this approach to the BCP, if a soil cleanup achieves the Track 1 SCOs, the applicant would be able to qualify for Track 1 site preparation tax credit (i.e., 50%) for soil remediation but qualify for a different cleanup track for groundwater-related or soil vapor-related costs.

- **§ 375-3.8(e)(2): Changes to Track 2 Cleanup Requirements -** A party currently has to demonstrate achievement of a Track 2 cleanup at 15 feet below the surface or bedrock, whichever is shallower, of the restricted residential, commercial, or industrial cleanup standards, or the Protection of Groundwater or Ecological Resources as applicable. Under the proposed regulations, for all Track 2 cleanups other than Residential, if the remaining contamination at 15 feet exceeds the protection of groundwater standards and the party is implementing a groundwater remedy, the Department can exercise its discretion to allow the party to achieve Track 2.

  The statutory definition of a Track 2 cleanup does not have a depth limit. *See* ECL § 27-1415(4). We support this proposal as being consistent with the statute.

- **§ 375-3.8(f)(4)(ii): Efforts by Volunteers to Address Off-Site Contamination -** Consistent with our comment above regarding proposed § 375-1.8(d)(1)(iii), this proposal should be revised to omit the words "at the site boundary" in the first sentence. Additionally, the proposal should be revised to clarify that a Volunteer need not prevent soil vapor emanating beyond the edge of a plume and that the Volunteer's efforts should be addressed to the plume itself.

  Further, consistent with § 375-1.8(d)(1)(iii), this proposal should be revised to replace the phrase "any plume" with the phrase "any site-related plume".

6 NYCRR Subpart 375-6

- **§ 375-6.8: Revised Soil Cleanup Objectives -** The Department's Regulatory Impact Statement indicates that after a rural background study regarding PFOA/PFOS "is completed and other data are analyzed, DEC *will* add SCOs for PFOA/PFOS." Regulatory Impact Statement at 5 (emphasis added).

  We disagree with the proposed inclusion of SCOs for PFOA/PFOS. PFOA and PFOS are ubiquitous, and background levels sometimes exceed regulatory limits. Additionally, scientific understanding about the fate and transport of PFOA and PFOS is still developing. However, the primary exposure routes for PFOA and PFOS appear to be drinking water. Given this context, PFOA and PFOS at many sites may not pose any threat to human health or the environment. Accordingly, it makes little

sense to have inflexible SCOs for PFOA and PFOS. At a minimum, the Department should include a footnote emphasizing that the Department retains discretion (pursuant to § 375-6.5(a)(1) or other authorities) to set site-specific SCOs for PFOA and PFOS.

While the Regulatory Impact Statement that accompanies the regulations states: "[c]hanges to SCOs will only apply to sites that do not have a remedy selected as of the adoption date of the revised regulations" the regulations themselves do not include a provision regarding how the new SCOs will be applied to current sites, leaving uncertainty that the Department will implement the new SCOs consistently across Regions and Project Managers. We respectfully suggest that any new SCOs become effective one year after final regulations are promulgated so that all remedial parties can effectively plan for the changes.

CONCLUSION

We thank the Department for the opportunity to comment on these proposed regulations.

EJ COMMITTEE NEWSLETTER

NEW YORK STATE BAR ASSOCIATION

May 2024

EVENTS & MEETINGS

- **May 15, 2024 | 2:00PM EST – Virtual**
  EJ Siting Law Informational Session - NYS Department of Environmental Conservation
  Register here

- **May 16, 2024 | 4:00PM EST – Virtual**
  EJ Siting Law Informational Session - NYS Department of Environmental Conservation
  Register here

- **May 16, 2024 | 12:30PM EST - Virtual**
  EJ Committee Meeting

- **May 28, 2024 | 12:00PM EST -Virtual**
  PFAS Briefing: State Consumer Product Regulations – Environmental Law Institute
  Register here

LEGISLATION & REGULATION

- The U.S. EPA has issued the first nationwide legally enforceable limits on harmful per-polyfluoroalkyl substances (PFAS) or "forever chemicals" in drinking water. The new drinking water standard sets maximum contaminant levels (MCL) at 4.0 ppt (parts per trillion) for perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) and includes limits on four additional compounds. The U.S. EPA has also finalized regulations designating PFOA and PFOS as hazardous substances under CERCLA (the federal Superfund law). The new Superfund regulations will enable the investigation of these harmful chemicals to ensure that leaks and spills are reported and that polluters cleanup their contamination in affected communities across the country.

"We need to involve communities earlier on, really listen to what they need, and engage in good faith… They speak for themselves. They are the experts."
– Catherine Coleman Flowers

Green Lakes State Park - Onondaga County, New York

DID YOU KNOW?

- **IT'S THE FIRST ANNIVERSARY OF OUR EJ COMMITTEE NEWSLETTER!** We thank our EJ Committee members and the Environmental & Energy Law Section (EELS) for their support and contributions to our monthly editions. We look forward to continue bringing environmental justice awareness, knowledge, and potential solutions for years to come.

- The NYS Department of Environmental Conservation (DEC) is seeking stakeholder input on ECL §70-0118 - Disproportionate impacts on disadvantaged communities - to develop regulations that will implement the Environmental Justice Siting Law. As this requires rulemaking for SEQRA (Part 617) and UPA (Part 621), and new regulations related to disproportionate burden analyses, DEC is hosting informational sessions on May 15th and May 16th (registration links in "Events" section above).

- On April 29, 2024, the New York State government announced a new round of Environmental Justice Community Impact Grants. A total of $7.34 million is now available to support community-based organization projects that address environmental and public health concerns of residents in impacted neighborhoods - up to $100,000 per applicant. The deadline to submit applications is **August 7, 2024**.

- On April 5, 2024, the NYC Mayor's Office of Climate and Environmental Justice (MOCEJ) officially released the EJNYC Report and the EJNYC Mapping Tool. In collaboration with the NYC EJ Advisory Board, these are part of the efforts to advance environmental justice in NYC, as required by Local Laws 60 and 64 of 2017. A critical next step is developing a comprehensive EJNYC Plan to guide the implementation of initiatives and policies to translate these efforts into transformative action in disadvantaged communities.

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