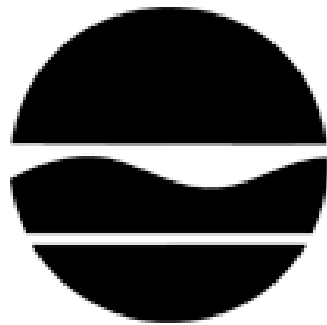

Division of Environmental Remediation

DRAFT
BROWNFIELD CLEANUP
PROGRAM
GUIDE



May 2004

New York State Department of Environmental Conservation

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INTRODUCTION: PURPOSE AND GOALS OF THE PROGRAM

New York State established the Brownfield Cleanup Program (BCP) to address the environmental, legal, and financial barriers that often hinder the redevelopment and reuse of contaminated properties. The BCP is set forth in Title 14 of Article 27 of the New York State Environmental Conservation Law. The program is intended to “encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment.”

“There are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden. These sites, known as brownfields, are also contributing to sprawl development and loss of open space. This program is designed to advance the policy of the State of New York to conserve, improve, and protect its natural resources and environment and control water, land and air pollution in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being.” ECL § 27-1403

Recognizing the economic, as well as the environmental, promise of this program, Governor Pataki proclaimed that the 2003 Superfund/Brownfield law is the greatest piece of economic and environmental legislation in decades.

“This is an historic day for New York State, and it is with great pleasure that I sign this bill. The programs and initiatives contained in this legislation illustrate the direct link between environmental health and fiscal stability. With a restored State Superfund and a new Brownfields program, we are able to further our mission of improving the quality of life for all New Yorkers. This measure allows municipalities across the state to take advantage of opportunities for redevelopment, job creation, and overall economic growth while protecting public health by removing contamination from communities.”

-Governor Pataki, October 7, 2003

Given the nature of many real estate transactions, timing is important. In order to provide greater certainty relative to timing, the law provides for the Department of Environmental Conservation (Department) to use its best efforts to meet certain time frames for reviews and approvals. The Department, in concert with our partners, will make every effort to meet these time frames.

In addition, this guidance also identifies several alternative approaches an Applicant may elect, which can accelerate a project by concurrent submittal of documents, thereby allowing concurrent public notices to be issued. This approach necessitates close coordination between the Department project team and the Applicant. The first opportunity is during the application process, when the remedial investigation work plan can be submitted and if substantially complete, the public notice for the work plan and the application can be combined, this is discussed in section 2.7. Another opportunity occurs when the Remedial Investigation is complete, at which time the Applicant may elect to submit the Remedial Investigation Report, Alternatives Analysis Report and Remedial Work Plan together, again allowing concurrent reviews and public notice, this is discussed in section 4.1.3. Finally, given the wide range of

projects of varying complexities and scope four scenarios for developing the Remedial Work Plan are presented in section 4.2.

The BCP codifies in many respects the Department's existing administrative Voluntary Cleanup Program. The goal under the BCP is to remediate the site to a level that is protective of public health and the environment; taking into account the current, intended, and reasonably anticipated future use of the site. A remedial program that achieves a permanent cleanup of a contaminated site is to be preferred over a remedial program that does not do so. Technical guidance and requirements for completing investigation and the remediation of contaminated sites in all of the Division of Environmental Remediation (DER) programs, including the BCP, are described in the guidance document "DER Technical Guidance Document for Site Investigation and Remediation," also referred to as DER-10. This document is presently available on the DER website as a draft, but is expected to be issued as a final guidance later this summer.

Administrative procedures and requirements specific to the BCP, that are not otherwise covered in the DER-10 are addressed in this guidance document. Notable among these procedures is the issuance of a Certificate of Completion. This Certificate entitles the Applicant to significant tax credits and an environmental liability limitation, subject to re-openers. The liability limitation is binding upon the State for any liability including future liability or claim for further remediation of hazardous waste and/or petroleum at or emanating from the brownfield site that was subject to the brownfield site cleanup agreement.

Primary responsibility for managing the BCP is with the Division of Environmental Remediation (DER). In implementing this program, the DER partners with many other Divisions within the Department, including:

Division of Fish, Wildlife and Marine Resources, the Division is responsible for determining the impacts to and remedial actions needed relative to the fish, wildlife and marine resources of the State;

Division of Public Affairs and Education, the Division assists with the outreach efforts for the program as well as the citizen participation activities on a site specific basis.

In addition, many State Agencies assist in the implementation of this program, including:

New York State Department of Health (NYSDOH), the agency which is responsible for determining that work completed under the BCP is protective of public health and appropriate for the current, intended and reasonably anticipated future use of the property;

New York State Insurance Department, the entity which is charged with identifying insurance products which are eligible for tax credits under the BCP;

Empire State Development Authority (ESD), the entity which is charged with identifying the Environmental Zones, or En-Zones, under the law. ESD also works closely with the Department relative to redevelopment/reuse projects.

New York State Department of Taxation and Finance (DT&F), which agency is charged with implementing the tax credits component of this program.

Project Managers, from both the DER Regional and Central Office, assigned for the sites serve as the main contacts for Applicants and the public. Additionally, Central Office staff are responsible for providing guidance and oversight to promote statewide consistency in the program. Information regarding various aspects of the program can be obtained from the DER contacts listed on the DER website <http://www.dec.state.ny.us/website/der> . A list of defined terms relative to the BCP used in this document is also included in Appendix 1.

SECTION 1 PRE-APPLICATION

1. The Department strongly encourages all applicants to schedule a pre-application meeting with Department staff to review the benefits, requirements, and procedures for completing a project in the BCP. Holding pre-application meetings helps projects to be completed more quickly and efficiently.

A. It is recommended that attendees at this meeting include the potential Applicant, the Applicant's consultant and counsel, as well as the Department Project Manager, Project Supervisor, Project Attorney, and a representative of the NYSDOH.

B. The following topics should be covered at this meeting:

- Overview of BCP - general description and typical time frames
- Application/Agreement Process
- Investigation Work Plan, Field Work, and Reporting
- Remedy Selection
- Remedial Action
- Certificate of Completion
- Liability Limitation
- Tax Credits
- Citizen Participation

C. The following handouts should be provided:

- BCP Handbook
- Citizen Participation Handbook
- Fact Sheets
- BCP Application
- BCP Agreement
- Investigation Scoping Checklist
- Technical Guidance for Site Investigation and Remediation (DER-10)

2. If an Applicant is interested in speeding the progress of their investigation or remediation project, the proposed work plan should be discussed at the pre-application meeting, and if necessary at a subsequent work plan scoping/development meeting(s).

A. Based upon the progress at these pre-application workplan meetings, the work plan, if received with the application, may be sent out with the application for concurrent public comment.

B. The pre-application development of the workplan and concurrent public comment period is discussed in more detail in Section 2 of this guidance. This is the first of several methods which will be identified throughout this document of speeding up a project by coordinating review periods, through the early involvement of the Department in the development of a work plan or report.

SECTION 2 APPLICATION AND AGREEMENT PROCESS

2.1 Eligibility

1. **Eligible Sites:** An eligible property is any real property, except those in one of the categories identified in 2. below, where the redevelopment or reuse of the property may be complicated by the presence or potential presence of a hazardous waste, petroleum or other contaminant.

2. **Ineligible Sites:** Real property in any of the following categories, are considered ineligible for the BCP program:

A. Sites listed in the Registry of Inactive Hazardous Waste Disposal Sites as Class 1 or 2. (Class 2 sites that are addressed by a Volunteer may enter the BCP through 7/1/05);

B. Sites on the United States Environmental Protection Agency (USEPA) National Priorities List (NPL). A listing of NPL sites can be found on the USEPA website at <http://www.epa.gov/superfund/sites>;

C. Hazardous waste treatment, storage, or disposal facilities (TSDF) permitted under ECL §§27-0901 (Interim status facilities and small quantity generators are eligible);

D. Sites currently subject to an order or stipulation for cleanup pursuant to:

- i. Article 12 of the Navigation Law, or
- ii. Title 10 of Article 17 - Control of Petroleum Bulk Storage;

E. Sites that are currently subject to a Department or USEPA enforcement action regarding solid waste, hazardous waste or petroleum. For this purpose, an “enforcement action” commences against a party:

- i. Under State law: upon issuance of a notification of violation or upon commencement of enforcement under ECL, Article 71 or upon issuance of an accusatory instrument under the Criminal Procedure law;
- ii. Under federal law: upon issuance of any notification pursuant to federal law that commences an administrative or judicial proceeding seeking to require the removal or remediation of hazardous substances.

3. The absence of an identified “reuse” or “redevelopment” project for the site will not preclude eligibility for the BCP.

2.2 Eligible Parties

1. All parties are eligible for the BCP, EXCEPT:

- A. Those subject to a State/federal enforcement action regarding the site; or
- B. Those subject to an outstanding claim by the Spill Fund at the project site.

2. Questions regarding eligibility should be directed to the Department Project Attorney.

2.3 Reasons to Deny a Request

1. The Department may deny a request to participate in the BCP if the public interest would not be served by granting the request. The Department will consider the following factors in determining if the public interest would not be served:

A. The party has been determined in an administrative, civil or criminal proceeding to have violated ECL Article 27 (collection, treatment and disposal of refuse and other solid waste);

B. The party has previously been denied entry into the BCP;

C. The party has been found in a civil proceeding to have committed a negligent act, or has been convicted in a criminal proceeding of a criminal act involving the handling, storing, treating, disposing or transporting hazardous waste or petroleum;

D. The party has been convicted of a criminal offense under the laws of any State or of the United States which involves a violent felony offense, fraud, bribery, perjury, theft, or an offense against public administration;

E. The party has in any matter within the jurisdiction of the Department knowingly falsified or concealed a material fact or knowingly submitted a false statement or made use of or made a false statement on or in connection with any document or application submitted to the Department; or,

F. The party is an individual who had a substantial interest in any corporation, partnership, association or organization which committed an act or failed to act, and such act or failure to act could be the basis for the rejection of an application under this program.

2.4 Applicant Status

1. The BCP includes two categories of Applicants, **Participant** or **Volunteer**, defined as follows:

A. A **Participant** is the traditional Potentially Responsible Party (PRP), except where liability is the result of ownership or operation after the discharge/disposal.

B. A **Volunteer** is a party who is:

- i. Not liable under law (a non-PRP); or,
- ii. A party whose liability is the result of ownership or operation after the discharge/disposal, often referred to as an “innocent owner.” To qualify as a Volunteer, a party must have exercised “Appropriate Care” relative to the contamination at or emanating from the site at the time of application.

- C. The Volunteer demonstrates appropriate care by having taken reasonable steps to:
 - i. Stop any continuing release;
 - ii. Prevent any threatened future release; and
 - iii. Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous wastes.

2.5 Applications to the BCP

1. Applications must be complete and site-specific. Applications are to be submitted as follows:

A. Three paper copies with all of the accompanying attachments, including one with original signatures, should be submitted to:

Chief, Site Control Section
New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, NY 12233-7020

B. One copy of the application (original signature) with all of the accompanying attachments, should be submitted to the appropriate Department Regional Contact (RC).

C. Applicants are encouraged to submit one electronic copy of the application, at a minimum, and as many of the attachments as possible.

2. In addition to eligibility information, site history, and environmental data/reports, the application requires information regarding the current, intended and reasonably anticipated future land use.

A. This information consists of responses to the 15 factors to be considered relative to the "Land Use" criterion. These factors are listed in Appendix 2.

B. Any public comment relative to these factors, will be considered by the Department after the close of the public comment period.

C. An important note is that if the proposed use does not conform with the applicable zoning laws or maps, the Department must disapprove the use.

D. This land use information will be used by the Department, in addition to all other relevant information, to determine whether the proposed use is consistent with the currently identified, intended and reasonably anticipated future land use of the site at this stage. Further this finding is subject to information regarding contamination at the site or other information which could result in the need for a change in this determination being borne out during the remedial investigation.

E. The Department will again consider each of the factors identified in Appendix 2 at

the remedy selection stage to ensure that the information in the application was correct, e.g. that no new information has come to light, such as there are residences next door where the Applicant indicated otherwise on the application.

F. For many projects, this land use information is similar to the information set forth in the SEQRA documentation, Business Plan/Prospectus and /or Phase I Environmental Study. In this regard, it may be helpful for parties to time the BCP application with the commencement of the SEQRA process or other milestones.

3. The BCP Application Form and a list of the Regional Contacts is available on the DER website.

4. To be considered complete the application must also include the Brownfield Site Contact List (BSCL).

A. The Brownfield Site Contact List must include, at a minimum, the names and addresses of the following:

- The chief executive officer and zoning board chairperson of each county, city, town and village in which the Site is located.
- Residents, owners, and occupants of the site and properties adjacent to the site.
- The public water supplier which services the area in which the site is located.
- Any person who has requested to be placed on the site contact list.
- The administrator of any school or day care facility located on or near the site.

B. This list can expand, as necessary and appropriate, to include additional interested stakeholders over the life of the project.

5. At the time of application, the Applicant must also identify a document repository. The document repository is a place where interested parties can conveniently review the project work plans (e.g., a local library). The repository is to be established before the first day of the public notice period on the application.

2.6 Determination of Complete Application

1. The first step in the application review and approval process is an initial evaluation to determine if the application is complete, in other words, whether all the items on the checklist, available on the DER BCP website, are included in the submitted application.

2. The Department will also notify the Administrator of the New York Environmental Protection and Spill Compensation Fund (the Oil Spill Fund) upon receipt of the application to determine if there is an outstanding claim against the party requesting participation. The Administrator of the fund will notify the Applicant and the Department of any outstanding claim.

3. A notification to the party applying will be sent within 10 days of receiving the application, indicating whether such application is complete or incomplete.

4. If the application is found to be incomplete:
 - A. The notification to the party will identify the additional information to be submitted; and,
 - B. The party may resubmit the application with the items identified in the incomplete application determination letter and request a new determination.
5. If the application is determined to be complete:
 - A. The Department will provide notice to the party of this determination;
 - B. Provide copies of the model citizen participation notices to the party; and ,
 - C. Instruct the party submitting the application to:
 - i. Publish the required newspaper notice;
 - ii. Provide the required notice to the Brownfield Site Contact List; and,
 - iii. Provide to the Department a certification of mailing and a copy of the proof of publication receipt within 10 days of the mailing/publication evidencing compliance with the CP requirements.
6. The Department will send a notice of the application to the Environmental Notice Bulletin (ENB).
 - A. A 30 day public comment period will start on the ENB publication date..
 - B. It should be noted that if the required newspaper notice or notice to the Brownfield Site Contact List is not made timely, the 30 day comment period will be extended to the latest date necessary to provide a full 30 day public comment period. Thus, Department staff and the party should pay close attention to the time frames.

2.7 Submittal of a Draft Remedial Investigation Work Plan with the Application

1. As discussed in section 1 of this guidance, relative to pre-application meetings, if the party has elected to begin development of the work plan prior to the submittal of the application, the draft remedial investigation work plan and a Department approved Fact Sheet may, after a preliminary review by the Department, be sent out for public comment concurrent with the application.
2. In so doing, the Applicant must recognize that if the work plan is changed significantly by a more detailed review of the work plan such that the final proposed work plan is not generally consistent with the draft that was publicly noticed, a second public comment period may be needed.
3. It must be noted that if a draft Remedial Work Plan is submitted at this time, the public

comment period will be 45 days (See Section 4).

2.8 Application Approval/Disapproval

1. The Department must use best efforts to notify the party requesting participation whether the application has been accepted or rejected within 45 days of receipt of a complete application or 15 days after the close of the public comment period. Items which could require additional submittals or disapproval of an application include, but are not limited to, the following:

A. If the application does not contain a clear and sufficient definition of the “brownfield site,” the Department may request the following additional information:

i. The tax map identifiers, site latitude and longitude, a site location map, and a site plan drawing required by the application.

ii. A survey with metes and bounds, may be needed in cases where the boundaries of the site cannot be clearly defined with the above information.

iii. It should also be noted that if during the course of the project, the definition of the site boundaries changes, the Project Attorney should be timely notified of the changes in the boundaries to ensure that the final definition of the site used in the Certificate of Completion is accurate.

B. If the Department determines the site or the party is subject to any enforcement action that could disqualify it from the program

C. The site is identified as ineligible pursuant to section 2.1, (e.g., Registry status, federal enforcement actions etc.).

2. The Department will consider all the comments on the application, including public comments. No formal responsiveness summary to the public comments will be prepared.

3. The Department will send an approval/disapproval letter to the party in the time frame set forth in 1. above. If the application is:

A. Approved, three originals of a Brownfield Cleanup Agreement (BCA) should be enclosed with the approval letter for execution on behalf of the Applicant. If more than one Applicant is subject to the BCA, additional originals should be executed.

B. Denied, the Department will include with the disapproval letter sufficient explanation relative to the Department’s rationale for denying the application.

2.9 Brownfield Cleanup Agreement

1. A Brownfield Cleanup Agreement (BCA) is required for all parties who wish to participate in the Brownfield Cleanup Program (§27-1409). The BCA is a standardized document, with one version for a Participant and one for a Volunteer. The model BCA is available on the DER website.

2. The BCA is executed as follows:

A. The Applicant signs the originals of the BCA and returns them to the Department's Project Attorney;

B. The agreements are then signed by the DER Division Director. The effective date of the agreement is the date signed by the Division Director; and,

C. The Department returns one or more fully executed agreements to the Applicant.

3. The BCA may be terminated by either the Applicant or the Department.

A. The Applicant may terminate the BCA at any time by providing written notification to the Department in accordance with the conditions and requirements provided for in the BCA .

B. The Department terminate a BCA, if any of the following occur:

i. The Applicant has stopped work;

ii. The Applicant is otherwise not in compliance with the requirements of the BCA;

or,

iii. For good cause.

C. If a BCA is terminated any deferral of Registry listing ends and an appropriate site classification may be assigned by the Department.

2.10 Citizen Participation Plans

1. Within twenty (20) days after the effective date of the BCA, the Applicant is required to submit a written citizen participation plan that, at a minimum:

A. Updates the names and addresses of the interested public set forth on the brownfield site contact list provided with the application;

B. Identifies major issues of public concern related to the BCP site;

C. Includes a description of citizen participation activities already performed;

D. Identifies document repositories for the project; and

E. Includes a description and schedule of public participation activities that are either specifically required by law or are needed to address public concerns related to the site.

3. The Department will review the CP Plan and will approve, reject or modify the document. The Department's and Applicant's responsibilities for responding are described in section 6.1 of this guidance.

2. No work plans, such as the Remedial Investigation Work Plan, can be approved until the CP Plan is approved by the Department.

SECTION 3 REMEDIAL INVESTIGATION WORK PLAN

3.1 Requirements

1. The remedial investigation work plan should be developed consistent with Section 3.3 of DER-10, which is the guidance for work plan development. The work plan should provide for a systematic investigation, including all appropriate media, as detailed in Sections 3.5 to 3.9 of DER-10. In developing a work plan the Applicant should be aware that:

A. The data requirements are site-specific and will be dependent upon many factors including site history, geology, hydrogeology, topography, existence of structures, contaminant type and volume, methods of waste disposal, and past remedial actions.

B. The data collected for some sites may indicate actual or potential threats to fish and wildlife resources, in which case Section 3.10 of DER-10 will apply and the work Plan must include sufficient investigation for an evaluation of these impacts.

C. DER encourages the use of innovative approaches to site remedial investigations, which accomplish the program goals. Applicants should refer to the DER web site for information on new approaches (e.g. the TRIAD approach).

D. The RI work plan developed by:

- i. a Participant is required to address the nature and extent of contamination both on and off the BCP site; and
- ii. a Volunteer is required to address the nature and extent of on-site contamination and conduct sufficient investigation to conduct an on and off-site qualitative exposure assessment. The Department is required to pursue PRPs to address the off-site contamination if there is a significant threat. In the event no viable PRPs are found, the Department is obligated to address off-site contamination using State funds. It is important to note that the Department is not required to, so long as the Applicant is in compliance with the BCA, list the BCP site on the Registry of Inactive Hazardous Waste Disposal Sites in order to access funding for off-site actions.

2. The applicant must submit five copies of the work plan(s), unless otherwise specified in the BCA, as follows:

- A. Three copies to the Department; and,
- b. Two copies to the DOH Project Manager. .

3. The applicant must submit a draft Remedial Investigation Work Plan Fact Sheet with the work plan

4. As discussed in section 2.1 of this guidance, in the case of simple and straight-forward projects, where pre-application meetings have been held and the Department has been involved in the development of the work plan, an Applicant may submit a draft work plan with the BCP

application:

A. In which case, after a minimal review as part of the determination if the application is complete, the work plan may be noticed along with the application.

B. This concurrent notice and comment period will allow for the consolidation of two public participation points, thus expediting the project.

5. Final work plans must be approved by the Department with concurrence of the NYSDOH. Generally, no investigative work should commence until Department approval of the work plan is obtained

6. The Department is required to make best efforts to approve, modify or reject a proposed work plan within 45 days of receipt or within 15 days of the close of the public comment period on that work plan.

A. Best efforts recognizes that although meeting the designated time frames is not guaranteed, a good faith effort must be made to achieve this goal.

B. If the Department cannot meet a time frame, the Department will notify the Applicant prior to the completion of the review period and provide an estimate of when the review will be completed.

3.2 Goals of the Remedial Investigation

1. The goals of a remedial investigation under the BCP include, but are not limited, to the following:

A. Defining the nature and extent of contamination;

B. Identifying contaminant source areas; and,

C. Producing data of sufficient quantity and quality to support the development of an acceptable Remedial Work Plan.

3.3 Remedial Investigation Work Plan Contents

1. In general, the final Remedial Investigation Work Plan should be consistent with Section 3.3 (d) of DER-10, and include the following sections:

- Introduction and Purpose
- Site History and Description
- Objectives, Scope (including Exposure Assessment), and Rationale
- Field Activities Plan
- QA/QC Plan
- Health and Safety Plans

- Reporting and Schedule
- Citizen Participation Activities

2. The Applicant should review the Consistency Review Checklist regarding the contents of the Remedial Investigation Work Plan to ensure that all the items have been addressed, prior to submittal of a work plan to the Department. The checklist is available on the DER website.

3.4 Previous Investigations and Evaluations

1. Often, an Applicant has performed some investigation at the site before participating in the BCP. For the Department to accept work generated without Department oversight, the Applicant must show that the results are representative, valid and useable:

A. For analytical data, this is best shown through the submittal of validation reports or Data Usability Summary Reports (DUSRs), the requirements for which are found in Appendix 2B of DER-10.

B. Other technical data may be considered under the BCP dependent upon many site-related factors, notably compliance with the guidance in DER-10, and is determined by the Department.

2. Survey data used to define site boundaries and features or to provide data used for interpreting groundwater conditions must also be shown to be reliable. For site boundaries, this may only be achieved through the submittal of a survey performed and certification by a New York State licensed and registered land surveyor.

3. The Department may require that any interpretive reports prepared before the effective date of the BCA and submitted in support of the project, have been prepared by individuals or firms as detailed in Section 1.5 of DER-10.

3.5 Source Areas

1. A major focus of the RI work plan should be the identification of source areas which may be present at the BCP site.

2. Source areas are portions of a site where highly contaminated media, which have the potential to release significant levels of contaminants to the environment. Highly contaminated media includes, but is not limited to:

A. Soil and/or groundwater where free product is present;

B. Concentrated solid or semi-solid hazardous substances;

C. Dense non-aqueous phase liquid (DNAPL) or light non-aqueous phase liquid (LNAPL); or,

D. Grossly contaminated soil or sediment.

3. To identify source areas, the remedial investigation should focus on:

A. A careful review of the site record and history including any chemical or industrial processes performed, waste disposal practices, drainage structures, chemical storage units, and on-site investigations, as detailed in Appendix 3A of DER-10 (Record search requirements); and,

B. Areas of concern identified in Section 1.8 of DER-10 should be included in the investigation scope.

4. The nature and extent of each source area should be carefully defined so that appropriate remedial technologies can be evaluated for the Remedial Work Plan.

3.6 Qualitative Exposure Assessments

1. All Applicants are required to complete a qualitative on and off-site Public Health exposure assessment. The purpose of the human exposure assessment is to:

A. Qualitatively evaluate actual or potential exposures to site contaminants;

B. Describe the nature and size of the population exposed, or potentially exposed, to the contaminants that are present at or migrating from the site; and,

C. Characterize the exposure setting, identify exposure pathways, and evaluate contaminant fate and transport.

2. Guidance for completion of the human health exposure assessment can be found in Appendix 3B and Section 3.3 (b) 8 of DER-10.

3 All Applicants are also required to complete an on and off-site Fish & Wildlife exposure assessment. The purpose of the fish and wildlife exposure assessment is to:

A. Qualitatively determine the route, intensity, frequency, and duration of actual or potential exposures to chemicals;

B. Describe the nature and size of the population exposed to the contaminants that are present at or migrating from the site; and,

C. Characterizing the exposure setting, identifying exposure pathways, and evaluating contaminant fate and transport.

4. Guidance relative to the fish and wildlife exposure assessment can be found in Section 3.10 of DER-10 .

5. Some off-site investigation may be required to support the Public Health and Fish and Wildlife exposure assessments at Volunteer sites. The need for off-site investigation is dependent on the extent of the contamination and whether the contamination:

- A. Approaches or has migrated beyond the site boundary, as defined in the BCA; and,
- B. Is in close proximity to receptors.

3.7 Quality Assurance/Quality Control

QA/QC requirements to be included in a work plan are provided in Section 2 of DER-10.

3.8 Review and Approval of Remedial Investigation Work Plans

1. Upon submittal of a RI work plan by the Applicant, the Department will make its best efforts to approve, modify or reject the work plan within 45 days of receipt, or within 15 days of close of the public comment period.

2. The Department's responsibilities for reviewing and notifying the Applicant regarding its decision relative to the work plan and the Applicant's responsibilities for responding are described in section 6.1 of this guidance.

3. If the work plan is not noticed for public comment concurrent with the application approval, as discussed in section 2.7 above, prior to the approval of the RI work plan the Applicant will:

A. Submit a Remedial Investigation Fact Sheet to the Department for review. The Department will provide the Applicant with a final Fact Sheet within 5 days of receipt; and,

B. After review or modification of the work plan, but before approval, the Department will instruct the Applicant to:

- i. Notify the individuals on the Brownfield Site Contact List of the availability of the draft RI work plan for review, by providing them with the Fact Sheet;
- ii. Place the Fact Sheet and draft work plan in the document repository;
- iii. Commence a 30 day public comment period; and,
- iv. Provide a certification of mailing to the Department within 10 days of the mailing evidencing compliance with the CP requirements.

C. The above citizen participation requirements must be completed prior to Department approval of the work plan.

D. Upon Department approval of the work plan, the approved work plan, with any modification letter, should be placed in the project document repository and the draft work plan removed.

3.9 Field Oversight

1. The Department will provide, or arrange for, sufficient oversight of field remedial investigations to insure that remedial investigations are completed according to the approved Remedial Investigation Work Plan.

2. The Applicant must provide the Department at least ten (10) days notice of the start of any field work.

3.10 Final Remedial Investigation Report

1. The final Remedial Investigation report should be prepared in accordance with Section 3.14 of DER-10. It should:

A. Include the remedial investigation data, detailed engineering and geological interpretations of the data, and conclusions appropriate to the site;

B. Compare the site data to Standards, Criteria and Guidelines used by the Department and/or the soil cleanup levels developed for the BCP or pursuant to the Guidance for Tracks 3 and 4;

C. Characterize the nature and extent of contamination which has migrated from the site; .

D. Include an on and off-site exposure assessment, described in 4.6 of this guidance; and,

E. Include a recommendation as to whether the Applicant believes that remediation is required:

i. If the report recommends, and the Department concurs, that the remedial requirements of the BCP have been met for: Track 1, then no further remediation is required and the project receives a Certification of Completion, as described in section 7 of this guidance; or ,

ii. If the site will not meet the Track 1 requirements (an unrestricted cleanup), an Alternatives Analysis Report as required by § 27-1413 is needed. See section 4.6 of this guidance for the Track 1 requirements.

2. Applicants may submit the Alternatives Analysis report and the Remedial Work Plan simultaneously. This is an opportunity for the Applicant to streamline the Citizen Participation requirements while providing the required notices and comment opportunities, providing an integrated approach to Department review and citizen participation.

3. The Department will review and either approve, modify or reject the RI report, similar to the RI work plan discussed in section 3.8.1 above.

4. Based upon information presented by the RI Report, the significant threat determination is made by the Department, see section 3.11 below.

5. The law requires the Department to evaluate the potential for an enforcement action related to the site. If an off-site exposure assessment conducted by a Volunteer indicates that there may be exposures of concern, and the site is determined to be a significant threat, the Department should consider remedial options that would stop or mitigate the plume emanating from the site so as to minimize the nature and extent of the off-site issues and also refer the site for enforcement.

3.11 Significant Threat Determination and Registry Evaluation

1. The significant threat determination will be made as part of the approval of the Remedial Investigation Report, or upon entry to the BCP if entry is post-RI .

A. The significant threat determination under the BCP will be made using the same protocols/factors as the significant threat determination under the State Superfund Program. Refer to 6NYCRR Part 375, for criteria on what constitutes a significant threat.

B. This determination will be made by the Department and will require the concurrence of the NYSDOH if a significant threat to human health is identified.

2. The significant threat determination has implications regarding Technical Assistance Grants (§27-1409(1)) as well as the remedial alternatives analysis (§27-1413(2)), both of which are discussed in this guidance.

3. General Principles for Registry Evaluation:

A. A BCP site is not placed on the Registry of Inactive Hazardous Waste Disposal Sites (Registry), unless:

- i. The project is not meeting the objectives of the BCA (e.g. unsatisfactory progress); and,
- ii. It meets the criteria for listing in the first instance (i.e. consequential amounts of hazardous waste disposal).

B. If the BCP project is already on the Registry, then the registry status may be reviewed at appropriate milestone events (e.g. after the Remedial Investigation Report or Remedial Action Report approval).

C. The Department will review the classification of the site if the Applicant withdraws or is terminated prior to the completion of the BCP remediation.

3.12 Citizen Participation on the Final Remedial Investigation Report

1. The Applicant should submit a draft fact sheet with the proposed final Remedial Investigation Report. Once the fact sheet is reviewed and ready for approval the Department will instruct the Applicant to:

- A. Start the 30 day public comment period by a certain date;
 - B. Transmit the fact sheet to the parties on the Brownfield Site Contact List; and,
 - C. Place a copy of the Remedial Work Plan and Fact Sheet in the document repository.
2. The Applicant is required to provide to the Department a certification of mailing within 10 days of the mailing to the Department evidencing compliance with the CP requirements.
3. If the Remedial Investigation Report concludes that No Further Action is required, then a 45 day comment period is required.

3.13 Remedial Investigation Approvals

1. Once the Department is satisfied that the Remedial Investigation is complete and the Report is ready for approval, with concurrence from the NYSDOH, the Department will send a remedial investigation approval letter, which:
- A. If remediation is required, should contain a list of preliminary Remedial Action Objectives (RAOs) and the significant threat determination; or,
 - B. If the Department concludes that no remediation is needed, it informs the Applicant of its eligibility for a Certificate of Completion. This process is described in section 7, Certificate of Completion.
2. If the Remedial Investigation Report is not approvable, it should be rejected or modified as detailed in section 6.1 of this guidance.
3. If remediation is needed but the Applicant declines to proceed with the cleanup;
- A. The Remedial Investigation Report will be approved but no Certificate of Completion will be issued; and,
 - B. The Registry status of the site will be reviewed consistent with section 3.11.3 above.

3.14 Interim Remedial Measures (IRMs)

1. For many sites, conditions make it appropriate to complete Interim Remedial Measures (IRMs) during the Remedial Investigation of the site.
2. An Interim Remedial Measure or "IRM":
- A. Is a discrete set of activities to address both time critical (emergency response actions) and non-time critical site conditions, which can be undertaken without extensive remedial investigation and evaluation, to prevent, mitigate, or remedy environmental damage or the consequences of environmental damage attributable to a site.

B. Its purpose is to lessen obvious risks to the environment and/or public health from hazardous waste. IRMs may function as a temporary rather than final remedial response to the problem.

C. The IRM should serve to reduce the scope and cost of the final remedy and an IRM may become the final remedy if it achieves the remedial goal established for the site.

3. A Time Critical IRM (Emergency Response Action): includes both significant and incidental actions to address or respond to a spill, or other event or condition, whether natural or human-made, as the result of which a release or threat of release of hazardous waste presents an immediate threat to life, health, property or natural resources. In these cases Department should readily approve the necessary actions to abate the emergency situations.

4. A Non-time critical IRM is an action of a more discretionary nature, as discussed in section 1.11 (d) of DER-10. This type of IRM will require Department review and approval as noted below:

A. IRM work plans are to be developed and submitted to the Department similar to a Remedial Investigation work plan.

B. If the Department determines that the proposed IRM may constitute all or a significant portion of the final remedy for the site, the review and approval of the IRM work plan will be completed using the same procedures as for a Remedial Work Plan, including citizen participation.

C. If the scope of the IRM is not significant in comparison to the likely remedy for the site, the process for approving, implementing, and documenting an IRM will be the same as for an Remedial Investigation Work Plan, except the formal citizen participation for will not be required but can be decided on a case-by-case basis.

3.15 Off-Site Remedial Investigation/Remediation of Significant Threat

1. In the event that a Site which is the subject of a BCA executed by a Volunteer is determined to constitute a significant threat, the Department is required to bring an enforcement action against any identified parties who are potentially responsible (according to applicable principles of statutory or common law liability) for contamination at or emanating from the Site. (27-1411.6)

2. The Department will be responsible for identifying any such parties and either:

A. Securing a voluntary commitment by such parties to develop and implement an off-site remedial program; or,

B. Bringing an enforcement action against such parties; or,

C. In the event that no such parties can be identified or enforcement efforts are

unsuccessful, the Department will be responsible for undertaking the necessary off-Site investigation or remediation utilizing the Hazardous Waste Remedial or Spill Funds.

SECTION 4 REMEDY SELECTION

4.1 General Requirements of a BCP Remedy Selection

1. Remedy selection in the BCP program should be undertaken consistent with section 4 of DER-10.
2. The goal of the remedy selection process in the BCP is to select a remedy for a site that is fully protective of public health and the environment, taking into account the current, intended and reasonably anticipated future land use of the site. The use is determined during the application process and confirmed during the remedy selection process.
 - A. Volunteers are required to remediate on-site contamination only, and.
 - B. Participants are required to remediate both on and off-site contamination.
3. Title 14 provides for cleanup tracks and the promulgation of soil cleanup objectives. **Until the Soil Cleanup Tables are developed as required by Title 14 , the multi-track approach will not be available. Instead the Department will continue to implement the approach used in the past under the VCP which most closely resembles Tracks 1 (unrestricted use) and 4 (site specific use based cleanup). Under this approach, the Department will continue to look at unrestricted remedies and site-by-site evaluations.**
 - A. Applicants may elect to propose an unrestricted use cleanup (thus, the equivalent of Track 1) or an use-based approach. The use based approach will require the submittal of an Alternatives Analysis Report.
 - B. The Alternatives Analysis Report will consider both an unrestricted scenario and the proposed restricted use scenario.
4. The Alternatives Analysis Report and the Remedial Work Plan may be submitted with the RI for review and approval, if the Applicant elects to submit the AAR without receiving Department approval of the RAOs or RI. In this way it may be possible to speed up the remedy selection process.
5. The Remedial Work Plan will be the decision document for the BCP and can be prepared using one of the scenarios discussed in section 4.2 below.
6. NYSDOH must concur with the Remedial Work Plan.
7. The Alternatives Analysis Report, Remedial Work Plan and Remedial Design documents, except for closures of underground storage tanks completed in accordance with the Section 5.5 of DER-10, must be signed and sealed by a licensed professional engineer registered in New York State.

4.2 Options for Development of the Remedial Work Plan

1. Concurrent with, or after preliminary review of the AAR by the DER, the Applicant submits the Remedial Work Plan (RWP) for the site. The RWP may be submitted with the AAR included or may be submitted after the initial review of the AAR. The RWP will include the following:

A. For a non-significant threat site, the Applicant will select a remedy based on the AAR and submits it as a draft RAP. The draft RWP:

- i. Will be reviewed and modified, if needed, either by the Applicant or DER; and,
- ii. When acceptable, the final draft RWP and a fact sheet will be sent out by the applicant to the BSCL for a 45 day public review.

B. For a significant threat site, the Applicant will submit a preliminary RWP, which will recommend a remedy. The preliminary RWP:

- i. Will be reviewed and modified to reflect the remedy selected by the DER; and,
- ii. When the DER selected remedy has been incorporated in a final draft RWP, the RWP will be sent out and noticed by the Applicant to the BSCL for a 45 day public review.

2. The RWP will serve as the decision document for the BCP program and the development of the RWP may proceed following one of the scenarios discussed in 3-5 below.

3. For a site where a Track 1 remedy is proposed no AAR is needed and the RWP can be prepared to document the selected of the remedy and evaluate the nine criteria

4. For a site where a remedial action work plan, consistent with Section 5.3 of DER-10, will provide a sufficient level of detail to construct the remedy, instead of a formal remedial design:

A. The RWP may be prepared in accordance with the guidance in section 4.9, with all technical plans developed in sufficient detail for construction, or;

B. The RWP may be developed as a conceptual level plan and, concurrent with the 45 day comment period, the Applicant may:

- i. Modify the RWP, by the addition of the necessary full technical plans (e.g OM&M, QAPP, etc.) identified in section 4.9, and,
- ii. In this approach, the RWP approved by the DER after consideration of public comment, will also serve as a final RAWP from which the project can be constructed

5. For sites where a formal remedial design is appropriate, the RWP should be prepared as a conceptual level document and approved at the conclusion of the evaluation of comments. In this scenario, the approved RWP will serve as the remedial design work plan and the remedial design will proceed consistent with section 5.2 of DER-10.

4.3 Issues to be Considered in Remedy Development and Selection

1. **Source Removal:** Source removal should be the goal of all BCP remedies. The following is the hierarchy of source removal and control measures ranked from most preferable to least preferable:

A. Removal and/or treatment: All free product, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid and/or grossly contaminated soil shall be removed and/or treated to the greatest extent feasible.

B. Containment: Any source remaining following removal and/or treatment shall be contained to the greatest extent feasible.

C. Elimination of exposure: Exposure to any source remaining following removal, treatment and/or containment shall be eliminated through additional measures, including but not limited to the timely and sustained provision of alternative water supplies and the elimination of volatilization into buildings to the greatest extent feasible.

D. Treatment of source at the point of exposure: Including but not limited to, wellhead treatment or the management of volatile contamination within buildings, shall be considered as a measure of last resort.

2. **Plume Stabilization:** A goal of the BCP is to prevent further migration of a plume of groundwater contamination. The BCP requires the evaluation of plume stabilization for all proposed remedies, as follows:

A. A Volunteer is obligated to prevent plume migration from the boundaries of the site to the extent practicable;

B. A Participant must prevent further plume migration to the extent practicable regardless of whether the plume is within the site boundaries or beyond the boundaries. In other words, a Participant has to “chase” the plume.

3. **Presumptive Remedy/Strategy:** The Department may develop a list of presumptive remedial strategies that Applicants may use to meet the requirements associated with Tracks 1 through 4. The presumptive remedies will be developed for specific site types and/or contaminants based upon historical patterns of remedy selection and the Department’s scientific and engineering evaluation of performance data on technology implementation.

4. **Innovative Technologies:** The Department shall consider and encourage the use of innovative technologies which will meet the remedial objectives of the BCP.

4.4 Institutional Controls/Engineering Controls

1. An institutional control is a non-physical restriction on the use of real property where the remedial program leaves residual contamination that makes the property suitable for some, but not all uses; the purpose may be to limit human or environmental exposure, restrict the use of

groundwater, provide notice of the use restriction, or prevent actions that would interfere with the remedial program, including OM&M.

2. An engineering control means any physical barrier or method employed to actively or passively contain, stabilize, or monitor hazardous waste or petroleum, restrict the movement of contaminants to ensure the long-term effectiveness of a remedial program, or eliminate potential exposure pathways to contaminants. Engineering controls include, but are not limited to, pavement, caps, covers, subsurface barriers, vapor barriers, slurry walls, building ventilation systems, fences, access controls, the provision of alternative water supplies via connection to an existing public water supply, adding treatment technologies to such water supplies, and installing filtration devices on private water supplies.

3. An institutional control/engineering control (IC/EC) evaluation, as detailed in Section 4.2 (b) of DER-10, is to be included in the AAR when a proposed work plan includes institutional controls and/or engineering controls as components of a proposed remedial program and shall include:

A. A complete description of any proposed use restrictions and/or institutional controls and the mechanisms that will be used to implement, maintain, monitor, and enforce such restrictions and controls;

B. A complete description of any proposed engineering controls and any operation, maintenance, and monitoring requirements, including the mechanisms that will be used to continually implement, maintain, monitor, and enforce such controls and requirements;

C. An evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed institutional or engineering controls and an analysis of the long-term costs of implementing, maintaining, monitoring and enforcing such controls, including costs that may be borne by state or local governments;

D. Sufficient analysis to support a conclusion that effective implementation, maintenance, monitoring and enforcement of institutional and/or engineering controls can be reasonably expected; and,

E. Where required by the Department; financial assurance to ensure the long term implementation, maintenance, monitoring, and enforcement of any such controls; and any engineering control must be used in conjunction with institutional controls to ensure the continued integrity of such engineering control.

4.5 Environmental Easement

1. An Environmental Easement is a form of institutional control that acts as an enforcement mechanism for property that requires institutional or engineering controls. The purpose of the Environmental Easement is to ensure that such use restrictions or engineering controls remain in place.

2. An Environmental Easement can only be:

A. Created by the property owner (the “grantor”) through a written instrument recorded in the appropriate county recording office;

B. Granted to the State (the “grantee”); and,

C. Extinguished or amended by a written instrument executed by the Commissioner and duly recorded.

3. An Environmental Easement:

A. Is binding upon all subsequent owners and occupants of the property. The deed or deeds for the property (as well as any other written instruments conveying any interest in the property) must contain a prominent notice that it is subject to an Environmental Easement; and,

B. May be enforced in perpetuity against the grantor, subsequent owners of the property, lessees, and any person using the property by its grantor, by the State, or by the municipality in which the property is located.

4. The Department may revoke the Certificate of Completion issued to any person who intentionally violates an Environmental Easement.

5. The State is authorized to enter and inspect any property subject to an Environmental Easement to ensure compliance with the restrictions.

6. The Applicant will:

A. Provide a copy of each Environmental Easement, as well as any documents that modify or terminate such easement, to the affected local government in which the property is located; and,

B. Provide the Department with a certificate of mailing evidencing compliance with 4.5.6A.

4.6 Cleanup Tracks and Tables

Until the Soil Cleanup Tables are developed as required by Title 14 , the multi-track approach will not be available. Instead the Department will continue to implement the approach used in the past under the VCP which most closely resembles Tracks 1 (unrestricted use) and 4 (site specific use based cleanup). Under this approach, the Department will continue to look at unrestricted remedies and site-by-site evaluations.

1. There are four tracks identified for the BCP program, which progress from the use of generic soil cleanup tables to an approach that utilizes site-specific information to determine appropriate cleanup levels.

2. Track 1 - Utilizes a generic table to identify soil cleanup objectives for unrestricted use remedies.

A. Track 1 provides for unrestricted remedies which allow the property to be developed for any use. Restrictions on the use of the site are not permitted.

B. To achieve a Track 1 remedy, contaminated soil that generally exceeds the limits in the table should be removed or treated.

C. For a Track 1 remedy, reliance upon institutional control/engineering controls to address exposure and achieve the RAOs for the site is not allowed, with one exception.

D. The one exception to the institutional control/engineering control prohibition, which allows for a groundwater use restriction to be placed upon the site is:

i. If a Volunteer has taken steps to reduce groundwater contamination to asymptotic levels, that is, concentrations have declined and leveled off to a protective level which may still be above groundwater standards; and,

ii. All other Track 1 requirements have been met.

3. Track 2 - Utilizes a generic table to identify soil cleanup objectives for commercial and industrial use remedies.

A. To achieve a Track 2 remedy, restrictions can be placed on the use of the site (e.g. commercial or industrial use) and on the use of site groundwater.

B. For a Track 2 remedy, reliance upon institutional control/engineering controls to address soil exposure and achieve the RAOs for the site is not allowed.

C. A groundwater use restriction may be placed upon the site.

4. Track 3 - Utilizes site-specific information to determine soil cleanup objectives using the same methodology used to develop the Track 2 tables.

A. Achieving a Track 3 remedy, represents the shift from use of generic tables to the approach of taking into account site-specific conditions to determine the soil cleanup objectives. Track 3 will utilize a process included in the regulations for development of the Track 2 table to take information about site and soil conditions and generate cleanup objectives specific to that site (e.g. organic carbon content and other factors that influence contaminant exposures and releases from soil).

B. For Track 3 there will not be a generic table of soil cleanup objectives.

C. For a Track 3 remedy, land use (e.g. commercial or industrial use) and groundwater restrictions are allowed but in general, it is still not acceptable to rely upon institutional

control/engineering controls to control soil exposure at a site.

5. **Track 4** - Utilizes site-specific information and guidance to identify soil cleanup objectives to achieve a restricted use remedies.

A. To achieve a Track 4 remedy, restrictions can be placed on the use of the property (e.g. commercial or industrial use) and upon groundwater use.

B. A Track 4 remedy can utilize institutional/engineering controls to prevent exposure to contamination. The decision of whether institutional control/engineering controls are appropriate will be made on a case-by-case basis by the Department in consultation with the NYSDOH.

C. For a Track 4 remedy, surface soil must meet the requirements of the generic tables for the intended use:

i. For commercial or industrial use, the top one foot must meet the requirements of the Track 2 generic table for commercial or industrial use.

ii. For residential, the top two feet must meet the generic requirements.

4.7 Remedy Evaluation Criteria

1. The AAR must evaluate how the remedy would be protective of public health and the environment. This is accomplished by an evaluation of the nine (9) criteria identified below. These criteria are defined, and the manner in which they are evaluated, is detailed in Section 4.1 and 4.2 of DER-10. The following are the nine (9) criteria used in this evaluation:

A. Protection of Human Health and the Environment

B. Standards, Criteria, & Guidance (SCG)

C. Short-term Effectiveness & Impacts

D. Long-term Effectiveness & Permanence

E. Reduction of Toxicity, Mobility, or Volume

F. Implementability

G. Cost Effectiveness

H. Community Acceptance

I. Land Use

2. Preliminary information regarding the land use factor was submitted as part of the

application. The Department accepted this initial determination of use by approval of the application. This preliminary determination is confirmed and updated as necessary during the remedy selection process. Current, intended or reasonably anticipated future land uses of the site and its surroundings must be considered in the selection of the remedy by taking into account the 16 factors identified in Appendix 2.

4.8 Alternative Analysis Report

1. The Applicant must prepare an Alternative Analysis Report (AAR) as detailed in Section 4.3 (c) of DER-10, if a Track 1 remedy is not to be selected or for the closure of underground storage tanks in accordance with Section 5.5 of DER-10. **Since the cleanup tables to support the cleanup tracks will not be available until the regulations are approved, the Applicant will always evaluate an unrestricted remedy until such time as the Track 1 table is available. Under this approach, the Department will continue to look at unrestricted remedies and site-by-site evaluations.**

2. The AAR will identify, and where appropriate evaluate, an alternative(s) based on the significant threat and track proposed for the remedy. The different alternatives to be evaluated in an AAR are as follows:

A. One alternative may be evaluated, if the alternative will achieve unrestricted use relative to soil contamination, without the use of institutional/engineering controls (Track 1); or,

B. Where a remedy which will require any restrictions on use of the site in the form of institutional controls or engineering controls is selected, the AAR will evaluate two or more alternatives, one of which will achieve unrestricted use relative to soil contamination, without the use of institutional/engineering controls; or,

C. If the site does not meet the significant threat threshold, the Department may require the evaluation of a Track 2 alternative in certain cases where the IC/EC cannot be reliably depended upon to protect the environment. Factors to consider in determining whether to evaluate additional alternatives include:

- i. The degree to which a Track 2 alternative would better satisfy the remedy selection criteria;
- ii. The impact of a Track 2 alternative on the applicant's ability to cleanup/redevelop Site; and,
- iii. The environmental and economic benefits of a Track 2 cleanup.

D. For sites that have been determined to present a significant threat to public health or the environment, the Department can require the evaluation of additional alternatives that it believes may be appropriate site remedies. For instance, the Department may request that a remedy be evaluated that had less of an impact to the surrounding community if significant community concerns were evident.

E. For sites where institutional and engineering controls will be a part of the remedy the

AAR will also include an analysis of the controls consistent with section 4.5 of this guidance and Section 4.2 (b) of DER-10.

3. The AAR will evaluate the remedy using the criteria identified in section 4.7 of this guidance and discussed in detail in Section 4.1 (e) of DER-10.

4. The AAR will be the basis for the remedy identified by the Remedial Work Plan and must demonstrate that the remedy can achieve the cleanup goals for the site.

4.9 Remedial Work Plan

1. The Remedial Work Plan represents the decision document for the remedy selection process for a BCP site. The Remedial Work Plan must at a minimum:

A. Identify cleanup levels to be attained or the process to be used to determine these levels;

B. Describe, based on the Alternatives Analysis Report, the basis for concluding that the results of the remediation will be protective of public health and the environment; and,

C. Provide a detailed conceptual description of the remedy selected.

2. For most sites the remedy is selected by the Applicant, except for sites which:

A. Have been determined to be a significant threat, in this case the Department can select the remedial alternative, but will do so based on a preliminary RWP prepared by the Applicant; or,

B. Unless a Track 2 cleanup would provide significant benefits to the environment as outlined in section 4.8.2C above.

3. For sites where the RWP is intended to serve as a Remedial Action Work Plan (RAWP), the technical plans will provide a sufficient level of detail to construct the remedy, instead of a more formal remedial design. This can be achieved either by:

A. The initial submittal for notice of a RWP that meet all of the requirements of a RAWP. This would require the addition of the full technical plans identified in 5E below; or,

B. Submittal of a conceptual level RWP with a scope of work for the technical plans for approval and public notice. Concurrent with the 45 day comment period, the Applicant could modify the RWP, by the addition of the necessary full technical plans (e.g OM&M, QAPP, etc.) identified in 5E below.

C. The requirements for a RAWP are detailed in section 5.3 of DER-10.

D. The construction document will thus be approved concurrent with the RWP by the

Department, after consideration of public comments are received, under either scenario.

4. For sites where a Remedial Design is anticipated, the concept-level Remedial Action Plan will be approved and will serve as a Remedial Design Work Plan, as such the Applicant should consider the guidance provided in Section 5.2 (b) of DER-10 in preparing the RWP and particularly the scope of work for the technical plans.

5. A Remedial Work Plan prepared either to serve as the basis of construction of the remedy or as a conceptual plan for the remedy, as discussed in 3 above, should include the following:

A. Introduction and Purpose

- i. Site Description
- ii. Site History
- iii. Previous Remedial investigations
- vi. Contemplated Use of the Site

B. Summary of Environmental Conditions

C. Summary of the alternatives identified by the Alternatives Analysis Report

D. Summary of Remedy

E. Appropriate Technical Plan.

- i. Project Plans and Specifications
- ii. Institutional & Engineering Controls
- iii. Health and Safety Plans
- iv. QA/QC Plan
- v. Schedule
- vi. Reporting
- vii. Project Organization
- viii. Citizen Participation Plan for Construction Activities

4.10 Approval of Remedial Work Plans

1. As with Remedial Investigation Work Plans and reports, before the Remedial Work Plan is approved or noticed for public comment, the document must be reviewed to determine if it meets all of the requirements of the BCP. If there are deficiencies the Department may reject or modify the RWP, as detailed in section 6.1 of this guidance.

2. The Department will approve the RWP after receipt of written concurrence by the NYSDOH.

4.11 Citizen Participation for Remedy Selection

1. The BCP requires public notice and a 45 day public comment period prior to the

Department approving a Remedial Work Plan. Prior to the release of the RWP and start of the comment period:

- A. The Department must be in substantial agreement with the remedy proposed; and,
- B. The concurrence letter must have been received from the NYSDOH.

2. The Applicant should submit a draft fact sheet with the proposed Remedial Work Plan. Once the fact sheet is reviewed and ready for approval the Department will instruct the Applicant to:

- A. Start the 45 day public comment period by a certain date;
- B. Transmit the fact sheet to the parties on the Brownfield Site Contact List; and,
- C. Place a copy of the Remedial Work Plan and Fact Sheet in the document repository.

3. The Applicant is required to provide to the Department a certification of mailing within 10 days of the mailing evidencing compliance with the CP requirements.

4. The Department is not required to hold a public meeting, unless one is requested, during the public comment period. If this occurs, the Department will work with the Applicant to arrange for and announce a public meeting.

5. No responsiveness summary is prepared based upon comments received either in writing or at a public meeting.

4.12 Changes to Approved Remedies

1. If after approval of the RWP it is determined that a change to the remedy is necessary and appropriate, the process for approving the changes is determined by whether the changes are considered minor, significant, or fundamental as defined in DER Program Policy DER-2 (TAGM 4059), "Making Changes to Selected Remedies."

2. Minor changes are recorded in the project file.

3. Significant changes are described in an "Explanation of Significant Differences" (ESD), which is then released to the public.

4. Fundamental changes will require a formal amendment to the remedy using the same procedures described for approving a Remedial Work Plan.

SECTION 5 REMEDIAL DESIGN AND REMEDIAL ACTION

5.1 Remedial Design or Remedial Action Work Plan

1. Remedies completed under the BCP often do not require the preparation of a formal design (e.g. plans and specifications), unless determined appropriate due to the complexity of the site conditions or remedy.

2. For simple remedial actions, the approved Remedial Work Plan, will provide sufficient documentation and control for the project, with the addition of the site-specific technical plans to allow it to serve as a Remedial Action Work Plan.

A. The plans to be added to an approved conceptual level Remedial Action Plan to make it a Remedial Action Work Plan for construction are:

- i. Project Plans and Specifications
- ii. Institutional & Engineering Controls
- iii. Health and Safety Plans
- iv. QA/QC Plan
- v. Schedule
- vi. Reporting
- vii. Project Organization
- viii. Citizen Participation Plan of Construction Activities

B. Guidance on the development of Remedial Action Work Plans can be found in Section 5.3 of DER-10.

C. If the approved RWP was prepared as described in section 4.9.3 of this guidance, no additional work is necessary and the RAWP is considered approved.

3. The Applicant or Department may determine that the complexity or sensitivity of the project requires the submittal of a full-scale Remedial Design.

A. A Remedial Design may be appropriate when one or more of the following factors apply:

- i. The proposed remedy includes treatment systems where the performance of the remedy is dependent upon the careful specification of sizes, capacities, process control, etc..
- ii. Implementing the remedy requires specialized engineering or specialized construction (e.g., a barrier wall).
- iii. Excavations will occur near sensitive environmental receptors (e.g., wetlands) making it necessary to have plan sheets that provide careful vertical and horizontal control.
- iv. Specialized construction materials need to be used (e.g., seamed geomembrane).

B. When a remedial design is necessary, the concept-level Remedial Action Plan will be approved and serve as a remedial design work plan and as such should consider the guidance provided in Section 5.2 (b) of DER-10

C. The remedial design will follow as a separate phase of the BCP project. Guidance on the development of Remedial Design can be found in Section 5.3 of DER-10.

5.2 Health and Safety Plans

1. Health and Safety Plans for site remediation must comply with OSHA.
2. The Health and Safety Plans for remediation must also address community health and safety issues associated with completing the remedy. One aspect of community health and safety is the NYSDOH required Community Air Monitoring Plan (CAMP). Appendix 1A of DER-10 provides guidance on preparing a CAMP.

5.3 Operation, Maintenance and Monitoring

1. The need for operation, maintenance and monitoring (OM&M) at a BCP site is dependent upon site-specific issues. For projects where the protectiveness of the remedy is dependent on continued OM&M, there must be a formal OM&M Plan with specific requirements including reporting.

1. A draft of the OM&M Plan (an outline for extensive projects) should be submitted/included at the time of the draft Remedial Work Plan and will typically be finalized subsequent to the construction of the remedy.
 1. A Soil Management Plan is an example of a plan that could be included in the OM&M Plan. This includes cases where the effectiveness of the remedy depends upon the use of engineering or institutional controls.
 2. OM&M Plans are approved using the same procedure as an remedial investigation work plan (see section 5), except that public comment periods are not required.
 3. Guidance on preparing OM&M Plans can be obtained from Section 6 of DER-10.

5.4 Annual Certification

1. As required by ECL 27-1415 and the BCA for the site, an Applicant is required to submit to the Department certification for any site where institutional and/or engineering controls are employed as part of the remedy on an annual basis, unless otherwise provided in writing by the Department. This certification should be prepared in accordance with the guidance in Section

5.6 and the certification provided to the Department as detailed in Section 6.2 of DER-10.

2. This annual certification should be prepared consistent with section 6.2 of DER-10 and:

A. Certify that the institutional or engineering controls required for the remedy are still in place, have not been altered, and are still effective.

B. Be signed by a professional engineer or by a qualified environmental professional, as defined in Section 1.3 of DER-10, approved by the Department to perform that function and certify that the institutional and/or engineering controls are unchanged from the previous certification and that nothing has occurred that would impair the ability of such controls to protect public health and the environment or constitute a violation or failure to comply with the approved site management plan.

5.5 Pre-Construction Citizen Participation

1. The Applicant should submit a draft Pre-Construction Notice to the Department at least 20 days prior to the start of construction. Once the fact sheet is reviewed and ready for approval the Department will instruct the Applicant to:

A. Transmit the notice to the parties on the Brownfield Site Contact List, at least 10 days prior to the start of construction; and,

B. Place a copy of the design document and notice in the document repository.

2. The Applicant must submit a certification of mailing to the Department within 10 days of the mailing.

5.6 Remedial Action Oversight

Remedial Action should be completed pursuant to the approved Remedial Work Plan. The Department will observe construction to ensure that remedies are built and operated according to the Remedial Work Plan or remedial design.

5.7 Remedial Action Report

1. Within 90 days after completion of construction, the Applicant should submit a Remedial Action Report (RAR) prepared in accordance with the guidance in Section 5.8 of DER-10.

2. Except for certain petroleum tank removals, the report, drawings, and certification must be prepared, signed, and sealed by a professional engineer, consistent with Section 1.5 of DER-10.

3. The RAR should include:

A. Appropriate “as-built” drawings, that include all changes made to the final design during construction;

B. A copy of the environmental easement, if required; and,

C. The final OM&M Plan, if required for the site.

4. Specifically the RAR should:

A. Describe the remedial activities completed;

B. Certify that the data generated was useable and met the remedial requirements;

C. Define the boundaries of the site;

D. Description all of the institutional controls employed at the site;

E. Certify that any restrictions, IC/ECs, and/or any OM&M requirements are adequately provided in an environmental easement that has been created and recorded and that local governments have been notified;

F. Certify that the OM&M plan has been submitted and approved by the DEC; and where applicable,

G. Certify that any financial assurance mechanisms required by DEC have been executed.

5.8 Remedial Action Report Review

Upon receipt of a draft Remedial Action Report and draft fact sheet, the Department verifies that the technical requirements of the BCA and work plan(s) have been satisfied and approves, modifies or rejects the Remedial Action Report in accordance with section ## of this guidance.

5.9 Certification Language

The Remedial Action Report must include the following certification by a professional engineer licensed to practice in NYS:

“I certify that the Remedial Work Plan (or Remedial Design) was implemented and that all construction activities were completed in substantial conformance with the Department-approved Remedial Work Plan (or Remedial Design) and were personally

witnessed by me (or “by a person under my direct supervision”).”

5.10 Post-Construction Citizen Participation

1. The Applicant shall submit a proposed notice and fact sheet along with the Remedial Action Report. Once the fact sheet, which should describe the content of the report, is reviewed and ready for approval the Department will instruct the Applicant to:

A. Mail the notice and fact sheet to the parties on the Brownfield Site Contact List prior to the Department approval of the report; and ,

B. Provide a certification of mailing to the Department within 10 days of the mailing to evidence compliance with the CP requirements.

2. If institutional or engineering controls are necessary at the site, within 10 days of issuance of the Certificate of Completion, a Department-approved fact sheet must be issued by the Applicant to the Brownfield Site Contact List.

A. The Applicant is required to provide a certification of mailing within 10 days of the mailing to the Department evidencing compliance with the CP requirements.

B. This notice can be combined with the one identified in 1. above.

SECTION 6 GENERAL PROVISIONS

6.1 Department Approval, Rejection or Modification of Documents

1. After review of a document submitted by an Applicant pursuant to a BCA, in consultation with the NYSDOH or other involved reviewers, the Department will either:

A. Approve the document, and notifies the Applicant of the approval. If CP requirements have not been met, then approval is withheld until they are complete; or,

B. If there are deficiencies in the document, the Department can reject the work plan; or

C. Make modifications to the work plan, when it is appropriate and efficient. For instance where the changes are minor and non-substantive.

2. For rejections or modifications, the Department letter:

A. Rejecting the work plan will provide a clear and concise description of any deficiencies and request the Applicant:

i. Notify the Department in writing which of the options identified in 3 below, it chooses within 20 days after receiving the notice of the rejection; and,

ii. Modify or expand the document within 30 days of receipt of the written rejection notice.

B. The modification letter should note the modifications made by the Department and request the Applicant:

i. Notify the Department in writing which of the options identified in 3 below, it chooses within 20 days after receiving the notice of the modification; and,

ii. If accepting the modifications, attach the Department modification letter to the work plan, where it becomes part of the final approved work plan.

C. When the Department modifies or rejects a draft document, a meeting or conference call should be scheduled to discuss the Department comments and concerns. Every effort should be made to resolve the concerns prior to the Applicant submitting the revised document, in order to avoid the need for additional iterations of the draft document.

3. If the Department rejects or modifies a document, pursuant to the BCA, the Applicant may then:

- i. Choose to accept any Department modifications, or modify or expand the work plan as requested by the Department;
- ii. Implement any other Department-approved work plans;
- iii. Invoke dispute resolution; or,
- iv. Terminate the BCA.

6.2 Permits

1. The Applicant will not be required to obtain Department issued permits for BCP sites in good standing.
2. The Department will require Applicants to obtain the necessary non-DEC State and local permits, unless the applicant can demonstrate that obtaining the permit will substantially delay the project or present a hardship, then the Department, at its discretion, may exempt Applicants from having to obtain permits issued by New York State or local municipalities.
3. In any event, all Applicants must comply with the substantive requirements of the Department, State or local permit programs. This requires the Applicant to follow the application process, but no formal permit is issued.
4. The Applicant must obtain all required Federal permits.

6.3 State Environmental Quality Review Act

1. A brownfield cleanup project is subject to the requirements of the State Environmental Quality Review Act (SEQRA).
 - A. Regulations on the SEQRA process can be found in 6 NYCRR Part 617.
 - B. Guidance on completing the SEQRA process can be found on the Department Website under the Division of Environmental Permits.
2. The following details when SEQRA is required:
 - A. All remedial investigation activities conducted under a brownfield cleanup agreement (BCA), are exempt from SEQRA.
 - B. Remedial activities conducted under a BCA may be subject to SEQRA, in the absence of a project otherwise subject to SEQRA, as follows:
 - i. Participants and Volunteers who currently own and/or operate the brownfield site are deemed exempt from SEQRA requirements.
 - ii. Only Volunteers who do not currently own or operate the brownfield site are

subject to SEQRA.

3. A SEQRA determination of significance (either a negative declaration or a positive declaration) will be issued by the lead agency prior to the approval of the Remedial Work Plan.

6.4 Payment of State Costs

1. An Applicant is responsible for the payment of State costs relative to the BCP site dependent on their status in the program, as follows:

A. A Volunteer is responsible for payment of all State costs incurred in the negotiation and implementation of the BCA.

B. A Participant is responsible for all State costs incurred in connection with the Site prior to the effective date of the BCA, as well as those incurred in the negotiation and implementation of the BCA.

2. Invoices for State costs can be sent to all Applicants after the work for each phase (ie. remedial investigation, design or construction) of the project has been approved.

A. For a Participant, the amount of past costs, if appropriate, and the duration of the scope of work under the BCA will determine if a separate bill for past costs will be sent to the Applicant rather than sending one invoice which combines both past and oversight costs.

B. If the BCA is terminated by either party, such notice will trigger the billing of any remaining costs due the State pursuant to the BCA.

3. If the invoice remains unpaid for more than 60 days, the Department will notify the Applicant and appropriate action will be taken following existing cost recovery procedures and the terms of the BCA.

6.5 Access

1. The Applicant will provide the Department and other appropriate agencies access to the site for site visits, necessary field oversight and to attend project meetings.

2. The Department will be provided access to take samples and scientific measurements and the Department and Applicant shall have the right to obtain samples, duplicate samples, or both, of all substances and materials sampled. The Department will make the results of all sampling and scientific measurements taken available to Applicant.

3. The Department may attend any field activities to be conducted pursuant to the BCP, as well as any pre-bid meetings, job progress meetings, substantial completion meeting and

inspection, and final inspection and meeting:

A. The Applicant shall notify the Department at least ten (10) days in advance of the start of field activities or meetings.

B. Except to the extent that the Department is not permitted to attend portions of meetings where privileged matters are discussed.

6.6 Change of Use

1. The Applicant, pursuant to ECL 27-1425, must notify the Department in writing at least sixty (60) days in advance of any change of use proposed for the Site. A change of use is defined as:

A. A change in ownership of all or a portion of the Site;

B. The erection of any structure on the Site;

C. The creation of a park or other public or private recreational facility on the Site;

D. Any activity that is likely to disrupt or expose hazardous waste or petroleum at the Site or increase direct human exposure; or,

E. Any other activity that will or may tend to significantly interfere with an ongoing or completed remedial program at the Site.

2. In the event the proposed change of use is a change in ownership of the Site, the general purpose of the notification is to allow the Department to maintain up to date and accurate records regarding the Site. Accordingly, the Department, absent extraordinary circumstances, will not object to such change of use or require additional remedial activities based solely on changes of ownership.

3. In the event the proposed change of use involves any physical alternation of the Site, the Department will evaluate whether or not the proposed change would be likely to lead to an increase in the potential for exposure to a hazardous waste or interfere with a proposed, ongoing or completed remedial program.

A. If it is determined that the proposed change of use would have such an effect, the Department will prepare a letter stating that the Department has determined that, based upon the change of use as described in the Applicant's notification, the proposed change of use will not be authorized.

B. The reasons for such determination should be sent out in a letter within forty-five

days of receipt of the notice of the proposed change of use.

6.7 Electronic Submissions

1. All approved final reports and data shall be submitted to the Department in an electronic format acceptable to the Department within thirty (30) days of approval of such final report.

2. If any document cannot be converted into electronic format, Applicant shall so advise the Department and, if the Department concurs, submit such document in an alternative format acceptable to the Department.

SECTION 7 CERTIFICATE OF COMPLETION

7.1 Certificate of Completion

1. A Certificate of Completion is issued by the Commissioner once it is determined that the remediation requirements have been achieved or will be achieved under a Work Plan. A Certificate of Completion may be issued:

A. At the completion of the Remedial Investigation, if no action or no further action is determined necessary for the site; or,

B. After construction is completed even though the remedial goals have not yet been fully achieved, in other words during the operation of a site remedy.

2. A Certificate of Completion may not be issued to any Applicant who has not resolved its liability to the Spill Fund under the Navigation Law at this site.

3. Following issuance of a Certificate of Completion, a Volunteer waives any right it may have to make a claim against the Spill Fund with respect to the Site.

4. Issuance of a Certificate of Completion is based upon a review of a Remedial Action Report which contains:

A. A description of activities completed pursuant to the approved Remedial Work Plan;

B. A Certification that the data demonstrates that remediation requirements have been or will be achieved in accordance with time frames contained in the approved Remedial Work Plan;

C. Site boundaries;

D. A description of any Institutional Controls that will be used, including mechanisms to implement, maintain, monitor, and enforce such controls;

E. A Certification that any use restrictions, institutional and/or engineering controls, and/or any OM&M requirements are contained in a duly recorded Environmental Easement and that every municipality in which the Site is located has been notified of the Environmental Easement;

F. A Certification that an OM&M Plan for any engineering controls employed at the Site has been approved; and

G. A Certification that any required financial assurance mechanisms have been executed.

5. Upon issuance of a Certificate of Completion, the Applicant:

A. Has no further liability to the State for contamination identified by the BCA as the responsibility of the Applicant at or emanating from the Site:

- i. Excluding liability for Natural Resource Damages for Participants, and
- ii. Subject to certain reopeners; and,

B. Is eligible for tax credits (Note: the Certificate of Completion is referred to as a Remediation Certificate in the Tax Law).

6. The Department will use best efforts to issue the Certificate of Completion within 60 days of its approval of the Remedial Action Report.

7. Upon issuance of the Certification of Completion the Applicant must send a notice to Brownfield Site Contact List, see section 5.10.

7.2 Modification or Revocation of the Certificate of Completion

1. A Certificate of Completion may be modified or revoked, following notice to the Applicant and an opportunity for a hearing, if:

A. The Applicant has not complied with the terms and conditions of the BCA, including non-compliance with OM&M requirements;

B. The Applicant misrepresented a material fact in the Application as to its eligibility or in a certification that the cleanup levels required under the BCA were reached; or

C. There is good cause for modification or revocation. This will be a case by case determination based upon a consideration of all relevant factors.

2. Whenever the Department becomes aware of information that indicates revocation or modification may be appropriate, the Department should send a letter to the Applicant detailing the basis for the Department's concerns:

A. Requesting a response within 30 days of receipt; and,

B. Indicating that if the Applicant's response is unsatisfactory the Department would consider revocation or modification, subject to a hearing.

7.3 Liability Limitation

1. Subsequent to issuance of a Certificate of Completion, an Applicant has no liability to the State for hazardous waste or petroleum at and/or emanating from the Site, subject to certain exceptions and re-openers.

2. Volunteers receive a release for Natural Resource Damages, however Participants do not.

3. This liability limitation applies to the Applicant's successors and assigns who take title to, develop, or otherwise occupy the Site, provided:

A. Such successors and assigns are not responsible for the disposal or discharge of hazardous waste or petroleum, unless they were parties to the BCA; and,

B. Such successors and assigns act with due care and in good faith to adhere to the requirements of the BCA.

4. The State reserves all of its rights concerning any further remedial investigation and/or remediation the Department deems necessary due to:

A. Contamination at, on, under, or migrating from the Site that creates conditions that are no longer protective of public health or the environment;

B. Noncompliance with the terms of the BCA, the Remedial Work Plan, and/or the Certificate of Completion;

C. Fraud committed by the Applicant in connection with its application or its participation in the BCP;

D. A finding by the Department that the Remedial Program implemented at the Site is no longer protective of public health or the environment due to a change in an environmental standard, factor, or criteria upon which the Remedial Work Plan or no further action determination was based;

E. A change in the Site's use that would create conditions not protective of public health or the environment (a Volunteer who remediates a site to unrestricted conditions is not subject to this reopener); or

F. Failure of the Applicant to make substantial progress toward redevelopment of the Site within three years or if the Applicant unreasonably delays redevelopment considering the size, scope and nature of the proposed development.

5. A notice must be filed as a Declaration of Covenant with the recording officer of the county in which the Site is located within 30 days of:

- A. The effective date of the Certificate of Completion; or
 - B. The date Applicant acquires title to the Site, whichever is later.
6. The Applicant receives contribution protection for work performed under the BCP.

7.4 Tax Credits

1. Brownfield tax credits are available to parties subject to tax under Articles 9, 9-A, 22, 32 and 33 of the Tax Law, who perform remedial activities under the BCP. The tax credits will offset costs associated with site preparation, property improvements, on-site groundwater cleanup, real property taxes, and a certain type of environmental insurance.

A. A Certificate of Completion must be issued by the Commissioner of the Department of Environmental Conservation for a party to be eligible for the tax credits.

B. Costs and expenses eligible for the tax credits generally accrue on or after the date of the BCA, but the taxable year for which the credits may first be claimed on a return is a taxable year beginning on or after April 1, 2005. For calendar year taxpayers, the first taxable year for which the credits may be claimed is 2006.

2. Three sections of the tax law, sections 21, 22 and 23 provide for the following tax credits:

A. Site preparation tax credit. (section 21) This credit is based on costs and expenses related to a site's qualification for a certificate of completion and other site preparation costs or expenses paid or incurred in connection with preparing a site for development.

B. Tangible property tax credit. (section 21) This credit is based on costs or expenses for tangible personal property, including buildings and structural components of buildings which constitute "qualified tangible property" as such term is defined in section 21 of the Tax Law. This credit has many attributes of other State investment tax credit provisions, including a requirement to "recapture" a portion of the credit if the property is disposed of before it has been in qualified use for at least twelve consecutive years.

C. On-site groundwater remediation tax credit. (section 21) This credit is based on costs or expenses for remediation of groundwater contamination.

D. Remediated brownfield credit for real property taxes. (section 22) This credit is based on "eligible real property taxes" paid with respect to a qualified site.

E. Environmental remediation insurance credit. (section 23) This credit is based on premiums paid for Environmental Remediation Insurance as described in section 3447 of the Insurance Law.

3. Calculation of the Tax Credits.

A. The determination of the site preparation, tangible property and on-site groundwater remediation credits is based on applying the “applicable percentage” to the costs eligible for each of these credits. The applicable percentage is as follows. The base percentage is 10% for taxpayers subject to tax under Article 22 of the Tax Law, and 12% for taxpayers subject to tax under Articles 9, 9-A, 32 or 33 of the Tax Law. The base percentage increases by 2% if the qualified site is remediated to a cleanup level (Track 1) that will provide for unrestricted use (see subdivision 4 of section 27-1415 of the Environmental Conservation Law) and an additional 8% if at least 50% of the qualified site relating to the credit is located in an “Environmental Zone”. Thus, a taxpayer subject to tax under Article 9-A, that remediates a qualified site to Track 1, where at least half of the site is located in an Environmental Zone, may apply a percentage of 22% against the costs and expenses associated with the site preparation, tangible property and the groundwater cleanup that are eligible for the credits described in section 21 of the Tax Law.

B. The remediated brownfield credit for real property taxes is 25% of the product of the taxpayer’s employment factor (a percentage based on the number of full-time employees employed on the qualified site by the taxpayer or employed by a lessee or lessees of the taxpayer at the qualified site) and the taxpayer’s “eligible real property taxes” paid (see section 22(b)(4) of the Tax Law). If the qualified site is located in an Environmental Zone the credit is 100% (as opposed to 25%) of the product of the employment factor and the eligible real property taxes paid.

C. The environmental remediation insurance credit is the lesser of \$30,000 or 50% of the premiums paid for the environmental remediation insurance.

4. Miscellaneous

A. A “qualified site” for purposes of the tax credits is a site with respect to which a certificate of completion has been issued to the taxpayer by the Commissioner of Environmental Conservation pursuant to section 27-1419 of the Environmental Conservation Law.

B. An “Environmental Zone” is an area so designated by the Commissioner of Economic Development which has a poverty rate of at least 20% and an unemployment rate of at least 1 1/4 times the statewide unemployment rate. A list of these areas is available on the Empire State Development website - www.nylovesbiz.com.

A. The credits provided for under the BCP as described in sections 21, 22 and 23 of the Tax Law are all refundable credits.

SECTION 8 CITIZEN PARTICIPATION

8.1 General

1. The Table in section 8.5 below summarizes the minimum requirements for public notice and comment for the various stages of a BCP project.

2. More extensive citizen participation activities may be undertaken particularly for sites which have significant public interest/concerns about the project. Citizen participation activities are carried out primarily by the Applicant, except the ENB notice, after approval from the Department.

3. These provisions have been detailed in Sections 2 - 6, as applicable, and are provided here as a useful summary of the collective CP requirements. A separate CP Guidance document for the BCP program will be available on the DER website.

8.2 Combining Public Notices

1. There are opportunities to combine public notices if the project is fairly straight-forward. For example:

A. An application may also include a remedial investigation work plan that has been developed with Department involvement. In this case, the Fact Sheet/ENB notice could solicit comments on both the application and the work plan. In this case, a document repository should be set up to assist the public in review of the documents.

B. At the time of the submittal of the final Remedial Investigation Report, the Alternatives Analysis Report and the Remedial Work Plan could also be submitted by an Applicant, thus allowing the fact sheet and the public comment period to run together for these documents.

8.3 Brownfield Site Contact List

1. The Brownfield Site Contact List (BSCL), at a minimum, should include;

A. The chief executive officer and zoning board chairperson of each county, city, town and village in which the Site is located;

B. Residents, owners, and occupants of the site and properties adjacent to the site;

C. Local news media from which the community typically obtains information;

D. The public water supplier which services the area in which the site is located;

E. Any person who has requested to be placed on the site contact list; and,

F. The administrator of any school or day care facility located on or near the site.

2. The BSCL is provided by the Applicant during the application process and will be expand to include additional interested stakeholders over the life of the project.

8.4 Document Repository

1. A document repository is to be established by the Applicant where interested citizens can conveniently review the project documents (i.e. in close proximity to the site, with evening or weekend hours, etc.).

2. Documents should be available in the repository (library, municipal building etc) on or before the first day of the comment period.

3. The repository should be reviewed periodically by the Applicant to assure all relevant documents remain available.

8.5 Summary of Required CP Activities by Project Phase

Project Phase	Document to Repository	Notice	Fact Sheet	Comment Period	Other
Application Deemed Complete	Yes	Yes	NR	30 day	Create BSCL ENB Notice Newspaper notice
If Application Includes RI Work Plan or RI Report	Yes	Yes	Yes	30 day	Same as above incorporate RI
Before Approval of RI Work Plan	Yes	Yes	Yes	30 day	Need Approved CP Plan
Before Approval of RI Report	Yes	Yes	Yes	NR	FS describes findings of RI
Before Approval of RI Report, if RI calls for No Action or No Further Action	Yes	Yes	Yes	45 day	FS must describe basis for No Action
Before Approval of Remedial Work Plan	Yes	Yes	Yes	45 day	Public meeting if requested
Before Construction Starts	NR	Yes	Yes	NR	

Project Phase	Document to Repository	Notice	Fact Sheet	Comment Period	Other
Before Approval of Remedial Action Report	Yes	Yes	Yes	NR	
Issuance of Certificate of Completion if IC/EC part of remedy	NR	Yes	Yes	NR	Within 10 days of issuance

NR = Not Required

8.6 Technical Assistance Grants

1. Technical Assistance Grants (TAGs) are authorized pursuant to ECL Article 14 for the BCP program.

2. TAGs are a citizen participation tool that is available to eligible community groups to increase public awareness and understanding of remedial activities taking place in their community.

3. TAGs of up to \$50,000 are available to qualifying community groups to obtain independent technical assistance for BCP sites that present a significant threat to public health and/or the environment.

4. The issuing of TAGs is administered by the Department. Please refer to the DER website for additional information on eligibility and application procedures for TAGs .

Appendix 1

Program Specific Definitions as set forth at ECL § 27-1405

Definitions

1. **"Applicant"** shall mean a person whose request to participate in the brownfield cleanup program under this title has been accepted by the Department:
 - (a) "participant" shall mean an applicant who either:
 - (i) was the owner of the site at the time of the disposal of hazardous waste or discharge of petroleum or
 - (ii) is otherwise a person responsible according to applicable principles of statutory or common law liability, unless such person's liability arises solely as a result of such person's ownership or operation of or involvement with the site subsequent to the disposal of hazardous waste or discharge of petroleum.
 - (b) "volunteer" shall mean an applicant other than a participant, including without limitation a person whose liability arises solely as a result of such person's ownership or operation of or involvement with the site subsequent to the disposal of hazardous waste or discharge of petroleum, provided however, such person exercises appropriate care with respect to hazardous waste found at the facility by taking reasonable steps to:
 - (i) stop any continuing release;
 - (ii) prevent any threatened future release; and
 - (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
2. "Brownfield" or "brownfield site" shall mean any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous waste, petroleum, pollutant, or contaminant. Such term shall not include real property:
 - (a) listed in the registry of inactive hazardous waste disposal sites under section 27-1305 at the time of application to this program and given a classification as described in subparagraph one or two of paragraph b of subdivision four of section 27-1305 provided, however except until 7/1/05, real property listed in the registry of inactive hazardous waste disposal sites under paragraph b of subdivision two of section 27-1305 of this article prior to the effective date of this article, where such real property is owned by a volunteer; such property shall not be deemed ineligible to participate;
 - (b) listed on the national priorities list established under authority of 42 u.s.c. section 9605;
 - (c) subject to an enforcement action under title seven or nine of this article, except a treatment, storage or disposal facility subject to a permit, other than an interim status permit;
 - (d) subject to an order for cleanup pursuant to article twelve of the navigation law or pursuant to title ten of article seventeen of this chapter;
 - (e) subject to any other on-going state or federal environment enforcement action related to the hazardous waste or petroleum which is the site subject to this agreement.
3. "Brownfield site contact list" shall mean a list of persons, government agencies, groups, or organizations, including, but not limited to the chief executive officer and zoning board of each county, city, town and village in which such site is located, the public water supplier which serves the area in which such site is located, any site residents, any person who has requested to be placed on the site contact list, and the administrator of any school or day care facility located on the site for the purposes of posting and/or dissemination at the facility. For the purposes of this section "water supplier" means any public water system as such term is defined for the purposes of the sanitary code of the State of New York as authorized by section two hundred twenty-five of the public health law. Provided, however, that where the site or adjacent real property contains multiple dwelling units, the applicant shall work with the department to develop an alternative method for providing such notice in lieu of mailing to each individual.
4. "Brownfield site cleanup agreement" shall mean an agreement executed in accordance with section 27-1409 of this title by an applicant and the Department for the purpose of completing a brownfield site remedial program.

5. "Brownfield site remedial program" or "remedial program" shall mean all remedial activities or actions undertaken to eliminate, remove, treat, abate, control, manage, or monitor hazardous waste or petroleum at or emanating from a brownfield site, including, but not limited to, the following:
 - (a) remedial investigation and remedy selection activities needed to develop such a program;
 - (b) design activities;
 - (c) construction activities including without limitation grading, contouring, trenching, grouting, capping, excavating, transporting, incinerating, thermally treating, chemically treating, biologically treating, or constructing leachate collection and treatment systems;
 - (d) interim remedial measures;
 - (e) post-construction operation, maintenance, and monitoring;
 - (f) restoration of the environment;
 - (g) involvement by local governments of jurisdiction and by the general public; or
 - (h) oversight by the department.
6. "Citizen participation plan" shall mean the description of citizen participation activities prepared and carried out by municipalities, community based organizations and/or applicants pursuant to section 27-1417 of this title.
7. "Concentrated solid or semi-solid hazardous substances" shall mean solid or semi-solid hazardous substances present in surface or subsurface soil, surface water or groundwater in a concentrated form, such as precipitated metallic salts, metal oxides, or chemical sludges.
8. "Contamination" or "contaminated" shall mean the presence of a hazardous waste or petroleum in any environmental media, including soil, surface water, groundwater, air, or indoor air.
9. "Dense non-aqueous phase liquid" or "DNAPL" shall mean a hazardous substance that is a liquid that is denser than water and does not dissolve or mix easily in water.
10. "Document repository" shall mean a repository of brownfield site remedial program documents approved by the department or released for public notice established in a publicly accessible building near the location of such site.
11. "Engineering control" shall mean any physical barrier or method employed to actively or passively contain, stabilize, or monitor hazardous waste or petroleum, restrict the movement of hazardous waste or petroleum to ensure the long-term effectiveness of a remedial program, or eliminate potential exposure pathways to hazardous waste or petroleum. Engineering controls include, but are not limited to, pavement, caps, covers, subsurface barriers, vapor barriers, slurry walls, building ventilation systems, fences, access controls, provision of alternative water supplies via connection to an existing public water supply, adding treatment technologies to such water supplies, and installing filtration devices on private water supplies.
12. "Feasible" shall mean suitable to site conditions, capable of being successfully carried out with available technology, implementable and cost effective.
13. "Financial assurance" shall include but not be limited to surety bonds, trust funds, letters of credit, insurance or a multiple of financial mechanisms as determined to be adequate by the Department.
14. "Free product" shall mean an immiscible non-aqueous phase liquid other than a dense non-aqueous phase liquid present as a liquid, in surface or sub-surface soil, surface water or groundwater in a potentially mobile state.
15. "Grossly contaminated soil" shall mean soil which contains free product or residual contamination which is identifiable visually, through the perception of odor, by elevated contaminant vapor levels, by field instrumentation, or is otherwise readily detectable.
16. "Groundwater" shall mean water below the land surface in a saturated zone of soil or rock. This includes

perched water separated from the main body of groundwater by an unsaturated zone.

17. "Hazardous waste" or "contaminant" shall mean a hazardous waste as defined in Section 27-1301, and petroleum.
18. "Institutional control" shall mean any non-physical means of enforcing a restriction on the use of real property that limits human or environmental exposure, restricts the use of groundwater, provides notice to potential owners, operators, or members of the public, or prevents actions that would interfere with the effectiveness of a remedial program or with the effectiveness and/or integrity of operation, maintenance, or monitoring activities at or pertaining to a brownfield site.
19. "Interim remedial measures" shall mean activities to address both emergency and non-emergency site conditions, which can be undertaken without extensive remedial investigation and evaluation, to prevent, mitigate, or remedy environmental damage or the consequences of environmental damage attributable to a site, including but not limited to, the following activities: construction of diversion ditches, collection systems, free product recovery systems, or leachate collection systems; construction of fences or other barriers; installation of water filters; provision of alternative water systems; the removal of free product; or plume control.
20. "Light non aqueous phase liquid" or "LNAPL" shall mean a hazardous substance that is a liquid that is lighter than water and does not dissolve or mix easily in water.
21. "Municipality" shall mean a local public authority or public benefit corporation, a county, city, town, village, school district, supervisory district, district corporation, improvement district within a county, city, town or village or indian nation or tribe recognized by the United States with a reservation wholly or partly within the boundaries of the State, or any combination thereof.
22. "Newspaper notice" shall mean the placement of a prominently located, paid newspaper advertisement in the community bulletin section or similar local section of a newspaper of general circulation in the vicinity of the brownfield site which is the subject of the notice. Such notice shall be in english and in any other language spoken by significant numbers of people within the community.
23. "Non-aqueous phase liquid" shall mean a liquid that does not dissolve or mix easily in water.
24. "Not-for-profit corporation" shall mean a not-for-profit corporation exempt from taxation under section 501(c) (3) of the internal revenue code whose stated mission is not inconsistent with promoting reuse of brownfield sites within a specified geographic area, and who has exercised due care with respect to any hazardous waste or petroleum at the brownfield site, taking into consideration the characteristics of such hazardous waste, in light of all relevant facts and circumstances, including but not limited to a not-for-profit corporation whose board of directors shall include residents of the community or communities in such specified geographic area and who has a demonstrated record of community involvement and/or revitalization. A "not-for-profit corporation" shall not include any not-for-profit corporation whose acts or omissions have caused or contributed to the release or threatened release of a hazardous waste from or onto the brownfield site, or any not-for-profit corporation that generated, transported, or disposed of, or that arranged for, or caused the generation, transportation, or disposal of hazardous waste from or onto the brownfield site. This definition shall not apply if any member, officer or director of the not-for-profit corporation is or was employed or receiving compensation from any person responsible for a site under Title Thirteen, any responsible party under this title or under applicable principles of statutory or common law liability.
26. "Off-site contamination" shall mean any hazardous waste or petroleum which has emanated from a brownfield site beyond the real property boundaries of such site, via movement through air, indoor air, soil, surface water or groundwater.
27. "On-site contamination" shall mean any hazardous waste or contamination located within the real property boundaries of a brownfield site.

28. "Permanent cleanup" or "permanent remedy" shall mean a cleanup or remedy that would allow a site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls.
29. "Petroleum" shall have the meaning set forth in section one hundred seventy-two of the navigation law.
30. "Residual contamination" shall mean a hazardous waste remaining as a solid, semi-solid or immiscible liquid in surface or subsurface soil, geologic matrix pore spaces or fractures and held in place by capillary forces or other physical or chemical forces that will not drain from the formation.
31. "State Costs" shall mean all the State's response expenses related to the Site, including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating, implementing, overseeing, and administering this Agreement, and any other response costs as defined under CERCLA. Approved agency fringe benefit and indirect cost rates will be applied. For Participants, State Costs also include such expenses incurred in connection with the Site prior to the date of the BCA.

Appendix 2

15 Factors to be Considered When Evaluating Land Use Criterion

1. Current, intended or reasonably anticipated future land uses of the site;
2. Historical and/or recent development patterns shall be considered;
3. Brownfield Opportunity Areas - is the site within a BOA, and if so, is it consistent with the land use vision/plan?
4. Applicable Comprehensive Community Master Plans including local waterfront revitalization plans;
5. Proximity to residential property, and urban, commercial, industrial, agricultural and recreational areas;
6. Environmental Justice Concerns; Environmental Justice (EJ) means the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies. It is the general policy of DEC (see DEC Policy No. CP-29) to promote environmental justice and incorporate measures for achieving environmental justice into its programs, policies, regulations, legislative proposals and activities;
7. Federal or State land use designation;
8. Population growth patterns and projections;
9. Accessibility to existing infrastructure;
10. Proximity to Cultural Resources; Proximity to important cultural resources, including federal or state historic or heritage sites or Native American religious sites;
11. Proximity to Natural Resources; The objectives of this review are to identify the fish and wildlife resources that presently exist and that existed before contaminant introduction. Maps, site descriptions, and resource descriptions are used to identify possible pathways of contaminant migration affecting fish and wildlife. Information obtained will be used to select the media of concern and the locations to be sampled during the remedial investigation. (See appendix 3c of the Der-10);
12. Potential vulnerability of groundwater (see appendix 4c of the Der-10);
13. Proximity to floodplains;
14. Geography and geology;
15. Current institutional controls at the site.