

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of the -

PROPOSED ADOPTION OF SUBPART 375-5 OF
TITLE 6 OF THE OFFICIAL COMPILATION OF CODES,
RULES AND REGULATIONS OF THE STATE OF
NEW YORK (REMEDIATION STIPULATION PROGRAM)

HEARING REPORT

- by -

_____/s/_____
Susan J. DuBois
Administrative Law Judge

September 14, 2006

PROCEEDINGS

Background

The New York State Department of Environmental Conservation (DEC or Department), in collaboration with the New York State Department of Health (DOH), has been working on draft regulations to amend Part 375 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) for approximately two years. These regulations are being promulgated pursuant to the Brownfield Clean-Up and Superfund Refinancing legislation that was enacted in 2003 (L 2003, ch 1), and amended in 2004 (L 2004, ch 577). See, Environmental Conservation Law (ECL) § 27-1401, *et seq.*

On November 16, 2005, the Department issued a first set of the regulations and public comments were received through March 27, 2006. Public meetings were held in various locations throughout the state in November and December of 2005 and three legislative hearings were held in March 2006. See, Hearing Report, April 19, 2006, <http://www.dec.state.ny.us/website/ohms/decis/part375hr.html>.

In response to those comments, DEC revised the proposed amendments and held a second comment period on draft subparts 375-1 through 375-4 and subpart 375-6. This comment period ended on August 25, 2006 and included a legislative hearing that took place on August 15, 2006. See, Hearing Report, August 16, 2006, <http://www.dec.state.ny.us/website/ohms/decis/part375hr2.html>.

In addition to the above revised proposal, DEC drafted a new subpart 375-5 (Remediation Stipulation Program) and scheduled a separate legislative hearing and comment period on this proposed regulation.

The hearing on proposed subpart 375-5 took place on August 31, 2006, at 2:00 P.M. at the DEC central office, 625 Broadway, Albany, New York, before Susan J. DuBois, Administrative Law Judge.

Notice of Public Hearing

The Department provided public notice of the legislative hearing on 6 NYCRR subpart 375-5 by publishing notices in the July 12, 2006 on-line *Environmental Notice Bulletin*, and the July 12, 2006 edition of the *Albany Times Union*. A notice concerning the proposed rulemaking, that included notice of the hearing, was published in the July 12, 2006 New York State Register.

Electronic notification about the hearing was sent to persons on e-mail lists maintained by the Department.

In addition to the legislative hearing session, two public meetings were held in Buffalo and New York City, on July 18 and 19, 2006, respectively.

The Department received two requests for extension of the comment period on proposed subpart 375-5: a July 31, 2006 request from 18 organizations that also asked for an extension of the comment deadline for the other parts of part 375, and an August 15, 2006 request from Thomas P. DiNapoli, Member of the New York State Assembly. In letters dated August 21 and 22, 2006, the Department responded that extension of the deadline or deadlines was not necessary. The deadline for written comments remained September 5, 2006.

Public Hearing

At the August 31, 2006 hearing in Albany, DEC staff was represented by James Harrington, P.E., Chief of the Training and Technical Support Section, Bureau of Technical Support, Division of Environmental Remediation. Approximately 14 persons attended this hearing and in addition to Mr. Harrington, four persons spoke.

Mr. Harrington summarized the earlier stages of the rulemaking process for part 375 and stated that the proposed Remediation Stipulation Program (RSP) provides for an alternative remedial program. He stated that the program would address sites not eligible for the brownfield cleanup program or sites where a less structured program is sought. He noted that application to the RSP is voluntary.

Jeff Jones, on behalf of New Partners for Community Revitalization, Inc., stated that proposed subpart 375-5 both advances and erodes the Brownfield Cleanup Program (BCP), which is "fundamentally flawed and in need of statutory correction." He stated that the statutory definition of brownfields has been severely constricted in its application and leaves out sites that belong in the program. He stated that the BCP would not work as intended if DEC takes the position that it does not have authority to address problems with eligibility for that program but does have authority to create a new program, the RSP. Mr. Jones stated that the RSP is of questionable value and totally without statutory basis, and that DEC's attempt to enact subpart 375-5 conflicts with the statutory intent expressed in ECL 27-

1401 [*sic*, probably 27-1403] of encouraging voluntary remediation of brownfield sites through the program established by the statute. As an example of how a more streamlined program could be created within the BCP, he cited a draft concerning moderately contaminated projects that will receive loans through the New York Metro Brownfields Redevelopment Fund Program. He recommended that DEC encourage a public dialogue on the limitations of the BCP, and that the Legislature and the Governor revise the tax credit aspect of the BCP to expand eligibility while both targeting sites that would not otherwise get cleaned up and encouraging cooperation with communities.

Tim Sweeney, Regulatory Watch Program Director for Environmental Advocates of New York, expressed disappointment that DEC had not extended the comment period. He stated that the Department's statutory authority under ECL articles 1 and 3 does not allow it to ignore more specific statutory directives. He stated that although the brownfields law was intended as a replacement for DEC's former voluntary cleanup program, the RSP is modeled after the voluntary cleanup program. Mr. Sweeney briefly noted several subjects on which he stated the RSP conflicts with the brownfields statute, and stated that Environmental Advocates would submit written comments that discuss these in greater detail.

Laura Haight, Senior Environmental Associate with the New York Public Interest Research Group (NYPIRG), described the RSP as rolling back the progress New York State has made in developing its brownfield program, and taking the state back to the old and unsatisfactory voluntary cleanup program. She urged DEC to retract subpart 375-5 and stated that problems with the eligibility criteria need to be dealt with by the Legislature, including by ensuring that tax credits are apportioned using a needs-based approach. Ms. Haight stated that applicants may choose to enter the RSP in order to avoid the more rigorous requirements of the BCP. She also objected to the timing of the comment period.

Anne Rabe, Coordinator of the Center for Health, Environment and Justice, described the RSP as "illegal and poorly conceived." She stated that the basis of the brownfields law is that if an applicant complies with the cleanup, public participation, and DEC approval requirements, it will qualify for liability relief and tax credits. Ms. Rabe criticized the RSP as allowing for liability relief without requiring compliance with many of the

statutory prerequisites, and stated that the Legislature had given DEC unusually detailed instructions governing how liability relief could be granted. She stated that the Legislature had not authorized DEC to undercut the "carefully negotiated" brownfield cleanup requirements, nor to provide liability relief to any sites outside of the brownfield cleanup program. Ms. Rabe described the independent cleanup approach of part 375-5 as risky and unsafe, and as not authorized by the law. She stated that a "qualified professional self-certification" approach had been considered and rejected during negotiations leading to the brownfields law. Ms. Rabe stated that it is necessary to maintain oversight of the program by DEC and DOH staff as provided in the statute, and that inadequate initial work plans and reports had been submitted by some responsible parties, volunteers, and their consultants under Superfund and the voluntary cleanup program.

The hearing concluded at 2:36 P.M.