

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL REMEDIATION**

**REVISED SUBPARTS 375-1 to 4 and 375-6
ASSESSMENT OF PUBLIC COMMENT**

October 2006

**Revised draft rule noticed: July 12, 2006
Comment period ended: August 25, 2006**

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Appendix A
Appendix B

ACRONYMS and ABBREVIATIONS

BCA	Brownfield Cleanup Agreement
BCP	Brownfield Cleanup Program
BOA	Brownfield Opportunity Areas Program
COC	Chemical of Concern
DQO	Data Quality Objective
DER	Division of Environmental Remediation
DOH	Department of Health
EC	Engineering Control
ERP	Environmental Restoration Program
IC	Institutional Control
NCP	National Contingency Plan
NYCRR	Official Compilation of NY State Codes, Rules and Regulations
NYS	New York State
NYSDEC	New York State Department of Environmental Conservation
NYSDOH	New York State Department of Health
OM&M	Operation, Maintenance and Monitoring
PCE	Tetrachloroethene or Perchloroethylene
PRP	Potentially Responsible Party
QA/QC	Quality Assurance/Quality Control
SVOCs	Semi-volatile Organic Compounds
SSD	Sub-slab Depressurization System
SSF	State Superfund Program
SVI	Soil Vapor Intrusion
TAGM	Technical and Administrative Guidance Memorandum
TCA	Trichloroethane
TCE	Trichloroethene
TOGS	Technical Operating Guidance Series
TSD	Technical Support Document
USEPA	United States Environmental Protection Agency
VCP	Voluntary Cleanup Program
VOCs	Volatile Organic Compounds

INTRODUCTION

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of brownfield sites. Specific to this rule-making, the State has the SSF, created in 1979; the BCP, created in 2003; and the ERP, created in 1996.

The New York State Department of Environmental Conservation (Department) drafted the regulation in response to historic legislation signed into law by Governor Pataki in October 2003, and amended in 2004. That law refinanced and reformed the SSF, enhanced the ERP, and created the BCP. The Department has been administering and implementing the new and amended programs since the legislation's passage. These remedial programs provide for the investigation and remediation of contaminated sites throughout New York State by volunteers, municipalities and the parties responsible for the contamination. The programs approach these cleanups in a common manner, with some unique aspects for each program.

That regulation is proposed to incorporate the statutory changes since the previous Part 375 rule making, and make adjustments to conform to experience acquired. The revisions are intended to clarify and streamline the current regulations and to address issues raised by program stakeholders. This proposed rule will facilitate the cleanup and reuse of contaminated sites which will stimulate economic revitalization, while ensuring the continued protection of public health and the environment.

The Department issued a draft revised 6 NYCRR Part 375, the regulation that has implemented the SSF and the ERP. The revised Part 375 will also now include the regulation to implement the BCP. The draft regulation and supporting documentation was available for a 120-day public comment period at repositories and on the Department website. The Department held three public hearings to solicit testimony during March 2006 and received written comments through March 27, 2006. Those comments and responses were provided to the public formally by notice in the State Register and Environmental Notice Bulletin on July 12, 2006 in the document entitled "Proposed Part 375 Response to Comments, June 2006" ("June 2006 RTC"). The Department also issued a Revised Proposed Part 375 (revised rule) for public comment on July 12, 2006 with a 45-day comment period to close on August 25, 2006. Both the June 2006 RTC and the Revised Proposed Part 375 were noticed in the State Register and the Environmental Notice Bulletin pursuant to the State Administrative Procedures Act, due to the substantive changes made in the proposed rule in response to the comments received. In revising the rule, the Department moved the soil cleanup objective (SCO) tables and provided an expanded discussion of their use, which had previously been included in subpart 375-3, to a new subpart 375-6 entitled "Remedial Program Soil Cleanup Objectives".

Two public meetings were scheduled to present the revised rule, one in Buffalo, NY on Tuesday, July 18, 2006 and the other in New York City on Wednesday, July 19, 2006. A public hearing was also held in Albany, NY on Tuesday, August 15, 2006. The public comment period closed on Friday, August 25, 2006.

Comments received on the revised rule fell into four categories:

1. Comments commending the Department for revisions to the original draft rule issued for comment on November 16, 2005;

2. Comments previously answered in the June 2006 RTC;
3. Comments on portions of the proposed rule which were not changed subsequent to the March 27, 2006 comment period; and
4. Comments on the new or revised sections of the proposed rule issued on July 12, 2006.

Regarding comments in the first category, the Department appreciates the supportive comments.

Comments in the second category are those on portions of the revised regulations which raise issues that were previously asked and addressed in the assessment of public comment included in that notice of revised rule-making (June 2006 RTC). These comments need not be addressed again in this assessment of public comment. These comments are set forth in Appendix A.

For comments in the third category, the public comment period for those portions of the regulation that were not subject to substantial revision closed on March 27, 2006. Because these comments addresses text of the proposed regulation that was not subject to substantial revision, it is untimely and will not be addressed as part of this assessment of public comment. These comments are set forth in Appendix B.

Comments in the final category, comments on new or revised sections of the proposed rule received during this comment period and at the hearing. The Department responses are presented by topic (as shown in the Table of Contents) in seven parts, five of which parallel the subparts generally:

- Part A – Comment on Part 375 Generally;**
- Part B – Comments on Subpart 375-1: Provisions applicable to all subparts;**
- Part C – Comments on Subpart 375-2: State Superfund Program (SSF);**
- Part D – Comments on Subpart 375-3: Brownfield Cleanup Program (BCP);**
- Part E – Comments on Subpart 375-4: Environmental Restoration Program (ERP);**
- Part F – Comments on Subpart 375-6: Remedial Program Soil Cleanup Objectives; and**
- Part G - Comments on matters outside Part 375**

PART A: COMMENTS ON PART 375 GENERALLY

A.1 Comment: The Department received various requests for an extension of the comment period.

Response: The Department considered the requests for an extended comment period and determined that an extension was not necessary given the extensive outreach and comment periods conducted on the rule.

A.2 Comment: A comment noted site background levels in heavily urban or industrialized areas may exceed the SCO cleanup levels in the tables requiring owners of “contaminated” sites to reduce exposures to surface soils simply because the levels have been determined by investigation while allowing owners of non brownfield sites, where background levels likely exceed the SCO, to pursue their projects without investigation or remediation. The NYSDEC should allow site owners to develop site specific cleanup standards based on site background levels no matter what they are, as long as the owner can demonstrate that the higher levels truly represent background conditions.

Response: The proposed rule provides for the consideration of site background in each of the three remedial programs subject to these regulations. The use of background, as set forth at paragraphs 375-2.8(c)(3); 375-3.8(e)(4) and 375-4.8(d)(3) for the SSF, BCP and ERP, respectively, is completely consistent with past practice. Site background levels will be determined through the application of Department guidance. The Department does not consider soils exhibiting levels less than background to be contaminated as a result of activities at the site. The remedial program normally does not set cleanup levels below anthropogenic background concentrations. This is consistent with USEPA’s approach to cleanups and background. The reasons for this approach include cost-effectiveness, technical practicability, and the potential for recontamination of remediated areas by surrounding areas with elevated background concentrations.

A.3 Comment: The revised regulations now apply the SCOs developed pursuant to the Brownfield Cleanup Program to all remedial programs, without providing a detailed justification for this change.

Response: This comment was addressed by the Response to Comment D.8.97 in the June 2006 RTC.

**PART B – COMMENTS ON SUBPART 375-1
PROVISIONS APPLICABLE TO ALL SUBPARTS**

B:0 General Comments on Subpart 375-1

No comments

B:1 Comments on Section 375-1.1

B.2.0 Comment: The revised draft proposal at 375-1.1(a) states the final rule will apply to orders, agreements and contracts entered into by the Department after its effective date. Similarly, the revised final rule would apply to work plans, reports, certificates and other documents “approved, accepted or issued by the Department” after its effective date. Under this language, work plans under development pursuant to an order or agreement that was entered into prior to the effective date of the revised rule would be subject to review and approval based on the content of the revised rule if such document were approved by the Department after such date. It was recommended that this section be amended to say that the revised final rule will not apply to orders, agreements and contracts entered into prior to effective date of the final rule, nor to work plans, reports, certificates and other documents submitted to the Department pursuant to such orders, agreements and contracts.

Response: The Department has considered this comment and declines to make any revisions to the proposed rule. Any order, agreement or contract entered into after the effective date should appropriately be compliant with the final rule. Relative to work plans, reports, certificates and other documents, it is equally appropriate that such documents comply with the final rule.

B:2 Comments on Section 375-1.2

B.2.1 Comment: The definition of “all appropriate inquiry” (AAI) at 1.2(a) should be amended to provide that ASTM E1527-00, and not ASTM E1527-97, applies to transactions occurring between 1/1/00 and 11/05/06.

Response: ECL 27-1323.4(c) requires the use of ASTM E1527-97 until such time as the Department issues regulations to identify another standard and as of time the issuance of these regulations, ASTM E1527-05 is the effective ASTM standard. However, inasmuch as ASTM E1527-00 superceded ASTM E1527-97, the Department will accept reports prepared in accordance with ASTM E1527-00 while such standard was in effect as satisfying this regulation.

B.2.2 Comment: The term Concentrated solid or semi-solid hazardous substances is not a defined term, the ECL definition uses “waste”.

Response: Subdivision 375-1.2(f) has been revised as indicated by the comment.

B.2.3 Comment: Several comments questioned the definition of "qualified environmental professional" contained in proposed 375-1.2(ak). The comments stated that the definition is extremely limited and excludes many individuals with appropriate education, training and experience. It was suggested that the DEC adopt the approach of USEPA when it defined a qualified environmental professional in a more expansive and appropriate manner in its "All Appropriate Inquiries" (AAI) rule (40 CFR Part 312) promulgated under CERCLA. See Federal Register, Vol. 69, No. 165, 8/26/04 at pp. 52552-52555 for a complete discussion of the rationale for the EPA's change to a more expansive definition of environmental professional and Federal Register Volume 70, No. 210, 11/01/05 at pp. 66078-66081.

Response: The Department carefully considered the "qualified environmental professional" definition cited and elected to utilize the definition presented. The Department has considered this comment and declines to make this revision.

B.2.4 Comment: The definition of "historic fill" at 375-1.2(x), while an improvement, still casts a distinction between historic fill sites and sites contaminated through subsequent activities, even though it may be the case that contamination at historic fill sites may equal or exceed contamination levels at non-historic fill sites. The revised definition of historic fill now at least recognizes that historic fill qualifying as characteristic hazardous waste should be treated the same as other characteristic hazardous waste. However, it is still unclear how DEC intends to use this definition in the remedial programs. Moreover, the Division of Solid and Hazardous Materials (DSHM) is currently revising Part 360 and has proposed a different definition of "historic fill" than the one currently proposed in Part 375. These definitions are inconsistent, most significantly in that Draft Part 360's definition limits the definition to material that was "used prior to January 1, 1963 to create usable land by filling water bodies, wetlands, and other topographical depressions." It is unclear whether these regulations, which are specific to historic fill, would be applicable to historic fill on present on sites enrolled in a Part 375 remedial program. See Draft Part 360.22. DEC should work with the City and other urbanized municipalities in order to develop a uniform, comprehensive policy for managing non-hazardous historic fill material in a way that is practical, cost effective, and protective of human health and the environment.

The final regulations have not resolved the fill issue, which is whether fill sites will or will not be eligible for the Subpart 3 Title 14 BCP, the new Subpart 5 stipulation program or no remedial program, but possibly a new Beneficial Use Determination program. At a minimum, the regulations should state that a new regulatory program shall be developed to address historic fill sites in a subsequent rule-making. NYSDEC should also indicate how the Part 360 Beneficial Reuse Determination (BRD) rules might be used in remedial programs to allow reuse of on-site materials.

Response: The first issue raised by this comment questions how the Department will use the definition. The rule uses the term in several places. In addition, the term is raised routinely in the context of remedial programs and guidance making a common definition desirable. The second issue raised is how the definition in the proposed rule compares to the definition in the pre-proposal version of the Part 360 amendments. The Part 360 regulation revisions cited have not yet been proposed; when finalized it is expected that the definitions will be consistent. In addition, the Department has evaluated the proposed Part 360 definition of historic fill and has revised the definition in subdivision 375-1.2(x) for clarity.

The comments also request that a generic BUD be issued to allow historic fill to be allowed as sub grade material beneath buildings or other structures. The request has nothing to do with the Part 375 rule-making as any such change would be in Part 360. Further, the suggestion is too broad in scope since many different site -specific pathways must be considered (direct contact is not the only pathway: potential groundwater impact and vapor intrusion must be considered) in such an evaluation. In addition, the Department agrees C&D material in and of itself should not justify eligibility for the BCP, nor would the presence of C&D material make a site with other contamination ineligible for the BCP program. Eligibility for a site with C&D material in the remediation stipulation program will be addressed in the response to comments for that rule-making.

B.2.5 Comment: The definition of "Person" at 375-1.2(ag) excludes the reference to "an estate". DEC should clarify whether this is a typo.

Response: The Department has considered this comment and determined not to make a change. The deletion of the phrase "an estate" was intentional to conform this definition to ECL 27-1307(4).

B.2.6 Comment: Regarding the definition of remedial investigation at 375-1.2(an), the term feasibility study is not defined. Further, we would argue a feasibility study is not required in the BCP rather an alternatives analysis as defined by the statute in ECL 27-1413.

Response: The definition has been revised to delete feasibility study and include the generic phrase “in support of the selection of a remedy”

B.2.7 Comment: In the definition of “Site management” there is no cross-reference to the easement section or regulation 375-1.8(a)(5). In addition, the phrase “operation and maintenance plan” is used in Title 14. How is a site management plan different from the traditional O&M plan? Hasn’t the O M&M plan always been the document that manages the EC and ICs?

Response: The Department has considered this comment and declines to make any revision. The use of the term site management in place of operation maintenance and monitoring (OM&M) reflects the fact that many sites will not have continued operation of a remedy and monitoring of conditions throughout their post-remedial period but will require continued implementation of use or ground water restrictions as well as management of excavations, hence the new term. Site management expectations were discussed in the Response to Comments B.8.36 and B.8.39 in the June 2006 RTC.

B.3: Comments on Section 375-1.3

No comments

B.4: Comments on Section 375-1.4

No comments

B.5: Comments on Section 375-1.5

B.5.1 Comment: While we commend you for attempting to rectify the *Aviall* mess through these new regulatory provisions, in order for the CERCLA contribution scheme to apply, an administrative settlement with the state – in this case under a BCP Agreement – must specifically encompass CERCLA liability.

Response: The Department has considered this comment and the text has been revised to reference 42 USC section 9601, et seq., and the reference to "CERCLA section 113(f)(2)" has been changed to "42 USC 9613(f)(2)."

B.6: Comments on Section 375-1.6

B.6.1 Comment: Section 1.6(a)(3) refers to a “qualified environmental professional acceptable to the NYSDEC.” We recommend that DEC revise the language to reference “a qualified environmental professional meeting the requirements of 375-1.2(ak).”

Response: The Department has considered this comment and the regulation has been revised to include a reference to subdivision 375-1.2(ak) .

B.6.2 Comment: Several changes, as underlined in the following quotes, were requested to 375-1.6(a)(3) ; “During all field activities conducted under a Department-approved work plan...” . and 375-1.6(b)(3)(iii)“certify that all activities were performed in full accordance with the Department approved work plan and any

Department approved modifications” since field conditions may warrant work plan changes.

Response: The Department has revised the regulation at paragraph 375-1.6(a)(3) and subparagraph 375-1.6(b)(3)(iii) as proposed by this comment.

B.6.3 Comment: Section 375-1.6(b)(2) states reports shall include, but not be limited to, all environmental or *health data* generated relative to the site. What is meant by the italicized term health data? I have never seen this phrase before, and frankly have no idea what it means.

Response: The term “health data” has been deleted from this paragraph.

B.6.4 Comment: The revised regulations should contain a municipal notice provision. Having an effective mechanism to track and enforce engineering and institutional controls including notice by local governments, as is required in the statute, is key to the implementation of a cleanup agreement.

Response: The Department agrees that effective mechanisms need to be in place to identify, employ and enforce institutional and engineering controls and stated this at Response B.8.26 in the June 2006 RTC. Relative to the municipal notification, the concern raised by this comment is already addressed. The remedial project is not complete until the final engineering report (FER) is approved. The FER is required to include several certifications which mirror the certification set forth at ECL 27-1419(4). The FER certifications are set forth at paragraph 375-1.6(c)(4). One of these certifications, subparagraph (iv) specifically requires notification to the affected municipalities of the filing of the environmental easement. Accordingly, the Department does not need to revise the proposed rule.

B.6.5 Comment: In response to a request for a definition of “remedial action objectives” or “RAOs”, the Department stated in its Response to Comments that such definition was best left to guidance documents and elected a couple of references to RAOs and replaced them with a reference to the applicable “remediation requirements.” The following additional references to RAOs in revised Part 375 should also be deleted and replaced with “remediation requirements, see Revised Part 375-1.6(c)(5) and 376-1.8(a)(4).

Response: The Department has considered this comment and finds no mention of “remedial action objective” in paragraph 375-1.6(c)(5), accordingly no change was made. In paragraph 375-1.8(a)(4), the change from “remedial action objective” to “remediation requirement” was made.

B.6.6 Comment: Section 375-1.6(b) (3) requires final reports to be completed by either a PE or a QEP and Subsection (c) (3) requires final engineering reports to be prepared by a PE. Both of these subsections identify the PE or QEP must have "primary responsibility for the day to day activities...".

If a "remedial party" is actively managing their own investigation or remediation their representative (who may not be a PE or QEP) should be able to manage and be responsible for the day to day activities. The remedial party's representative should also be allowed to prepare final reports or (at least) portions of final reports. The PE or QEP should be providing oversight and guidance since they will be required to certify the reports based on the activities performed and the approved work plan or remedial design. If a remedial party's representative prepared any portion of any final report, the remedial party should also certify the applicable report. The Department is urged to provide this option to the remedial party.

Response: The Department has considered this comment and declines to make the requested revision.

B.7 Comments on Section 375-1.7

No comments

B.8 Comments on Section 375-1.8

B.8.1 Comment: In general, in those instances in which the remedial party has no “remedial responsibilities” it would be helpful for the regulations to indicate at least procedurally what the NYSDEC responsibilities will be. The lack of clarity on the process that the state will use to address off-site sources of groundwater contamination that are impacting cleanup program sites continues to complicate cleanup plans and more importantly the liability negotiations in real estate transactions.

Response to B.8.1: The Department has considered this comment and determined not to make a change to the proposed rule. The proposed rule is in accord with the enabling statutes. Generally, regulations are promulgated to advise the regulated community as to its obligations, not to establish obligations for the Department. We shall continue to produce guidance which will provide additional information on the implementation of the statutory and regulatory provisions.

B.8.2 Comment: As provided in the statute, the DEC should promote the use of innovative technologies, and as such, the regulations should promote the use of the Triad approach.

Response: The Department added paragraph 375-1.8(a)(4) to these revised regulation in furtherance of this statutory requirement. The Department declines to revise the regulation to highlight this one example of an innovative approach. See also Response B.8.9 in the June 2006 RTC.

Groundwater protection and control measures

B.8.3 Comment: The language in 375-1.8(d) is an improvement over the first draft but requires additional clarification to specifically address the technical complexities that arise when on- and off-site sources contribute the same contaminants to groundwater. The regulations should specify that in the case where on- and off-site sources contribute the same contaminants to the groundwater, the remedial party is only obligated to remediate groundwater to the levels detected in the up gradient wells. In addition, the mitigation measures should be clarified by incorporating into the regulations examples of mitigation measures.

Response: The Department has considered this comment and declines to make any revision to the regulations. The rule is sufficiently clear as to the responsibilities to address groundwater.

B.8.4. Comment: NYSDEC should clarify 375-1.8(d)(1)(iii) if the volunteer's obligation to evaluate the feasibility of containing the “plume” on-site extends to the potential for vapor intrusion to migrate to off-site properties. Likewise 375-1.8(d) (2) should clarify if the criteria in this section apply to vapors migrating from an off-site groundwater plume and interplay with section 375-1.8(3)(2)(ii) and the draft vapor intrusion guidance.

Response: ECL 27-1415(5)(a) states, “Plume stabilization shall be evaluated for all remedies and the further migration of contamination from the site shall be prevented to the extent feasible, including any actions that would be necessary to maintain and monitor such stabilization. In addition, a participant shall prevent the further migration of plumes to the extent feasible.” This statutory requirement is incorporated into the regulation at paragraph 375-1.8(d)(1) and would extend to contamination in soil vapor emanating from a site. The volunteer has no obligation to address off-site contamination.

Accordingly, the Department has determined that no further clarification is considered necessary.

B.8.5 Comment: The requirement at 375-1.8(d)(2)(i)(b) that the Department must determine the existence of an actual "off-site source of contamination, located on one or more up gradient locations, that has come to impact on-site groundwater as a result of the migration of the contaminant in, or on groundwater" may be ineffective and overly burdensome in practice. In many circumstances, tracking groundwater contamination to a specific up gradient source may be impossible, especially in an urbanized setting where there are a large number of potential sources and the contamination may be ubiquitous. In circumstances where it is not feasible to identify actual off-site sources, it should be enough for a remedial party to demonstrate that there is not an on-site source causing or contributing to the identified groundwater contamination.

Response: Clause 375-1.8(d)(2)(i)(b) does not require the Department to determine the "actual" off-site source of contamination. Rather, the Department would consider a remedial party's response, as stated by the last sentence of this comment, to be appropriate and consistent with what is required by paragraph 375-1.8(d)(2). The issue of ubiquitous contamination is more appropriately addressed in the groundwater strategy being developed pursuant to ECL 15-3109. Also see Response to Comment B.8.144 in the June 2006 RTC.

B.8.6 Comment: Thank you for clarifying that an off-site source impacting on-site groundwater is not the responsibility of the remedial party. However, section 375-1.8(d)(2)(ii)(b-c) and (d)(3)(b) are confusing at best and should be deleted. If the criteria in (d)(2)(i) did not apply, the party would not be subject to (2)(ii). Similar language does not appear in (d)(3), suggesting it is a typo or that you were intending to cross reference a different section. Second, with respect to (d)(2)(ii)(c) and (d)(3)(ii)(b), why should the innocent party who is the unfortunate recipient of someone else's plume still be required to spend money to identify a remedy which eliminates the plume?

Response: The Department has considered this comment and declines to make the requested change.

B.8.7 Comment: The new provisions related to groundwater remediation included in the revised draft rule, draft Part 375-1.8(d)(2)(ii)(c), states that where on-site groundwater is impacted solely by an off-site source, the remedial party must "identify a remedy . . . which eliminates or mitigates, to the extent feasible, the impact of any off-site contamination entering the site." The Department's intent here is unclear. Does it mean that the remedial party is required to actively treat on-site groundwater? At most, it seems that the Department should require to eliminate or mitigate on-site environmental or public health exposures caused by off-site sources, not on-site impacts.

Response: The Department has revised clause 375-1.8(d)(2)(ii)(c) to clarify that the remedy is intended to address on-site environmental or public health exposures caused by off-site sources (e.g. allow a groundwater use restriction on the site).

B.8.8 Comment: The Department expanded in Revised Part 375-1.8(d)(3) the description of the circumstances under which a remedial party will be held responsible for addressing contamination migrating across a site from an upgradient off-site source. It reasonably links responsibility to a contribution of contaminants from an on-site source. However, Revised Part 375-1.8(d)(2) would require the Department to determine that there has been "no contribution" before a remedial party is relieved of liability for the contaminants simply transiting across its site. Because the addition of one molecule of a contaminant or of minor concentrations of different contaminants can both be viewed in some respects as a "contribution," the proposed regulation is overbroad. Revised Part 375-1.8(d)(2) needs to be amended to shield any remedial party from liability for contaminated groundwater coming from an off-site source unless there is something more than a inconsequential amount

being contributed from on-site sources of the same contaminants. The regulations should also specify that in the case where on- and off-site sources contribute the same contaminants to the groundwater, the remedial party is only obligated to remediate groundwater to the levels detected in the upgradient wells. In addition, the mitigation measures should be clarified by incorporating into the regulations examples of mitigation measures presented in the Response to Comments.

Response: The Department believes the regulation provides sufficient flexibility to address the “one molecule of a contaminant” scenario identified by the comment. The Department however does recognize that the definition of what constitutes a source as defined at subdivision 375-1.2(a) “means a portion of a site ...containing contaminants in sufficient concentrations to migrate in that medium, or to release significant levels of contaminants to another environmental medium.” By this definition a source would be expected to contribute more than an “inconsequential amount” to the groundwater therefore subparagraph 375-1.8(d)(2)(ii) has been revised to reflect that “something more than an inconsequential amount being contributed from on-site sources” is needed to determine a contribution by the site. Further, clause 375-1.8(d)(3)(ii)(a) clearly indicates that the remedial party’s responsibility is for developing a remedy for the “on-site sources **contributing** to the groundwater contamination”. (emphasis added) Such responsibility would not extend to remediating groundwater to levels lower than that contamination entering the site from non-site sources. Relative to the request for examples of mitigation measures, such examples are best addressed in guidance.

B.8.9 Comment: NYSDEC should clarify what is meant by “community needs” at 375-1.8(d) (4) (iii) (d).

Response: The Department has considered this comment and determined not to make a change. This provision is directly from the statute. Any clarifications are more appropriate for guidance.

B.8.10 Comment: I commend the Department for the redraft of this section to include some of the requirements provided in the statute. The Department has included the provision “while the current use of groundwater as drinking water may be considered, the absence of such use shall not exclude the need for remediation.” This language is very critical since it reflects important statutory intent. As proposed, the revised draft regulation gives no indication that the Department will ever require the remediation of groundwater that is not currently being used as drinking water. In addition, while section §375-1.8(d) has been redrafted and expanded, the hierarchy of remedial measures to be used is now only a list of measures to be considered (re: source removal or control; groundwater quality restoration, and plume containment/stabilization). The Department has also included most of the groundwater remediation strategy that is laid out in section 15-3109 of the statute but fails to include “or which can be initiated by the State pursuant to other provision of this chapter to address groundwater contamination”.

Response: The comment acknowledges the incorporation in the revised regulation subparagraph 375-1.8(d)(4)(iv), which states, “while the current use of groundwater as drinking water may be considered, the absence of such use shall not exclude the need for remediation.” This language clearly requires “the remediation of groundwater that is not currently being used as drinking water” despite the commentors apparent view to the contrary. As to the groundwater strategy, a new subparagraph 375-1.8(d)(4)(v) has been added to include the previously omitted referenced language.

B.8.11 Comment: I commend the Department for revising the regulations to explicitly include all statutory off-site investigation and cleanup requirements; however, some language appears to have been deleted in the revision. The deleted language should be re-inserted.

Response: The Department has considered this comment and determined not to make a change.

Remedy selection

B.8.12 Comment: With respect to 375-1.8(f)(9)(i) (and this comment also applies to the comments with respect to Subpart 2), if the new cleanup standards only apply to Superfund sites where cleanup to pre-release conditions is not feasible, then there will not be too many Superfund sites applying anything other than the unrestricted cleanup levels. If there is a development plan for a Superfund site, and the plan is residential, commercial or industrial in nature, then the applicable cleanup standards should apply.

Response: The goal for Superfund sites has been, and remains, pre-disposal conditions to the extent feasible. The regulation, in allowing the application of the Subpart 375-6 tables to Subpart 375-2, maintains this goal, unless proven not to be feasible through the site specific feasibility study as set forth in subdivisions 375-2.8(b) and (c). Once a remedial party, through the feasibility study, evidences that a pre-disposal cleanup is not feasible, a use-based cleanup may be considered.

B.8.13 Comment: With respect to the zoning language, in 375-1.8(f)(9)(ii) if a party wants to build a residential project on industrially zoned land, the remedy should proceed provided it is for a residential project.

Alternatively, if a party wants to build industrial or commercial facilities on residentially zoned land, they may still have to cleanup to residential levels based on the zoning. However, the Department suggests that until rezoning for the proposed use is approved, issuance of the COC for the proposed use will be held up even after the cleanup is complete until the rezoning is granted. If a party has cleaned up the site, they should still get the benefit of a COC for a use that is acceptable under the current applicable zoning. It is likely that the clean up surpassed industrial only levels since the vast majority of development projects are not industrial in nature or the developer will have changed their plans by this point anyway if rezoning has been consistently denied. So this provision should be a bit more flexible, and allow for a process that permits adjustment or modification of the future use to be consistent with the applicable zoning and still allow the party to earn the COC under the current zoning.

Response: The provision is sufficiently flexible in that it only applies where the proposed use is non-conforming. If the remedial party modifies the proposed non-conforming use to a conforming use the COC can be issued. Accordingly no change will be made to the regulation.

B.8.14 Comment: The only addition made by DEC to revised Part 375-1.8(f)(9)(ii) was to allow it to disregard the remedial party's proposed use and "approve a remedy based upon the most restrictive use which is consistent with existing zoning..." The statute is satisfied by *any* land use that is consistent with applicable zoning. As written, it would prohibit the Department from "approving" any "remedy" that does not attain conditions protective of public health and the environment for the use for which a property is zoned - regardless of whether the current, intended and reasonably foreseeable use does not require such stringent standards. By doing so, the Department renounces the flexible authority which the Legislature provided it to select a remedy based on consideration of a number of factors that will attain conditions protective of public health and the environment. It is not clear why DEC is seemingly willing only to approve the "most restrictive" (as opposed to the "most intensive") land use that comports with existing zoning. The provision should be revised to authorize *any* land use that is consistent with current zoning and to allow the issuance of COC predicated on such consistency. For example, if it were infeasible to attain residential SCOs at a fenced electrical substation in an area zoned residential, Revised Part 375-1.8(f)(9)(ii) would nevertheless bind the Department to not approve any remedy. This would result in a situation where the substation could not be cleaned up. Revised Part 375-1.8(f)(9)(ii) should be conformed to statute and, in such circumstances, only restrict the Department from "considering" a non-conforming use when there are other feasible remedies available for selection which attain conditions protective of the use of the site as zoned.

Response: For purposes of clarity, subparagraph 375-1.8(f)(9)(ii) has been modified to reference paragraphs 375-1.8(g) which was revised to clarify these provisions. However, the statute, and therefore this rule, does not afford the opportunity to allow non-conforming uses as suggested by the comment.

Use of a site

B.8.15 Comment: Regarding 375-1.8(g) the description of unrestricted and restricted, along with the restricted scenarios has too many whichs. Also one substantive clarification needs to added to the industrial category to allow lunch areas or outside seating areas for workers.

Response: The Department has revised subdivision 375-1.8(g) to remove several superfluous “whichs”. The example for industrial use cited was addressed in the Response to Comment D.8.37 in the June 2006 RTC. As stated previously, examples of allowable uses in each use category are best addressed in guidance.

B.8.16 Comment: Also it appears as if the most and least restrictive hierarchy was misapplied in 375-1.8(g)(3).

Response: The hierarchy is correct as set forth in paragraph 375-1.8(g)(3), following the obvious logic that an unrestricted use (e.g. no restrictions on the site) is the least restrictive use while an industrial use, at the other end of the spectrum, would be the most restrictive.

B.8.17 Comment: DEC added a new track 2 “residential” category to the existing three categories (restricted-residential, commercial and industrial). This is a new restricted single-family homes category instead of leaving residential in Track 1. Multiple dwellings were already covered under Track 2 restricted-residential. It appears that the need for this new category was created when DEC made the Track 1 SCOs more stringent or perhaps DEC felt a need to create another category specifically for single-family homes because they were effectively excluded from Track 2 cleanups in the prior draft of the regulations. Interestingly, the new Track 2 residential human health SCOs are generally less stringent than the former Track 1 human health SCOs, which also begs the question why DEC is now willing to use less stringent SCOs for single-family homes than they were in November. On the other hand, DEC has preserved the concept of land use specific levels of stringency within Track 2 because the residential SCOs are more stringent than the restricted-residential SCOs. Just as with the new Track 1 SCOs, DEC needs to explain the rationale for developing the new Track 2 Land Use Category.

Response: The Department of Health did not use any less stringent SCOs for the residential (single family) use category. The new Track 2 residential use column utilizes the same public health protection values developed for use in the original unrestricted (farms excluded) public health SCO presented in the original Track 1 SCO table (Table 375-3.8(e)(1)). As noted in the Response to Comment D.8.16 in the June 2006 RTC, the reason some of the protection of public health SCOs in the original Track 1 SCO table are lower than the new table is that the protection of public health column in Table 375-3.8(e)(1) was generated using the lowest of the public health based residential use SCOs and PGW SCOs in the current Table 375-6.8(b). For many compounds, notably the volatile organic compounds, the PGW SCO would have been the determining value in the original unrestricted table not the health based SCO. This commenter clearly needs to review the Technical Support Document which presents the basis for the derivation of the SCO tables.

B.8.18 Comment: We oppose the DEC’s proposal to create a new “restricted-residential” category for many of the same reasons that we already stated in our March 27th comments regarding the “restricted-residential” category. This category was not contemplated in the original legislation, which only specified three cleanup

tracks: Unrestricted, Commercial, and Industrial. The proposed “residential use” category is not supported by statute and is unenforceable in practice. They should be eliminated.

Response: The Department has considered this comment and declines to make the revision. The statutory basis for the “residential use” category is the same as that for the “restricted-residential”. The Department response to similar objections regarding the “restricted-residential category” provides the Department position on the objection raised. See the Response to Comments B.8.45 and D.8.16 from the June 2006 RTC.

B.8.19 Comment: The Redrafted Regulations (375-1.8(g)) do not expressly provide a category within the BCP for a site that will contain a school or daycare. (Although the regulations are clearly not intended to list all possible uses for the land, this absence is glaring.) Because of the highly-sensitive nature of student populations, we suggest that schools be included in the “residential” land use category. Also, detailed lists of the specific uses that will be allowed under each land use category should be restored to the text of the regulations.

Response: The Department has considered the request for lists of specific uses allowed for a use category and declines to make this revision, as such lists are more appropriate for guidance. Also see the Response to Comment B.8.45 in the June 2006 RTC.

B.8.20 Comment: DEC is commended for creating a land use category in 375-1.8(g)(2)(i) that permits single family housing. One concern, however, is that DEC's decision to not allow engineering controls except with respect to groundwater may dissuade remedial party from making the conservative decision to voluntarily install a soil vapor barrier, passive sub-slab venting system, or other protective measure. If such systems are installed as voluntarily protective measures and not to address any remaining on-site contamination, DEC should not consider them to be engineering controls that would prevent an otherwise acceptable site from being developed as single family housing.

Response: Where a remedial work plan does not include a requirement for the installation of a sub-slab venting system, the installation of such a system “voluntarily” by a remedial party would not be considered an engineering control requiring an institutional control.

B.8.21 Comment: While the "restricted-residential use" category at 375-1.8(g)(2)(ii)(b) includes a description of "active" recreational uses, and "restricted commercial use" includes a description of "passive" recreational uses, there is no indication how natural areas should be categorized.

Response: Generally natural areas provided as “green space” on a developed property would be considered part of the site subject to the soil cleanup criteria applicable to the use of the site.

B.8.22 Comment: It is unclear to us how or why the DEC determined that a family that cannot afford a house of its own, or who lives in an area without available detached houses, must endure greater levels of PCBs, hexavalent chromium, benzene, TCE, dichlorobenzene, etc. (See Redrafted Regulations 375-6.) Certainly this distinction has a deleterious effect on residents of “common ownership” housing, and a disproportionate impact on lower income people, who tend to live in higher-density housing. The conception of the “restricted-residential” category should be eliminated, and the “residential” clean-up standards applied to all such sites.

Response: The public health protection afforded those occupying either single family or common ownership housing would be the same for either the residential or restricted-residential land uses. The public health exposure scenarios (dermal contact, soil ingestion and inhalation) evaluated and

considered in developing the residential and restricted-residential uses SCO are the all the exact same, with the exception of the vegetable garden uptake exposure scenario. The garden scenario was not evaluated for the restricted-residential SCO since vegetable gardens are not typical components of higher density housing, unless in designated areas (e.g. community gardens as cited in the description of restricted- residential). The residential use SCOs are the unrestricted public health values previously developed for Track 1. (See Response B.2.#) The “residential” SCO column in the restricted use table was added in response to various requests for a single family residential restricted use during the initial comment period. The development of the SCOs is discussed in more detail and the calculations of the values for each of the exposure scenarios are presented in the Technical Support Document.

B.8.23 Comment: The cross-reference to paragraph (1) in 375-1.8(h)(3)(ii)(a) in is unclear, as it does not discuss individuals.

Response: The reference in clause 375-1.8(h)(3)(ii)(a) has been modified to identify the appropriate individual.

B.8.24 Comment: The current time frame to submit notice of failure of a IC/EC in 375-1.8(h)(3)(v) is vague. The NYSDEC should establish a specific number of days from the discovery of the failure. In addition, the reference to submitting a work plan for implementing the “corrective action” could be confused with obligations under RCRA. Instead, it is suggested that the NYSDEC simply refer to a work plan to remedy the failure of the IC/EC.

Response: The Department has considered including a time frame and declines to make this change or add this provision. The Department has, however, deleted the reference to “corrective action” and substituted the phrase “a work plan to remedy the failure “ in its place.

B.9 Comments on Section 375-1.9

B.9.1 Comment: The regulations should explicitly state that, as long as the soil vapor systems are included in the Site Management Plan, the soil vapor systems, which are often not part of remediation but are constructed later as part of the final development project, will be covered by the certificate of completion for the remedy.

Response: The Department has considered this comment and declines to revise the regulation. The comment evidences a lack of understanding of the purpose of a certificate of completion. The certificate of completion does not “cover” a particular component of the remedy (e.g. vapor mitigation systems) rather it declares the site has met the statutory/regulatory requirements of the remedial program for completion, subject to continued site management and other reopeners.

B.10 Comments on Section 375-1.10

B.10.1 Comment: Revised 375-1.10(h) and 375-2.10(f) while more specific still fail to adequately distinguish between time-sensitive IRMs needed to eliminate significant threats to human health and the environment, and noncritical IRMs. For all time-sensitive IRMs, the remedial party, upon notice to DEC, should have the obligation of notifying the public within seven days after the IRM is commenced and once again when the IRM is completed.

Response: The Department has considered this comment and declines to make this revision. Additional guidance for citizen participation on interim remedial measure will be considered during the development of the revised citizen participation guidance handbook. See also Response B.10.10 in the

B.11 Comments on Section 375-1.11

B.11.1 Comment: While this comment supports and appreciates DEC's revised approach of not requiring specific information regarding a transferee to be communicated to DEC until 15 days after the transfer, for the practical reasons indicated above we would urge DEC to further revise §375-1.11(d)(3)(iii) to allow persons proposing to make a change of use that involves a potential transfer of ownership to make the required certifications within 7 days of the setting of a transfer (closing) date, where 60-days of advance notice is not possible because contingencies necessary to consummate the purchase and sale agreement and schedule the closing have not yet been satisfied.

Response: As noted in Response to B.11.4 of the June 2006 RTC, the Department has already struck an appropriate balance between the needs of the Department and the realities of real estate transactions. Therefore, the Department declines to make further revisions to the rule.

B.12 Comments on Section 375-1.12

No comments

**PART C – COMMENTS ON SUBPART 375-2
STATE SUPERFUND PROGRAM**

C:0 General comments on Subpart 375-2

No comments

C:1 Comments on Section 375-2.1

No comments

C:2 Comments on Section 375-2.2

C.2.1 Comment: The Part 375 2.2(c) definition should be consistent with 375-1.2(h), specifically the list of media in which contamination can occur should be broadened to include “sediment”.

Response: The definition of sediment has been modified to be consistent with subdivision 375-1.2(h) as noted by this comment.

C.2.2 Comment: The 2.2(e) definition of “environmental damage” should be modified to provide that injury to the environment is a result of the disposal of hazardous waste. Another comment noted the removal of “flora and fauna” made in Response to Comment B.2.12 and stated this term should not have been removed since Response to Comment B.2.12 stated other requested changes were not made because the definition was “a continuation of the present regulation 375-1.3(h)” Another comment stated that since this definition now only applies to Superfund it should be restored to the current definition or at least maintain the more concisely worded version of the original definition included in the November 2005 version of the regulation?

Response: The Department has considered this comment and determined to restore this definition to the what was included in the original revised regulation of November 2005. Accordingly, subdivision 375-2.2(e) will be restored to read as follows: “Environmental damage means any injury to the environment, any impairment of its use by flora or fauna and any adverse public health impact.” This definition is a clearer wording of the existing Part 375 definition of “environmental damage” as set forth at subdivision 375-1.3(h).

C:3 Comments on Section 375-2.3

No comments

C:4 Comments on Section 375-2.4

No comments

C:5 Comments on Section 375-2.5

No comments

C:6 Comments on Section 375-2.6

No comments

C:7 Comments on Section 375-2.7

C.7.1 Comment: DEC inaccurately revised the "significant threat" threshold language in its revised regulations and must amend the regulations to meet the statute's requirements. All references in 375-2.7 to "and/or" must be stricken and replaced with "or" to follow the Superfund law's explicit language to act on sites that are "a significant threat to the public health or environment."

Response: The regulation has been revised to provide for "public health or the environment" in section 375-2.7.

C.7.2 Comment: There remains considerable confusion in the regulated community as to when the NYSDEC will delist a site and when it will reclassify a site. For purposes of financing and conveying property, it is preferable that the NYSDEC delist a site. Accordingly, we recommend that the NYSDEC revise sections 375-2.7(d) (1) and 375-2.7(e) to clarify the circumstances when the NYSDEC will delist a site as opposed to reclassifying a site. We would recommend that the NYSDEC policy express a preference for delisting sites. Perhaps a reclassification is more appropriate during the remedial process, but it would be preferable to try to delist operable units as soon as possible to facilitate the reuse of these sites.

Response: The Department has considered this comment and declines to make these revisions. While it is no doubt preferable that the Department delist a site, a site may only be delisted if it no longer meets the statutory/regulatory criteria for inclusion on the Registry.

C.7.3 Comment: NYSDEC deleted references to the Part 624 administrative procedures. Will NYSDEC be implementing a Part 375-2 process for adjudicating delisting disputes?

Response: The process for dispute resolution related to delisting is set forth in clause 375-2.7(f)(5)(ii)(b).

C:8 Comments on Section 375-2.8

C.8.1 Comment: Section 375-2.8(b)(2) would require that the unrestricted use soil cleanup objectives (SCOs) in Table 375-6.8(a) be considered equivalent to pre-disposal conditions. This should not apply when the site background exceeds the unrestricted use SCOs, in which case, the site background levels should represent pre-disposal conditions.

Response: The regulation already allows for site background to be considered in lieu of the unrestricted soil cleanup objectives for a State Superfund site. Subparagraph 375-2.8(b)(1)(iii) allows the development of site-specific soil cleanup objectives which are protective of public health and the environment based upon other information, while subparagraph 375-2.8(c)(3)(ii) states that the Department may approve a remedial program for a site that considers site specific background concentrations in the development of the remedy. The Department does not believe additional clarification is necessary.

C.8.2 Comment: It is suggested that Section 375-2.8 of the regulation be revised and/or clarified to indicate that the method of choosing soil cleanup objectives under the remedial program on Superfund sites will be based on a viable reuse plan for the site, the same method utilized in Subpart 375-3 and Subpart 375-4. This would follow more closely with the statutory language of ECL Title 13 and the intention of this rule-making to simplify and consolidate the processes and requirements under the State Superfund, Brownfield and Environmental Restoration Programs.

Response: The Department's approach to utilizing the subpart 375-6 SCO tables in the State Superfund

program as set forth in subdivision 375-2.8(b) is intentional and appropriate given the goals of the State Superfund program. Also see Response to Comment D.8.1 in the June 2006 RTC.

C.8.3 Comment: The revised draft rule proposes to apply the four track remedial approach set forth in Title 14 to the State Superfund Program as well (see revised draft Part 375-2.8(b)). Under this new draft provision, the Title 13 remedial party would propose a soil cleanup approach based on one of the four brownfield program “tracks” – unrestricted or restricted use SCOs, modified SCOs and site specific soil cleanup objectives – with the Department retaining full authority to approve or modify the remedial party’s proposal.

Response: This commenter is mistaken. Subdivision 375-2.8(b) does not apply the track concept of the Brownfield Cleanup Program (BCP) to the State Superfund Program. Subdivision 375-2.8(b), however, does allow a remedial party to use of the soil cleanup objective tables developed for the BCP in developing a remedy for a site under the State Superfund Program. The use of the soil cleanup objective tables is only one of three options identified in this subdivision. Nowhere does section 375-2.8 require the incorporation of the “tracks” or track requirements on a remedial party implementing a State superfund remedial program.

C.8.4 Comment: The revised regulations for both Superfund and ERP sites allow applicants to utilize the soil cleanup objectives set forth in the new subpart 375-6, or develop site-specific SCOs as set forth in the new section 375-6.9. Furthermore, the Department has stated that “after the rule-making is complete the final disposition of TAGM 4046 will be decided.” It appears from the revised regulations that the DEC has already made its decision. In addition, the revised draft regulations specify that the department will consider unrestricted use SCO’s, as set forth in Table 375-6.8(a), as representative of pre-disposal conditions for Superfund cleanups (revised draft 375-2.8(2)).

For years, community groups have strongly opposed the agency's attempts to apply land-use based cleanups at Superfund sites. Community groups have opposed this approach as it basically "locks" communities into industrial or commercial uses for sites for generations—and environmental groups have fought to halt the practice in Superfund policy. If the pre-release goal cannot be achieved at a site, the Department is supposed to try and obtain a cleanup that is as close to pre-release as possible and as feasible, taking into account TAGM 4046 guidelines and the overriding goal of protecting public health and the environment.

Response: Response to Comment C.8.1 from the June 2006 RTC appropriately addresses this comment relative to the consideration of land use in the Superfund and Environmental Restoration Programs. As to TAGM 4046, the Department will be updating the information and procedures addressed by the existing TAGM 4046 and reissuing it as a new guidance document in the future. The Department notes that the proposed regulation provides that the Department will generally consider unrestricted use SCO’s, as set forth in Table 375-6.8(a), as representative of pre-disposal conditions for Superfund cleanups. Further, that land use will only be considered where a cleanup to pre-disposal conditions is not feasible as set forth in paragraph 375-2.8(c)(2).

C:9 Comments on Section 375-2.9

No comments

C:10 Comments on Section 375-2.10

No comments

C:11 Comments on Section 375-2.11

No comments

C:12 Comments on Section 375-2.12

No comments

**PART D – COMMENTS ON SUBPART 375-3
BROWNFIELD CLEANUP PROGRAM (BCP)**

D:0 General Comments on Subpart 375-3

No comments

D:1 Comments on Section 375-3.1

No comments

D:2 Comments on Section 375-3.2

D.2.1 Comment: Section 375-3.2(e) the definition of “Indirect ownership” which means an ownership interest in an entity that has an ownership interest in an entity, is a circular definition and is not used in the regulations. Therefore, its purpose and intent is completely unclear.

Response: This definition, as well as “ownership” and “substantial interest”, may be somewhat circular but all are consistent with ECL 27-1509. Accordingly, no change to the rule is being made.

D.2.2 Comment: “Substantial interest” is not a term appearing in the statute, and the 10% threshold is too low. The interest threshold should be either more than 50% or an entity that exercises control over the property/project.

Response: This is the current definition of “substantial interest” which appears in ECL 27- 1501(7) and 27-1501(9), which includes this threshold. Also see the Response to Comment D.2.5 in the June 2006 RTC and Response D.2.1 above.

D:3 Comments on Section 375-3.3

D.3.1 Comment: It is unclear how NYSDEC intends to apply its current guidelines regarding the definition of a brownfield for purposes of determining site eligibility. NYSDEC has not subjected—and apparently does not intend to subject—its eligibility criteria to rulemaking. NYSDEC’s decision in this regard is not only inconsistent with SAPA; it also deprives NYSDEC of an opportunity to clarify—and for the public to understand—how it will apply these criteria to sites on a going forward basis.

Response: This commenter is mistaken as to the application of SAPA to the March 2003 Eligibility guidance document. The Suffolk County Supreme Court held in July 2006 that the “eligibility criteria used by the DEC to determine participation in the Brownfield Cleanup Program are not fixed, general principles to be applied by the DEC without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers. Rather, they are guidelines established by the DEC for a case-by-case analysis of the facts and need not have been formally adopted as rules or regulations in order to be valid.” *Application of Jopal Enterprises LLC, and Belmont Villas LLC v. Denise Sheehan, Commissioner, New York State Department of Environmental Conservation, Index #: 00803-06*. The Court went on to find that SAPA “specifically excludes from regulatory rule requirements ‘forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory.’” Also see Response to Comment D.3.1 in the June 2006 RTC.

D.3.2 Comment: If vapor contamination is showing up on a site, but the source is not on the site, a party should

be able to participate in the program to eliminate the vapor intrusion.

Response: The Department has considered this comment and declines to make any revision. Also see the Response to Comment D.3.14 in the June 2006 RTC.

D.3.3 Comment: One comment noted that the redrafted regulations state that in determining eligibility for the BCP, the DEC will only consider contamination from on-site sources. [See 375-3.2(a)(2)] This limitation is new and seems unreasonable and contradictory when in the same document DEC requires that impacts from off-site sources be mitigated. Another state that Section 375-3.3(a)(2)(iii) is no longer contained in the regulations. However DEC's public presentation still stated that "only contamination from on-site sources is considered eligible". DEC should not exclude sites that are contaminated urban fill or from off-site sources from the BCP.

Response: Regarding paragraph 375-3.2(a)(2), this is not a new requirement. It was included in the original draft at subparagraph 375-3.3(a)(2)(iii), which stated "In determining eligibility, the Department may consider only that contamination from a source or sources located on the brownfield site." Subparagraph 375-3.3(a)(2)(iii) was simply moved to paragraph 375-3.3(a)(2). Also see the Response to Comment D.3.5 in the June 2006 RTC.

D.3.4 Comment: If construction and demolition debris is not a contaminant, then these materials should not be part of the historic fill definition in subpart 1.

Response: The Department is not considering "historic fill" as a contaminant, therefore the approach is consistent.

D.3.5 Comment: The exclusions at paragraph 375-3.3(a) (3) [corrected to (4)] are not mentioned in the statute and have no basis in law. If the presence or potential presence of these "contaminated" materials is complicating reuse of the site, the site qualifies as a brownfield site.

Response: The Department has considered this comment and declines to make any revision. The materials listed are not hazardous waste [as defined at subdivision 375-1.2(w)] or petroleum [as defined at subdivision 375-1.2(ah)]. Accordingly the presence of the materials identified in paragraph 375-3.3(a) (4) at a site cannot form the basis for eligibility.

D.3.6 Comment: At 375-3.2(a)(4) [Note the typo.] it states, in determining eligibility, the Department may determine that adjacent properties or parcels, or only a portion of any proposed site, meets the statutory definition of "brownfield site," and may approve adjacent properties or parcels or only a portion of a site for participation in the brownfield cleanup program. It is unclear what the Department means by reference to "adjacent properties or parcels" noted above. An adjacent parcel by definition is not part of the brownfield site. The addition of "adjacent properties or parcels" might also be misconstrued to imply that the NYSDEC may require a volunteer to remediate conditions migrating from the brownfield site. This added language should be qualified to eliminate this potential confusion.

Response: This reference is in the context of determining an eligible BCP site and means that a brownfield site may consist of multiple adjacent parcels or portions of such parcels. The commenter is confusing parcels adjacent to an eligible brownfield site with adjacent parcels (or portions thereof) determined to comprise an eligible brownfield site. This was added in response to comments requesting that the Department allow parties to apply for "adjacent parcels" under one application. This does not impart any "off-site" obligation as suggested. However, to clarify this intent, the Department has

replaced “adjacent” with “contiguous”.

D.3.7 Comment: With respect to the Phase II requirement in 375-3.2(a), the additional requirement is fine. However, if contamination is found, you do not indicate what level of contamination is sufficient to get the site into the program. Contamination above the new cleanup standards, including historic fill, as defined in subpart 1 without reference to C&D material, which is defined as containing contaminants above the cleanup standards, should be the reference point by which a site after a Phase II is performed should be able to access the program. Sites with contamination under this level can access the new stipulation program. There needs to be a clear eligibility distinction between the two programs and given that you are basing eligibility on contamination only, having contamination under or over the cleanup standards should be the clear mark of distinction between BCP vs. Stipulation program eligibility.

Response: If a Phase II does not identify contamination at a site, this fact would have a bearing on the eligibility of a site for the BCP. As stated in the Response to Comments D.3.1 and D.3.7 in the June 2006 RTC, eligibility determinations will be governed by the statute, these regulations and guidance. Since this rule does not address the Remediation Stipulation Program, this part of the comment is more appropriately addressed in the comments on the Remediation Stipulation Program.

D:4 Comments on Section 375-3.4

D.4.1 Comment: In 375-3.4(b) (6) the NYSDEC has expanded the comment period to 45 days for RAP. This is not authorized under the BCP law.

Response: The 45 day comment period is authorized under the BCP law as set forth at ECL 27-1417(3)(f).

D.4.2 Comment: Section 375-3.4 (c)(1) states that for an application, or an application which includes a remedial investigation work plan, the Department will use all best efforts to reply within 45 days after receipt of an application, or 5 days after the close of the public comment period, whichever is later. It is assumed you are aware that the statute at ECL 27-1407(6) states application approval should be 45 days after receipt of a complete application or within 15 days of the close of the public notice comment period. We are not sure why you are shortening the statutory response time. We would be happy if the Department complied with the 15 day provision.

Response: The comment misrepresents ECL 27-1407(6), which states, “The Department shall use all best efforts to expeditiously notify the applicant within forty-five days after receiving their request for participation that such request is either accepted or rejected.” Further the reference to the 15 day provision is at ECL 27-1411(4), which states, “The commissioner shall use all best efforts to expeditiously approve, modify, or reject a proposed work plan within forty-five days from its receipt or within fifteen days of the close of the comment period, whichever is later.” The statute clearly requires “best efforts” by the Department, but does allow for an additional 15 days after the close of the comment period for a work plan.

D.4.3 Comment: In 375-3.4(c)(1) NYSDEC has extended its review period for an RI to 45 days. This is not authorized under the statute.

Response: The referenced paragraph sets forth the time frame for the review of an application to the BCP, or an application which includes a remedial investigation work plan, not for the review of a remedial investigation (RI) report as mistakenly stated by the comment. There are no time limits

imposed on the Department for the review of a remedial investigation by ECL. It should also be noted that the Department is allowing the concurrent review of the application and RI work plan which requires the Department to afford the additional time. Relative to the 45 day review period see the Response to Comment D.4.2 above.

D.4.4 Comment: In 375-3.4(c)(2) NYSDEC has extended its review period for an RAP to 60 days. This is not authorized under the statute. If DEC wants to expand the time period, it should be willing to use the approach in PA where failure to complete its review in 60 days is deemed to be an approval of the submittal.

Response: The referenced paragraph sets forth the time frame for the review of an application to the BCP which in this case includes a draft remedial investigation or draft remedial action plan (RAP). ECL 27-1407(7) provides the Department 60 days to notify the applicant if the investigation is complete or incomplete. For the record there are no time limits imposed on the Department for the review of a remedial action plan by ECL nor for the approval of an RI which is not complete. The Department will timely review and, as appropriate, approve all work plans and reports. However, the Department declines to provide for specified time frames in this rule except where statutorily required. Default approvals were dealt with in Response B.6.2 of the June 2006 RTC.

D:5 Comments on Section 375-3.5

D.5.1 Comment: Section 375-3.5(c)(2) (i) refers to whether a remedial party “seeks dispute resolution”. We recommend the NYSDEC revise the language to “advises the NYSDEC in writing....”.

Response: The Department has made this revision to subparagraph 375-3.5(c)(2)(i).

D.5.2 Comment: The waiver in 375-3.5(f) should not apply to those portions of a property that are not part of the “brownfield site” and there should not be a release of the oil spill fund if there is petroleum contamination on a portion of the site not included within the “brownfield site”.

Response: The Department has reviewed this comment and determined no change is required. The waiver and release provisions only apply to the “brownfield site” as defined by the BCA. Accordingly, no waiver or releases would apply to property which is not part of the “brownfield site”.

D:6 Comments on Section 375-3.6

D.6.1 Comment: While the Section 375-3.6 language specifies a time frame, it is a “best efforts” review timeframe for work plans and reports submitted under the Brownfield Site Cleanup Program. There are two notable drawbacks with Section 375-3.6, as follows: (1) the “best efforts” component would allow the Department an opportunity to take an unlimited amount of time (in a “business as usual” approach after the regulations go into effect); and (2) Section 375-3.6 does not apply to other programs. The commenter requests that the NYSDEC incorporate into subpart 375-1, and all other relevant sections, similar language as presented in Section 375-3.6, but eliminate the phrase “use all best efforts to” and add a reasonable not to- exceed review period.. Also that a time frame be specified that obligates the Department to be responsive in providing a written opinion on work plans and reports, including design documents and completion reports.

Response: The Department has considered this comment and declines to make the revision. This provision mirrors statutory requirements. Also see Response to Comment B.6.2 of the June 2006 RTC.

D.6.2 Comment: Regarding section 375-3.6(b) work plans are not the only documents generated in the

program. The Final Remedial Investigation and Final Engineering Report should be referenced here as well. It is very important to have a review time frames for the FER, since this is issued near the end of the project and the tax credits are lost if the COC is issued after the doors of the facility are open. Moreover, the title of this section is “Work plans and reports”.

Response: The statute only provides time frames for work plans; therefore the Department declines to make any revision.

D.6.3 Comment: Section 375-3.6(c) would require submittal of the first work plan within 30 days after the effective date of the Brownfield site cleanup agreement. First, it is unclear what the Department means by “first work plan”. Is it a remedial investigation work plan, an IRM work plan, a remedial work plan? This would depend on the status of work already performed at a site and whether a work plan was submitted with the BCP application. Regardless, it is unreasonable to require an applicant to meet an across-the-board 30-day work plan submittal deadline, in view of these site-specific concerns, significant complexities at some sites, the possible need to procure consulting services to prepare a work plan, and uncertainty on a requestor’s part whether it would even be accepted into the BCP. Therefore, it is suggested that this requirement be deleted or, at a minimum, changed to read, “If an investigation work plan was not submitted with the BCP application, within 90 days of the effective date of a Brownfield site cleanup agreement, the applicant shall submit an investigation work plan.”

Response: The Department has considered this comment and determined not to make a revision. A similar provision has been a requirement of the brownfield site cleanup agreement since the inception of the program. The first work plan is just that, the first work plan to be submitted under the brownfield site cleanup agreement. To the extent the first work plan is submitted with the application, then this requirement is satisfied.

D:7 Comments on Section 375-3.7

D.7.1 Comment: In section 375-3.7(2)(ii) did you intend the significant threat determination to apply to petroleum sites? If so, you cannot just reference hazardous waste. The suggested language is consistent with the language in 375-2.7(a).

Response: Subparagraph 375-3.7(b)(2)(ii) deals with the consideration of a Registry listing of a site under a brownfield site cleanup agreement which is terminated. The consideration for the Registry is only based on hazardous waste disposal. Accordingly the current language is correct. The definition of contamination at subpart 375-2 specifically excludes petroleum (i.e. only hazardous waste is considered), while in subpart 375-3 the definition of contamination includes both hazardous waste and petroleum, thus requiring the noted distinction. The Department has also eliminated the phrase “requiring listing of the site on the Registry” from paragraph 375-3.7(a)(2) to clarify that a site posing a significant threat in the BCP is statutorily deferred from listing rather than “requiring listing”.

D:8 Comments on Section 375-3.8

Scope of investigation

D.8.1 Comment: The regulations need to be amended by the addition of the underlined phrases to adequately define the trigger that would *require* an applicant to include vapor intrusion testing in the site remedial investigation: "375-3.8 (b) Scope of investigation. Remedial investigations and final investigation reports must be completed in accordance with ECL 27-1411.1 and 27-1414.2 and this title...Vapor intrusion testing is

required at sites where subsurface contamination from volatile organic compounds (VOCs) is found.”
(Recommended additions are underlined.)

Response: The Department has considered this comment and declines to make the changes requested to subdivision 375-3.8(b). The need for a remedial investigation to evaluate soil vapor is already set forth in paragraph 375-1.8(a)(6).

D.8.2 Comment: An amendment is needed to clarify that the exposure assessment encompasses both on-site and off-site exposures. ECL Section 27-1415 (2)(b) states that the assessment includes "...contaminants that *are present at* or emanating from a site..." The revised regulations need to be amended as follows (Recommended addition is underlined.): 375-3.8 (b)(2)(i) A volunteer shall perform a qualitative exposure assessment of the contamination at the site and any contamination that has migrated from the site...." The regulation should clarify that exposure assessments should be the basis for identifying the presence of specific migration pathways of concern between industrial/commercial and residential properties and then, separately, DEC should clarify/proscribe how to determine the need for soil migration controls.

Response: The requested addition to subparagraph 375-3.8 (b)(2)(i) is not consistent with the intent of the paragraph, which is off-site contamination. Accordingly, the Department declines to make the change. Further, the on-site remedial investigation provides for a full characterization of the nature and extent of contamination on the brownfield site [see 375-3.8(b)(1)]. This full on-site investigation is much more robust than the limited qualitative environmental assessment and provides the information necessary to assess both exposure resulting from migration of contaminants from the site and the impacts to off-site receptors, thus the qualitative environmental assessment has not been mentioned in the regulation. However, the statutory requirements are fulfilled as part of the remedial investigation, as set forth in subdivision 375-1.8(e). Identification of specific soil migration controls is best addressed by guidance.

D.8.3 Comment: In two sections of 375-3.8, applicants are directed to "fully characterize the nature and extent of the contamination....", *see* 375-3.8(b)(1) and 3.8(b)(2)(ii). In contrast, the statute requires that "a participant shall also be required to fully investigate and characterize...." *See* Subdivision 1 of ECL Section 27-1411 (emphasis added). The omission of the statutory term "investigate" is problematic. The term characterize" means "to describe the character or quality of" (*see* Merriam-Webster Online). "Investigate" means "to observe or study by close examination and systematic inquiry," or it means "to make a systematic examination." (*see* Merriam-Webster Online). To adequately emphasize and define the important investigative nature of the activity, the statutory term "investigation" needs to be added to these regulatory provisions.

Response: The proposed regulation has been revised to read as "investigate and characterize" (addition underlined) in paragraph 375-3.8(b)(1) and subparagraph 375-3.8(b)(2)(ii).

D.8.4 Comment: Section 375-3.8(b)(2) should clarify that a volunteer is not required to assess or remediate offsite vapor intrusion.

Response: A volunteer does not need to fully investigate the nature and extent of off-site contamination, but must perform a qualitative exposure assessment which could require some sampling to complete. The Department has revised subparagraph 375-3.8(b)(2)(i) to clarify that a volunteer has no obligation to develop a remedy to address exposures resulting from off-site contamination.

D.8.5 Comment: We commend the Department for including in 375-3.8 (b)(2)(i) the requirements in Subdivision 5 of Section 27-1411 that the DEC is responsible for addressing off-site pollution at a volunteer

significant threat site. Two important provisions still need to be added to this section. First, the critical statutory "timing trigger" on enforcement action, specifically, the statute states that DEC must take action to have polluters fund the off-site cleanup *within 6 months of the decision that a volunteer's brownfield site poses a significant threat*. Second, the revised regulations omit an important statutory directive on how the department should fund the off-site cleanup if the responsible party enforcement action fails. Specifically, the statute states that the agency shall use Superfund or Oil Spill Funds.

Response: The Department has considered this comment and will add "within 6 months of the decision that a volunteer's brownfield site poses a significant threat" to the end of clause 375-3.8 (b)(2)(i)(a). It is noted that the absence of these provisions does not, and cannot, alter the statutory obligations for the State Superfund or Oil Spill Fund to address off-site contamination.

D.8.6 Comment: The regulations should reference the regulatory definition of "remedial investigation." The Department supported the inclusion of other statutory definitions in the regulations at D.2.2 and we request that the Department include a regulatory reference to the Remedial Investigation definition and clarifying terms as follows: 375-3.8 (2)(b) Scope of investigation. Remedial investigations and final investigation reports must be completed in accordance with ECL 27-1411(1) and 27-1415(2) of this title, and the definition in 375-1.8(e). A remedial investigation shall fully characterize the nature and extent of the contamination at and/or emanating from a brownfield site.

Response: The definition of remedial investigation, as set forth at subdivision 375-1.2(an), is based upon the current regulatory definition of remedial investigation (375-1.3(t)). The Department notes that there is no statutory definition of "remedial investigation" in ECL 27-1301 or ECL 27-1405, which are the sources of most of the definitions included in this regulation. The Department elected to continue the present regulatory definition of "remedial investigation", albeit with some minor updating to reflect some current concepts (e.g. site management plan) as well as to account for the remedial investigation work plan requirements set forth in ECL 27-1411(1). Accordingly, the Department declines to make the revisions requested.

Remedy selection

D.8.7 Comment: Section 375-3.8(c)(3) states the Department only selects a remedy if the site is significant threat site. [See 27-1413(2)]. The Department can force any applicant, even at a non-significant threat site, to analyze a Track 2 cleanup, but this still does not translate into the Department's selection of all remedies. The following underlined additions are suggested: "The Department will select a remedy if the site is significant threat site, or approve a remedy for a site after consideration of an alternatives analysis presented in a site specific remedial work in accordance with ECL section 27-1413(2)."

Response: The Department has considered this comment and has moved paragraph 375-3.8(f)(5) to create a new paragraph 375-3.8(c)(4) to address the issue of the Department's selection of a remedy and has included the reference to ECL identified by the comment in paragraph 375-3.8(c)(3).

D.8.8 Comment: The revised draft regulations for the BCP remedial program (revised Draft 375-3.8) are much clearer than the original proposed regulations. We do not understand the distinction between section 375-3.8(c) "remedy selection," which is essentially unchanged from the original draft regulations, and the new 375-3.8(f)(5) "selection of a remedy" (under the alternatives analysis). We recommend that 375-3.8(f)(5) be moved up to 375-3.8(c).

Response: The regulation has been revised as noted by the comment. Paragraph 375-3.8(f)(5) has been

moved into subdivision 375-3.8(c) which deals with remedy selection, and renumbered as paragraph 375-3.8(c)(4).

D.8.9 Comment: As for non-significant threat sites, the new section 375-3.8(f)(5)(ii) must be amended. The statute gives the DEC discretionary power to require the applicant to evaluate a Track 2 cleanup under certain circumstances, and can then require the applicant to implement such remedy. The draft regulations properly mirror the statute's requirements for the Track 2 evaluation in the alternatives analysis (revised draft 375-3.8(f)(3)(ii)(4)), but fail to note the Department's authority in the remedy selection to require the applicant to implement such remedy. This section must be amended to be consistent with ECL 27-1413(5) by adding the following language, "provided, however, that where the department has required the applicant to develop and evaluate a Track 2 cleanup, in accordance with subdivision 375-3.8(f)(3)(ii)(4), the department may require the applicant to implement such remedy." Further, this section should be moved to 375-3.8(c),

Response: The regulation has been revised to include the language in the new paragraph 375-3.8(c)(4) [See response to D.8.8 Comment above] which details the Department's discretionary ability to select a Track 2 remedy for a non-significant threat site, as set forth in ECL 27-1413(5). Paragraph 375-3.8(f)(3)(ii)(4) will remain in the alternative analysis subdivision as it sets forth the criteria for the Department to consider when requiring a Track 2 evaluation in the alternatives analysis.

D.8.10 Comment: The proposed remedy selection language is confusing and should be clarified to explicitly define the respective roles. The draft regulations say that: "applicants must...select or propose a remedy" (draft 375-3.8(c)(1)); "participants must also...propose or select a remedy" (draft 375-3.8(c)(2)); and "the Department will select, or approve, a remedy" (draft 375-3.8(c)(3)). Although the revised regulations are somewhat improved, we still think this language could cause confusion. We recommend that the two remedy selection sections (revised draft 375-3.8(c) and 375-3.8(f)(5)) be combined and the respective roles in remedy selection more clearly explained.

Response: The regulation has been revised to clarify the remedy proposal and selection process.

Cleanup tracks

D.8.11 Comment: The need for soil vapor controls or long-term monitoring should not be a basis for disqualification from Track 1.

Response: The Department has considered this comment and cannot revise the regulation due to statutory constraints. Also see Response to D.8.12 in the June 2006 RTC.

D.8.12 Comment: Significant threat thresholds relative to ecological resource impacts set forth in 375-2.7(1) are factors to be considered in determining whether to apply the ecological resource SCOs. The revised draft rule says any impact, regardless of its severity, on any ecological resource at or near a site, regardless of its significance, can serve as the basis for applying the ecological resource-based SCOs. It also would allow the of ecological resource-based SCOs to govern the soil cleanup at Title 13 sites where actual or potential ecological impacts were initially deemed insufficient to require remediation under the statute. To address these concerns, draft Part 375-3.8(e)(1) and (2) should be amended to state that the ecological resource-based SCOs should apply only where the Department has determined that significant ecological resources are present at the site, and that contaminants pose a significant actual or potential hazard to those resources.

Response: No revision will be made to paragraphs 375-3.8(e)(1) and (2) as requested. The issue raised was addressed by subdivision 375-6.6(c) of the revised draft, and while rewritten for clarity in the final

regulation, the use of the significant threat thresholds from paragraph 375-2.7(a)(1) remains unchanged in the final regulation and clearly address the concerns theorized by the comment relative to Title 13 sites.

D.8.13 Comment: The apparent inconsistency between the statute and the regulations on the issue of long term controls on Track 1 sites should be resolved. In section 375-3.8(e)(1)(ii), the current regulations stipulate that the only long-term controls allowed on a Track 1 site are groundwater use restrictions. However, this language is clearly inconsistent with the statute that allows both institutional and engineering controls on a Track 1 site. Clearly the statute contemplated more flexibility on Track 1 sites than DEC has acknowledged or incorporated into the regulations. DEC should amend Section 375-3.8(e)(1)(ii) to indicate that both a restriction on groundwater use and engineering controls may be included in a Track 1 cleanup if the applicant meets the requirements stipulated in (a) and (b) of that section.

Response: The Department has considered this comment and ECL 27-1415(4) and cannot identify the flexibility in the statute to allow the use of institutional and engineering controls on a Track 1 site claimed by the comment, other than the exception included for “volunteers whose proposed remedial program for the remediation of groundwater may require the long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved but whose program would otherwise conform with the requirements necessary to qualify for Track 1”. Also see the Response to Comment D.8.12 in the June 2006 RTC.

D.8.14 Comment: At 375-3.8(e)(1)(iii)(b) the Department will allow restrictions on groundwater use if the party can demonstrate there has been a bulk reduction in groundwater contamination to asymptotic levels; it should recognize the potential for a future release, and allow for the installation of soil vapor barrier and passive sub slab piping system as a protective measure for Track 1 cleanup sites. Also see comment on 375-1.8(g)(2)(i) above.

Response: See the Response to Comment B.8.19 of this document.

D.8.15 Comment: The rule makes limited reference to restricted use groundwater cleanups. Proposed Part 375-1.8(g)(2)(1) states that, for residential use sites, “restrictions on the use of groundwater are allowed.” Residential use is one of four categories of Track 2 restricted use sites addressed in the draft rule. However, no reference to restricted use sites is mentioned with regard to other categories of Track 2 cleanups, or to Track 3 cleanups. To address these concerns, the final Part 375 regulation should include reference to the availability of restricted use groundwater cleanups at Part 375-3.8(a) regarding brownfield remedial programs, Part 375-3.8(e)(2) and (3) regarding brownfield site cleanup tracks 2 and 3, respectively, and Part 375-6.5(a) regarding groundwater protection SCOs.

Response: The requested revisions to section 375-3.8 and 375-6.5 are unnecessary. Subparagraph 375-3.8(e)(2)(vi), which sets forth requirements for Track 2 (and which is also noted by paragraph 375-3.8(e)(3) as applicable to Track 3) states that “the remedial program may include the use of long-term institutional or engineering controls to address contamination related to other media, including but not limited to groundwater and soil vapor”. Also subparagraph 375-6.5(a)(1)(ii) states that “an environmental easement will be put in place which provides for a groundwater use restriction on the site”.

D.8.16 Comment: Track 2 residential cleanups should be preserved, but not at the expense of losing the ability to do residential cleanups under Track 1 in urban areas.

Response: Track 2 residential cleanups was preserved from the original proposal, and in fact was expanded to include a second residential scenario in response to comments. Track 1 continues to allow residential uses since this is the unrestricted use Track; thus any development could occur without restriction, except as provided by the one exception identified by ECL 27-1415(4) under the Track 1 requirements. The comment correctly notes that the Track 1 SCOs under the revised rule are generally lower than in the original proposal as a result of including the farming consideration as well as collapsing the protection of ecological resources SCOs and the protection of public health SCOs into one set of SCOs. The Track 1 SCOs represent the lower of the protection of ecological resources and the protection of public health SCOs. Accordingly, it may be more challenging for parties to reach Track 1 than under the previous proposal. Nonetheless, the approach set forth in the revised rule is consistent with the statute, provides for a cleanup which requires no restrictions, and was devised in response to comments on the original proposal.

D.8.17 Comment: Subsection 3.8(e)(4)(i)(b) indicates that in Track 4 site specific cleanup standards may be developed in accordance with subdivision 375-6.9(e); however subdivision 375-6.9(e) is not provided.

Response: The reference to subdivision 375-6.9(e) has been replaced with a reference to section 375-6.9.

D.8.18 Comment: Subsection 375-3.8(e)(4)(iii) (a) appears to conflict with Subsection 3.9(a)(3)(i). Subsection (e)(4) (iii) requires that contaminant concentrations that exceed background levels in the top 2 feet of uncovered soil meet the limits given in the SCO tables. However subsection 3.9(a)(3)(i) indicates that alternate cleanup levels may be approved if the applicant can demonstrate that they are protective of human health and the environment.

Response: There has been no substantive change in these requirements from the original draft; however, paragraph 375-3.8(e)(4) was redrafted in the revised proposed rule for clarity. Subparagraph 375-3.8(a)(3)(i) provides that for a Track 4 cleanup an applicant may seek to demonstrate that a risk level greater than an excess cancer risk of one in one million for carcinogenic end points and a hazard index of one for non-cancer end points would be protective of public health and the environment. If upon a finding of protectiveness by the Department and NYSDOH, the applicant may then utilize this site specific level for the Track 4 SCO. However, as set forth at ECL 27-1415.6(d), there is a statutory requirement that the top one or two feet of exposed surface soil must meet the applicable Track 2 SCO. This provision clearly applies regardless of the site specific levels allowed to remain in the subsurface of a site in Track 4.

Alternatives analysis

D.8.19 Comment: The language in 375-1.8(d)(1)(iii) states that although remedies should prevent further migration of on- or off-site plumes, a volunteer in the BCP is only obligated to **evaluate** the feasibility of containing the plume on-site; but, the language in 375-3.8(f)(4)(ii) requires a volunteer to **address**, to the extent feasible, the on-site plume and prevent off-site migration and states that the requirement includes such actions to maintain and monitor stabilization of the plume. The discrepancies in the language in Sections 375-1.8(d)(1)(iii) and 375-3.8(f)(4)(ii) must be resolved so that the distinction between a volunteer's obligations and a participant's obligations are clear. It must be clear that the volunteer is obligated to examine the feasibility of containing the plume on-site and only obligated to contain it if it is feasible. Language that requires the volunteer to address the off-site plume should be deleted. Feasibility should be determined in accordance with the nine balancing criteria with special deference to implementability and cost-effectiveness given the

volunteer's status.

Response: The Department has reviewed this comment and declines to revise subparagraph 375-3.8(f)(4)(ii) or make any other changes noted by the comment. While the volunteer has no obligation to address off-site contamination [also see Response to Comment D.8.4 above] ECL 27-2415(5)(a) clearly states that a volunteer is responsible for preventing the further migration of contamination from the site to the extent feasible.

D.8.20 Comment: The provision in 375-3.8(f)(3)(ii) that even if there is no significant threat determination, NYSDEC can require a Track 2 cleanup anyway under certain circumstances defeats the purpose of offering a Track 4 cleanup and performing the significant threat determination. Under the statute, if there is no significant threat, the remedial program track is the applicant's choice.

Response: As stated by the comment the applicant can select the Track they wish to pursue in the BCP. However, ECL 27-1413(3) allows the Department to require the evaluation of a Track 2 alternative upon consideration of the factors noted in subdivisions (a) through (d), which are mirrored in the regulations in clause 375-3.8(f)(3)(ii)(d).

D.8.21 Comment: Feasibility in 375-3.8(f)(4)(ii) should be determined in accordance with the nine balancing criteria with special deference to implementability and cost-effectiveness given the volunteer's status. In areas where DEC has the obligation to address off-site groundwater contamination, the volunteer should also have the option to demonstrate that DEC's off-site remedial actions would effectively address off-site migration without the need for any on-site containment system.

Response: The Department declines to modify this subparagraph to give deference to implementability and cost-effectiveness for volunteers or to provide a volunteer the option to demonstrate that off-site remedial actions would effectively address off-site migration without the need for any on-site containment system. However, should the timing of a Department remedy be such that the volunteer were able to demonstrate that off-site remedial actions would effectively address off-site migration without the need for any on-site containment system, it could be considered.

D.8.22 Comment: Section 3.8(f)(4) should clarify that plume stabilization does not include vapor intrusion (i.e., just have to gain hydrologic control over groundwater and not vapors migrating beyond edge of plume).

Response: The Department has considered this comment and declines to make any revision. As set forth in subdivision 375-6.7(a) "The remedy will be protective for soil vapor and vapor intrusion and shall address through appropriate removal or engineering controls the migration of contaminants in soil and groundwater at levels which could impact the indoor air of buildings." Further, plume stabilization does not obviate the need to address the impacts of soil vapor and vapor intrusion. Also see Response to Comment B.8.4 of this document.

Remedial work plan

D.8.23 Comment: What is a decision document identified in 375-3.8(g)(1)? Under this program, a fact sheet would describe the remedy.

Response: The "decision document" is a Department issued document summarizing the remedy for the site. It will supplement, not replace, the statutorily required fact sheet.

D.8.24 Comment: The revised 375-3.8(g)(4) (ii)(c) refers to “a community plan.” We don’t know what this means. The previous draft referred to a “community *health and safety* plan” (emphasis added), which was more self-explanatory. The original proposed language should be restored or there should be some explanatory language added.

Response: The correct citation in paragraph 375-3.8(g)(2), is now paragraph 375-3.8(c)(4)[see Response to Comment D.8.7 above. The regulation has also been revised at clause 375-3.8(g)(4) (ii)(c) to add the phrase “health and safety” following community.

D:9 Comments on Section 375-3.9

D.9.1 Comment: Section 375-3.9(a) should clarify whether NYSDEC will not issue a COC if there is an existing oil spill lien on the property that is not related to actions or omissions of the applicant.

Response: The Department has revised subdivision 375-3.9(a) to add the phrase “for the brownfield site” after the words “navigation law”. Also, the cross-reference in this subdivision has been corrected, and is now subparagraph 375-3.4(b)(4)(ii).

D:10 Comments on Section 375-3.10

No comments

D:11 Comments on Section 375-3.11

No comments

D:12 Comments on Section 375-3.12

No comments

**PART E – COMMENTS ON SUBPART 375-4
ENVIRONMENTAL RESTORATION PROGRAM (ERP)**

E:0 General comments on Subpart 375-4

No comments

E:1 Comments on Section 375-4.1

No comments

E:2 Comments on Section 375-4.2

E.2.1 Comment: At 375-4.2(d) the definition of “Cost” references a definition for cost at subdivision 375-2.2(d), there is no definition of cost in section 375-2.2.

Response: The definition of “Cost” at subdivision 375-2.2(d) was incorporated into paragraph 375-2.5(b)(7) during the revision of this proposed regulation. Therefore the definition of cost as set forth at ECL 56-0502(2) has been included as the definition of “Cost” at subdivision 375-4.8(d).

E:3 Comments on Section 375-4.3

No comments

E:4 Comments on Section 375-4.4

No comments

E:5 Comments on Section 375-4.5

E.5.1 Comment: The language at 375-4.5(b)(1)(ii) is significantly worse than the language in the first draft. The statute and regulations clearly state that a municipality is exempt from liability for the site once the application is approved and that there is no guarantee a grant for remediation will be issued. This provision effectively eviscerates the liability protection in the Bond Act by making the municipality responsible for remediation regardless of the indemnification provided upon application approval if they sell the site. Certainly, notice of sale should be required, but the indemnification should remain and the municipality cannot be required to perform the cleanup. Moreover, because the Bond Act program is a two step application program, which requires a municipality to re-apply for remediation dollars after it completes a Bond Act investigation, in the event the municipality does not receive the remediation grant, it clearly should not be responsible for the remediation. This is a particular concern given that the Bond Act may run out of funding since it does not appear from case notes received that any cost recovery actions have been commenced under this program in direct violation of the statute.

Response: The Department has considered this comment and declines to make the requested revision.

E.5.2 Comment: In the event a municipality notifies the Department of a sale, and the new buyer is willing to enter into a new agreement, the following amendments are recommended, which should apply to not only new but existing SACs::

375-4.5(b)(1)(ii) if, before the Department issues a certificate of completion, **and** the municipality, or a successor in title, **would otherwise be entitled to receive a subsequent remediation grant, but** wishes to transfer title to or subdivide the site into separate parcels **before receipt of such**

remediation grant, it may do so after **the prospective purchaser** commits in a document, approved by the Department, to remediate all of the site in accordance with the Department's record of decision, within such time period as the Department may require; **or if the municipality is not granted a subsequent remediation award, the municipality can sell the site with full disclosure of the contamination to the prospective purchaser and remain protected from liability in accordance with ECL 56-0509.**

Response: The Department has considered this comment and declines to make the requested revision. The Department notes that the provision as presented in the revised draft regulations provides greater flexibility than the existing rule.

E.5.3 Comment: Section 4.5(b)(6) contains language that has been modified to reflect the manner in which the NYSDEC notifies municipalities of performance failures that would result in the suspension of grant payments appears flexible and reasonable. It provides that the municipality will be afforded a “reasonable opportunity of not less than 30 days to cure such failure.” Since some failures to perform may involve third party consultant or remedial construction contracts or other relationships not directly under a municipality’s control, the proposed regulations should provide needed flexibility in the response time.

Response: As this comment notes, Section 4.5(b)(6) was modified by the Department to provide clarification of what constituted a “reasonable opportunity.” Specifically, the Department added the phrase “of not less than 30 days” to the time to cure a failure. This is a very flexible regulatory approach which would accommodate the scenario noted by this comment, accordingly no change has been made to the rule.

E:6 Comments on Section 375-4.6

No comments

E:7 Comments on Section 375-4.7

No comments

E:8 Comments on Section 375-4.8

E.8.1 Comment: The revised regulations for both Superfund and ERP sites allow applicants to utilize the soil cleanup objectives set forth in the new subpart 375-6, or develop site-specific SCOs as set forth in the new section 375-6.9. Furthermore, the Department has stated that “after the rule-making is complete the final disposition of TAGM 4046 will be decided,” it appears from the revised regulations that the DEC has already made its decision. In addition, the revised draft regulations specify that the department will consider unrestricted use SCO’s, as set forth in Table 375-6.8(a), as representative of pre-disposal conditions for Superfund cleanups (revised draft 375-2.8(2)).

For years, community groups have strongly opposed the agency's attempts to apply land-use based cleanups at Superfund sites. Community groups have opposed this approach as it basically "locks" communities into industrial or commercial uses for sites for generations—and environmental groups have fought to halt the practice in Superfund policy. If the pre-release goal cannot be achieved at a site, the Department is supposed to try and obtain a cleanup that is as close to pre-release as possible and as feasible, taking into account TAGM 4046 guidelines and the overriding goal of protecting public health and the environment.

Response: See Response to C.8.4 Comment in this document.

E:9 Comments on Section 375-4.9

E.9.1 Comment: The proposed regulations condition the liability protections on the satisfaction of three criteria. The regulations should clearly state that, prior to receipt of the certificate of completion, as long as the municipality is in compliance with the terms and conditions of the regulations and the statutory and regulatory requirements of the program, the statutory protections remain in effect.

Response: The Department has considered this comment and determined that a change to the proposed rule is not required. The proposed rule already provides for the liability protections to be provided upon approval of the application contingent upon receipt of a certificate of completion at a later date. It is sufficiently clear from this provision that the protections remain in place provided the municipality is in compliance with the terms and conditions of the State Assistance Contract and timely receives a certificate of completion.

E:10 Comments on Section 375-4.10

No comments

E:11 Comments on Section 375-4.11

No comments

E:12 Comments on Section 375-4.12

No comments

**PART F – COMMENTS ON SUBPART 375-6
REMEDIAL PROGRAM SOIL CLEANUP OBJECTIVES**

F:0 General comments on Subpart 375-6

No comments

F:1 Comments on Section 375-6.1

No comments

F:2 Comments on Section 375-6.2

No comments

F:3 Comments on Section 375-6.3

No comments

F:4 Comments on Section 375-6.4

F.4.1 Comment: Section 375-6.4(c)(3) implies that only SCOs from the table can be used for the protection of public health at a site while all programs allow for the development of site specific SCOs, for example Track 4 in the BCP, as well as the use of the SCO tables is one of three options in superfund or the ERP [375-2.8(b) and 375-4.8(c)] with the other two being site specific SCOs. This paragraph should be revised to acknowledge that the table SCO applies unless a site specific SCO is proposed.

Response: The Department has considered this request and will revise paragraph 375-6.4(c)(3) to clarify that the table SCO applies “unless a site-specific soil cleanup objective is proposed”.

F:5 Comments on Section 375-6.5

F.5.1 Comment: In keeping with ECL 27-1415(6), revised Part 375-6.4(c) prohibits the application of the applicable land use-based protection of public health SCOs if the Department determines that “ecological resources” are present or that “a groundwater standard is being contravened.” If the groundwater standards have been exceeded, then the soil cleanup must attain the lesser of the protection of groundwater SCOs or the applicable protection of public health SCOs. In order to avoid this outcome, there is an exception set forth in the draft regulations at Revised Part 375-6.5(a)(1). However, as presently written, the exception is drafted in an unreasonably narrow manner. Revised Part 375-6.5(a)(1) states that, even where there is a documented exceedance, the protection of groundwater SCOs need not be considered if (i) the source of the groundwater contamination has been addressed, (ii) use of the groundwater is restricted, and (iii) there is no off-site migration of contaminated groundwater (or a groundwater remedy is in place to control or treat any off-site migration). As narrowly drafted, the migration of groundwater off-site containing the most minor exceedance of the drinking water-based groundwater quality standards will prevent the application of restricted use SCOs unless an unnecessary groundwater remedy is put in place to control or treat any off-site migration. If there has been appropriate source removal and the use of the on-site groundwater has been restricted, and it is reasonably ascertainable that the off-site groundwater will not be materially impacted, the protection of groundwater SCOs should not be applied, regardless of whether or not a groundwater remedy is in place to control or treat any off-site migration.

The final draft rule should also broaden the exceptions for application of the groundwater based SCOs found at revised draft Part 375-6.5(a)(1). As drafted, this provision would require application of the groundwater SCO even if groundwater migrating off-site contains a minor exceedance of the drinking water-based groundwater quality standards, or will require active remediation of groundwater even though such effort would result in marginal environmental benefits. If there has been appropriate source removal and the use of the on-site groundwater has been restricted, and it is reasonably ascertainable that the off-site groundwater will not be materially impacted, we believe that the protection of groundwater SCOs should not be applied.

Response: The Department has considered this comment and declines to make this revision. The remedy selected will need to satisfy the regulatory requirements at subdivisions 375-1.8(c), (d) and (f), including feasibility and cost effectiveness.

F:6 Comments on Section 375-6.6

F.6.1 Comment: DEC should clarify the criteria for determining what will trigger a fish and wildlife analysis for BCP sites. DEC should look at more widely accepted standards, such as the federal standards, for criteria on assessing the value of ecological receptors as well as the potential to impact such resources. When considering the need for remediation, DEC should also look at more widely accepted standards to clarify what is meant by an “important” ecological resource.

Response: The Department has considered this comment and declines to revise the regulation as such criteria are more appropriate to guidance.

F.6.2 Comment: Revised Part 375-6.6(a) defined “ecological resources” as “upland soils at sites where terrestrial flora and fauna and the habitats that support them are identified”, while excluding “such non-wild biota” as pets, livestock, agricultural and horticultural crops and landscaping in developed areas, it is still overly broad for purposes of satisfying the intent of the statute. The definition of ecological resources at Revised Part 375-6.6(a) should be further revised consistent with the Department’s acknowledged intent to include only “significant habitats” and those species of flora and fauna that are of ecological relevance and to exclude more clearly flora and fauna that are incorporated into the built environment, like lawns and gardens. At a minimum, the definition of ecological resource should be clarified to include only species of ecological relevance and to exclude those found in association with tillable or developed land as well as undesirable and pest species.

Response: The Department has considered this comment and declines to revise the regulation. The cited section already includes language similar to the requested additions.

F.6.3 Comment: The revised draft regulations contain a substantial amount of more detailed language regarding the determination of when and where the SCOs for protection of ecological resources will apply to sites (*revised draft 375-6.6*). The language continues to raise concern. First, as currently drafted it is very hard to follow and seems inconsistent. Clarification is needed. I strongly recommend that the aquatic environment and non-wild biota be protected at sites. In addition, I am concerned about the proposal that protection of ecological resources will not apply to “sites or portions of sites where the condition of the land . . . precludes the existence of *significant* ecological resources” (*revised draft 375-6.6(a) (2) (i) emphasis added*). This seems like much too high a bar, and is inconsistent with language elsewhere in this section that requires the protection of ecological resources that “constitute an *important component* of the environment at, or in the vicinity of, the site” (*revised draft 375-6.6(b) (3) (ii) emphasis added*). Overall, despite the concerns noted above and a general lack of clarity, the proposed language is a substantial improvement over the original draft.

Response: Section 375-6.6 has been rewritten to provide the clarity requested by the comment, but the

Department declines to extend the protection of ecological resources to aquatic environments and non-wild biota or areas where there are no important ecological resources.

F.6.4 Comment: The terms “significant” (revised draft 375-6.6(a)(2)(I)) and “important” (revised draft 375-6.6(b)(3)(ii)), are subjective terms that are not defined in the regulations. We are concerned that an arbitrary interpretation could set the bar too high for protecting such resources. The statute did not limit its protection to “important” or “significant” ecological resources. In addition concerns were raised about how the phrase “constitute an important component” will be interpreted. It is recommended that DEC provide some criteria in regulation, as well as additional, more detailed guidance, regarding what the determination of “importance” is required to entail. Similar criteria and guidance should be provided for the terms “vicinity” and “impact or threat.”

Response: The Department has considered this request and revised proposed sections 375-6.6, as well as section 375-6.7, to utilize the terms “important ecological resources” or “ecological resource which constitutes an important component of the environment”, in place of “significant” where it appears in the text. However, the Department has considered and declines the request to provide additional criteria relative to what constitutes “an important component”. Any further clarification of important ecological resources or additional criteria related to the other terms identified by the comment is more appropriate for guidance.

F.6.5 Comment: New language added in the revised rule-making will result in greater opportunity for inappropriate application of these ecological resource based SCOs. The proposal (revised draft Part 375-6.6(a)) now calls for “consideration” of the ecological resource-based SCOs if such resources are present at or adjacent to a restricted use site and such resources are “impacted” in any way by contamination identified in on-site soils. It further provides (revised draft Part 375-6.6(b)(3)(c)) that the ecological resource based SCOs “shall apply” to a site if one of the ecological based “significant threat” thresholds is met, or if any ecological resource is, or is potentially, impacted to any degree by soil contaminants at the site.

Response: The Department has considered this comment and declines to make a revision.

F.6.6 Comment: The revised draft rule (Part 375-6.6(a)) states the ecological resource SCOs apply to “upland soils” at sites where terrestrial flora and fauna, and their habitats, are located. It is unclear what is meant by “upland” soils. This term typically refers to relative elevation of land and/or proximity of land to water bodies. This provision could be clarified by stating that, where applicable, the ecological resource SCOs only apply to the soil horizon in which there are actual or potential exposures to ecological resources.

Response: The Department has considered this comment and declines to make this revision, however should further clarification be necessary it would more appropriately be handled in guidance.

F.6.7 Comment: The new draft regulations state that “the presence of ecological resources shall be determined during the investigation of a site.” (Revised draft 375-6.6(b)). While this is an improvement, the regulations should be strengthened by adding language in section 375-1.8(e) to include “identification of ecological resources” in the scope of investigation.

Response: The Department has considered this request and declines to revise the regulation. This requirement to identify ecological resources in the scope of the investigation is already set forth at subparagraphs 375-1.8(e)(1)(iv) and (v) and 375-1.8(e)(2)(iii).

F:7 Comments on Section 375-6.7

Soil vapor and vapor intrusion

F.7.1 Comment: Section 375-6.7(a)(2) discussed the nature and extent of “any contamination of the soil vapor media” suggesting even low levels may trigger action.

Response: This regulation is intended only to highlight the need to identify and consider contamination of the soil vapor in the remedy. The specific details of the investigation and considerations in selecting a remedy will be the subject of guidance developed by the Department and the NYSDOH.

F.7.2 Comment: While we appreciate the inclusion of this new 375-6.7(a) section (which also appropriately belongs in the remedial investigation and remedy selection sections), it does not provide the needed site criteria outlining *when* such an investigation would be required. The regulations need to be amended by addition of the language to adequately define the trigger that would *require* an applicant to include vapor intrusion testing in the site remedial investigation.

Response: The Department has considered this comment and declines to make the changes requested to paragraph 375-6.7(a)(2). The need for a remedial investigation to evaluate soil vapor is already set forth in paragraph 375-1.8(a)(6).

F.7.3 Comment: We strongly reject the implied parity between contaminant removal and engineering controls with regard to remedies for soil vapor and vapor intrusion. Revised draft 375-6.7(a)(3) states that “the remedy will be protective for soil vapor and vapor intrusion and shall address through appropriate removal or engineering controls the migration of contaminants in soil and groundwater at levels which could impact the indoor air of buildings.” In keeping with the statute’s “preference for permanence” and the goal of protecting public health, the regulations should clearly state that contaminant removal is the preferred remedy.

Response: The Department has considered this comment and declines to make the requested change. The preference for contaminant removal is clearly identified in the regulation in several areas; notably in the emphasis on source removal in subdivisions 375-1.8(c) and (d),

Adjacent residential properties

F.7.4 Comment: DEC created a new requirement that commercial and industrial site remedies must address the migration of contaminants to adjacent residential sites through removal or engineering controls. DEC’s language regarding removal or engineering controls is unnecessarily broad, possibly resulting in increased uncertainty, delays and cost. DEC needs to amend the Public Health Exposure section of the BCP regulations to clarify that exposure assessments should be the basis for identifying the presence of specific migration pathways of concern between industrial/ commercial and residential properties and then, separately, DEC should clarify/proscribe how to determine the need for soil migration controls, i.e., the proximity of the site to residents, the likelihood of impacts, and the type of impacts.

Response: This is not a new requirement. The Department has considered this comment and declines to make the change, as it is a statutory requirement. See also Response D.8.163 in the June 2006 RTC.

F.7.5 Comment: DEC should also establish a hierarchy of mitigation measures and what realistic controls may be applied to prevent impacts to adjacent residential sites.

Response: The Department has considered this comment and believes this request is best addressed in guidance.

F.7.6 Comment: The regulations need to clarify that this new requirement only applies to potential impacts from soil migration and does not apply to groundwater or soil vapor pathways.

Response: The Department has considered this comment and declines to include the requested clarification. Paragraph 375-6.7(c)(2) clearly limits this subdivision to “the migration of contaminants in soil”.

Soil covers and backfill

F.7.7 Comment: DEC has adopted and expanded its consideration of “historic fill” in the Redrafted Regulations. Although the term still does not play a large role in the BCP regulations, the Redrafted Regulations potentially exempt BCP sites with historic fill from the standards for soil cover. (*See* Redrafted Regulations 375-6.7(d).) Rather than being expanded, the consideration of “historic fill” should be eliminated from the regulations and guidance documents for all purposes.

Response: The Department has considered this request and declines to make a change. Subdivision 375-6.7(d) addresses material brought to a site to construct a soil cover or as backfill and includes, at subparagraph 375-6.7(d)(3)(vi), an exemption which acknowledges the presence of “historic fill” at a site.

F.7.8 Comment: In a new section of the regulations, Part 375-6.7(d), DEC added requirements regarding the regulatory status of the material (it must be unregulated) as well as the concentration of contaminants allowed in the fill. This approach is unreasonably restrictive for backfill, which should only be required to meet the SCOs selected for the site soils. Further, it is unnecessary to create more requirements for cover material because those requirements were covered in the description of Track 4 in Section 375-3.8(e). The fact that the section allows the Department to provide an exemption from these requirements does not sufficiently address these concerns. DEC should reevaluate their requirements for backfill and cover at BCP sites. There is no reason why only material determined by Department regulation to be “unregulated” can be used for backfill. These requirements should be incorporated into the requirements for Site Management Plans in order to cover future excavation and backfilling.

Response: While paragraph 375-3.8(e)(4) provides some details for an acceptable soil cover for a Track 4 cleanup, as noted by the comment, subdivision 375-6.7(d) is intended to provide more detail relative to soil imported as a component of a remedial program. Contrary to the comment, the Department did, however, delete subparagraph 375-6.7(d)(1)(ii) which provided the Department does have a very good reason to control the nature and quality of fill brought to a site as part of the remedial program since it is providing releases to the remedial party and, in the case of the BCP, significant tax credits. Importing a new problem to a site is not protective of public health or the environment. Importing soil from another remedial site being brought to a site for use in the remedial program. Other provisions of this subdivision provide sufficient assurance that only material of appropriate nature and quality could be imported for use as fill or soil covers.

F.7.9 Comment: Relative to 375-6.7(d)(1)(I) and (ii), if material was placed in the ground to fill in a depression that merely consisted of old C&D solid building materials, generally speaking this is solid material that can be excavated and often reused, and is not contaminated enough to exceed the new standards (i.e. is good reusable

fill). This C&D fill should be not eligible for the Title 14 program. It is also unclear what is meant by the italicized phrase non-hazardous solid waste. Non-hazardous solid waste is basically municipal solid waste, which is excluded from the definition in the last sentence. If C&D material is excavated, and such material does not exceed cleanup standards, why can't it be reused on the site?

Response: Subdivision 375-6.7(d) addresses material brought to a site for construction of the soil cover or as backfill. Soil, or as noted by the comment C&D, which is excavated from a site is not subject to the provisions of this subdivision and could be reused on the site if approved by the Department.

F.7.10 Comment: There appears to be a possible discrepancy between 375-6.7(d)(iii) and (d)(iv). In (d)(iii), the Department indicates that soil cover/backfill must not exceed the SCOs specified for unrestricted use in Table 375-6.8(a) and the applicable restricted use in Table 375-6.8(b). It is unclear whether reference to the SCOs in (d)(iii) only refers to protection of public health SCOs or also to protection of groundwater and/or protection of ecological resource SCOs. However, (d)(iv) would require such soil at industrial use sites to meet the lower of the protection of groundwater use SCOs and the protection of public health for commercial use SCOs.

Response: The Department agrees there is overlap in this subdivision and has clarified paragraph 375-6.7(d)(1), including the merging of subparagraphs (iii) and (iv). The Department also has eliminated paragraph (4) by combining it with paragraph (2).

F.7.11 Comment: In 375-6.7(d) if industrial use SCOs are used as cleanup standards at a site, the backfill should not have to meet more stringent SCOs (i.e., those for commercial sites). In addition, if groundwater protection SCOs are determined not to apply as cleanup standards in accordance with 375-6.5, backfill should also not be required to meet groundwater SCOs. Finally, if site-specific SCOs are developed under Track 3 or Track 4, more stringent SCOs should not apply to the backfill. In summary, if appropriate SCOs at a site are protective of human health and the environment, those levels would also be protective if used in backfill.

Response: The basic concerns in the development of criteria for soil covers and backfill was that sites being remediated not become a location for the disposal of soil with other contaminants or that backfill does not result in, or add to, groundwater contamination at the receiving site. The direct contact soil cleanup objectives of some contaminants for the industrial use scenario are quite high and material with those levels may be considered to be contaminated and subject to remediation at a site with a less restrictive use. The requirement that backfill also comply with the protection of groundwater driven soil clean up objectives is to insure that the backfill does not become a source of groundwater contamination. Some sites will not require active groundwater treatment because a current groundwater exceedance does not exist. However, use of soil with contaminant levels above the groundwater driven SCOs may create a problem, rendering the site unprotective of public health and the environment. Also see Response to Comment F.7.8 above.

F.7.12 Comment: Section 6.7(d)(1)(I) allows only unregulated material pursuant to Part 360 to be used as backfill (with only site specific exemptions at 375.6.7(d)(3)). Yet, the new Part 360.22 states that historic fill is solid waste and must be land filled. Thus historic fill cannot be used as backfill under Part 375. This is a radical departure from current practice, which is for historic fill to be used, after testing, at another site as backfill or sent to a construction and demolition recycling facility. The proposed changes to Part 360 and 375 may materially raise the cost of remediation projects in New York City (and other urban areas with ubiquitous historic fill) with minimal, if any, environmental benefits.

Response: An exemption relative to a beneficial use determination has been added at subparagraph 375-

6.7(3)(vii). Also see the Response to Comment B.2.4 of this response to comments regarding the proposed Part 360.

F.7.13 Comment: Relative to 375-6.7(d), DER and DSHM must develop a coordinated approach to soil covers and backfill at construction sites and sites enrolled in remedial programs. DEC should avoid conflicts or unintentional regulatory burdens that may be created by discrepancies between the two interrelated draft regulations. Furthermore, both Draft Part 360 and Draft Part 375 are overly restrictive in how non-hazardous historic fill materials (and non-hazardous construction and demolition debris) can be reused once they are excavated. The commenter recommends that DEC take a more sensible approach to the management of excavated historic fill material and mildly contaminated C&D debris by creating a pre-determined, generally applicable BUD that will allow this material to be reused as sub-grade fill material underneath buildings, engineered caps, or clean fill at other construction sites without first being handled by a debris processing facility. Indeed, even if sampling of excavated soils reveals the presence of contaminants at levels above soil cleanup objectives, DEC should still allow the material to be transported **as** an unregulated material to be re-used **as** fill at another project site. If this fill material does not comport with clean up objectives for end-use at the deposition site, this material can be used safely when it is placed below clean fill, or underneath buildings or managed with other traditional engineering controls.

Response: The Department has considered this comment and deleted subparagraph 375-6.7(d)(1)(ii) which stated an outright prohibition of the use of soil from remedial sites as fill or cover material and added an exemption for BUDs to the list in paragraph 375-6.7(d)(3). These revisions will allow not only reuse of soil through a beneficial use determination but also recognizes that the reuse of clean soil from a remedial site which is not regulated in any way should be prohibited at other remedial sites. Also see the Response to Comments F.8.7, F.8.11 and F.8.12 above.

F:8 Comments on Section 375-6.8

F.8.1 Comment: According to a number of consultants that have reviewed the new cleanup tables, the unrestricted use cleanup numbers may now be unachievable. It is unclear what benefit there is of having cleanup standards that are so clean no place actually reaches that level of cleanliness. If the concern is farming, and vegetable consumption, then there should be a separate table for these uses, which may reflect the new numbers. The Track 1 incentive was causing many developers to perform Track 1 cleanups. If the numbers are not reasonable to attempt to achieve, then this incentive is eliminated.

Response: The Department has considered this comment and declines to make any revision. The soil cleanup objectives were calculated in accordance with the statutory provisions.

F.8.2 Comment: In the prior draft of the regulations there were two sets of Soil Cleanup Objectives (SCOs) under Track 1, one for protection of ecological receptors and one for protection of human health. DEC eliminated this dual SCO approach and condensed the Track 1 SCOs into one set that is comprised of the most protective of the SCOs developed for protection of human health, ecological receptors or groundwater. The Track 1 SCOs are now more stringent and these changes are likely to make Track 1 clean-ups unworkable in NYC and other urban centers and appear to eliminate Track 1 as a viable cleanup track under the BCP. Eliminating or minimizing the ability to conduct Track 1 cleanups contradicts the statutory intent of encouraging Track 1 cleanups through incrementally generous brownfield tax credits and more comprehensive liability releases. Moreover, this approach will discourage greater levels of cleanup for such public uses as affordable housing and deny the associated brownfield tax credits in order to do so. DEC should reestablish Track 1 SCOs that are based on the different levels of protection necessary for ecological receptors and human health. DEC should revise this section of the regulations and reinstate two sets of SCOs: one that is protective

of ecological receptors and one that is protective of human health for those sites where there are no ecological receptors.

Response: As noted by the comment, the original Track 1 table (Table 375-3.8(e) (1) in the November 2005 draft) consisted of two columns:

- the first column was for the protection of public health and was derived from the lower of the protection of groundwater (PGW) values (the same values included in the PGW SCO column in the Track 2 table) and a unrestricted protection of public health SCO value, calculated for the exposure scenarios set forth in the Technical Support Document (TSD), which excluded dairy/cattle farms; and
- the second column was for the protection of ecological resources (PER) column which is the same column of PER SCOs utilized in the Track 2 table. This column was only to be used if ecological resources were identified at the site.

The current unrestricted use (Track 1) table, now included as Table 375-6.8(a), has only one column. This column represents the lowest of the following values:

- the newly calculated unrestricted protection of public health values, which were revised to allow for farming;
- the PGW value which is the same as the PGW SCO column in the restricted use tables ; and
- the PER value which is the same as the PER SCO column in the restricted use table.

The lower values in this new unrestricted column are attributable to the consideration of both the new protection of human health and the PER SCOs, not solely the PER SCO as noted by the comment. The new unrestricted public health values and their derivation are presented in the updated Technical Support Document. Also see Response to Comment D.8.10 in the June 2006 response to comments for the rationale for the change to a one column unrestricted use (Track 1) table.

Specific soil cleanup objectives:

F.8.3 Comment: “Total Cyanide” is presented as a contaminant in the SCOs tables [Tables 375-6.8 (a) and (b)]. However, the CAS Number (57-12-5) that is listed for total cyanide in these tables is actually the CAS number for free cyanide. Moreover, the Technical Support Document Appendix A, page AS-255, reveals that toxicity values for free cyanide were used to calculate the total cyanide SCO. As such, the SCO listed in Table 375-6.8 is actually the SCO for free cyanide and not for total cyanide. This discrepancy should be corrected in the SCO tables by removing the term “Total Cyanide” and replacing it with “Free Cyanide”.

Considering the wide range of cyanide forms that can be measured in a total cyanide determination, including free cyanide, the Department must also consider different forms of cyanide species and complexes on a site-specific basis in order to obtain relevant and appropriate soil cleanup objectives. Free cyanide, where detected in soils at MGP sites, comprises only a fraction of one percent of the total cyanide. Accordingly, as with TAGM 4046, a provision should be made that will allow flexibility to establish more accurate site-specific cyanide SCOs on the basis of the site-specific forms of cyanide actually present at a site.

As previously noted, the use of EPA-approved method OIA-1677 is recommended for the determination of free or available cyanide in soil. Further, the micro-diffusion method for the determination of free cyanide, currently known as ASTM D4282-95, is now under EPA review for incorporation into SE-846. Once the micro-diffusion method is approved, it should be routinely applied to more specifically and accurately determine free cyanide. In addition, we recommend the use of other methods to determine various cyanide forms such as the metal cyanide complexes by anion exchange chromatography and UV detection method (EAP SW-846 method 9015).

Response: The CAS number indicated for total cyanide has been removed. A CAS number should not have been indicated for total cyanide because no such CAS number exists. The health-based SCOs for cyanide are based on toxicity values for free cyanide. The Department chose this approach because of the possibility that some brownfield soils may contain cyanide wastes other than iron cyanide complexes, some of which may be in a more toxic and/or bio-available form (e.g., barium cyanide, potassium cyanide, sodium cyanide, calcium cyanide). This was consistent with the Department's approach to establishing SCOs for other contaminants where different forms of the contaminant may be present in soil. However, this determination is not intended to limit the scope of brownfield investigations, and the proposed regulation already provides flexibility for developing site-specific cyanide SCOs on the basis of the site-specific forms of cyanide actually present at a site. Specifically, soil cleanup objectives for contaminants not included in Tables 375-6.8(a) and (b) may be developed by the remedial party or required by the Department (see 375-6.9). Additionally, applicants may develop site-specific SCOs under Track 4 (see 375-3.8(e)(4)).

The last part of this comment relates to the analytical method to be used to determine the amount of total cyanide in soil. The proposed regulations do not specify the method to be used, nor is one method appropriate for every site. An applicant may propose a method in their sampling and analysis plan along with a justification for the selection of that analytical method. The Department will review the proposal and if adequately justified, may accept it. In general an accepted analytical method, as set forth in the Department's Analytical Services Protocol or EPA SW-846, would be preferred over one being developed for a site.

F.8.4 Comment: The proposed PCB SCOs in the initial draft rule were set at 1 ppm for unrestricted use, restricted-residential use and restricted-commercial use. Based on the definition of restricted-commercial use as defined in the proposed regulations (subsection 375-1.8), we recommended that the restricted-commercial use SCO be less conservative than that for unrestricted use and restricted-residential use, given that the potential for exposure would likely be less under a restricted-commercial scenario than that for unrestricted use and restricted-residential use. Therefore, we recommended that the PCB SCO for restricted-commercial should be reexamined.

Response: As described in Section 6.0 of the Technical Support Document, the PCB SCOs are derived from a US Environmental Protection Agency (EPA) regulation (Disposal of Polychlorinated Biphenyls (PCBs), 40 CFR 761). In this regulation, EPA established a PCB cleanup level of less than or equal to 1 part per million (ppm) for "high occupancy areas" and defined "high occupancy areas" as areas where people may be present for 335 hours or more per year. The exposure scenarios used in developing the SCOs for other contaminants assume that people may be present more than 335 hours per year at commercial sites (see Section 5.2 of the Technical Support Document). Therefore, the Department has determined that EPA's "high occupancy area" PCB cleanup level of 1 ppm is applicable to the commercial land use category.

F.8.5 Comment: The unrestricted use SCO for PCBs has been established at 0.1 ppm in Revised Table 375-6.8(a). This SCO, however, is for total PCBs. The Department is requiring the remedial party to sum up all of the Arochlor values after an EPA 8082 analysis. What is troubling is that this level is set below the sum of the individual Contract Required Quantitation Limits (CRQL) acceptable for Department analytical services contracts for PCBs. In an EPA 8082 analysis, it is not unusual to have reporting limits of 35 to 50 ppb for each individual Arochlor. It, therefore, will be technically infeasible to document attaining <0.1 ppm total PCBs as long as there is more than two Arochlors detected. Moreover, even if only one Arochlor is detected, if a remedial party was forced to assume that a constituent that is not detected is actually present at the detection

limit, or ½ the detection limit, it will be technically infeasible to document attaining <0.1 ppm total PCBs. Footnote 'b' to Table 375-6.8(a) states that for constituents where the calculated SCO is lower than the CRQL, the CRQL is used as the Track 1 SCO value. In keeping with this footnote, the unrestricted use SCO for totals PCBs should be raised to reflect the aggregate sum of the quantitation limits for all of the Arochlors in an EPA 8082 analysis. This sum approximates 1 ppm used in the residential use SCO.

Response: The unrestricted use SCO for PCBs is based on total PCBs and, as indicated in the comment, the appropriate analytical method for total PCBs is SW846 method 8082. Results from this method can be reported as either total PCBs or on an Arochlor specific basis. However, when using the SCOs, the Total PCB analysis should be requested. While the Department's Analytical Services Protocol (which sets the CRQL) does not identify a CRQL for total PCBs, the total PCBs CRQL would be comparable to the CRQLs for the individual Arochlors because the analytical method is the same. Therefore, the Total PCB CRQL would range from 35 to 50 ppb, which is well below the total PCB SCO of 100 ppb (0.1 ppm). Where Arochlor specific data is provided, summing the CRQL for the different Arochlors to determine the quantitation limit for total PCBs as suggested by the comment, would not be an appropriate application of method 8082.

The comment also raised a question regarding how results below the method detection limit are handled. To determine the total concentration of a contaminant group, reported values above the quantitation limits are to be used as reported, estimated values (above the method detection limit but below the quantitation limit) are to be used as estimated and values below the method detection limit (reported as less than) are to be considered as zero.

F.8.6 Comment: The proposed PCB SCO for unrestricted use is 0.1 ppm, which was apparently calculated based on the proposed 1 ppm SCO for residential use and adjusted for potential dietary exposure to PCBs. However, since the Department did not provide any rural background data for PCBs in the Technical Support Document, it could not be determined whether the 0.1 ppm SCO should be adjusted for a possibly higher rural background concentration. The Department should provide rural background data for PCBs and adjust the proposed 0.1 ppm unrestricted use SCO if the rural background level exceeds 0.1 ppm.

Response: Concentrations of PCBs (as Arochlor mixtures) in samples collected by the statewide Rural Soil Survey were reported in Appendix D of the Technical Support Document (see "Summary" and Tables 5a, 5b, 5c, 6a, 6b, and 6c). Arochlors were detected in 4 of 242 rural soil samples (1.7%). Specifically, Arochlor 1016 was detected in one source-distant sample at a concentration of 72 ppb, and Arochlor 1260 was detected in one habitat sample and two near source samples at 47, 32 and 20 ppb, respectively. Concentrations of total PCBs (as combined Arochlors) never exceeded the proposed unrestricted use SCO of 100 ppb (0.1 ppm), so the Department did not establish a Rural Soil Background Concentration for PCBs.

F.8.7 Comment: For chrysene it appears that there may be errors in the entries for pathway SCOs and/or calculations for combined cancer risk under various use scenarios. For example, based on data presented for chrysene in Table 5.3.6-1(a)-(e) of the Technical Support Document, under the unrestricted use scenario, the combined cancer risk is calculated as equal to $[1/(1/1.8 + 1/43)]$, which is 1.73 ppm, whereas Table 5.3.6-1(a) specifies 0.52 ppm. It is requested that the Department check the pathway SCOs and its calculations for combined SCOs for chrysene and other chemicals and, if appropriate, revise the Technical Support Document and SCOs.

Response: There is an inconsistency as noted by this comment. The unrestricted, residential and restricted-residential pathway-specific cancer SCOs for chrysene reported in Table 5.3.6-1(a)-(c) were

inadvertently not updated to account for the potentially increased sensitivity of children to the carcinogenic effects of early life exposures. However, the combined pathway SCOs for chrysene in those tables (and the ultimate SCOs included in the proposed regulation) were correct. We reviewed the SCOs for other chemicals and determined that the inconsistency was limited to chrysene. The revised Technical Support Document will include the updated values for chrysene.

F.8.8 Comment: The Department made an arbitrary decision to increase levels of tetrachloroethene by changing its reliance on CalEPA oral toxicity values to US EPA oral toxicity values. The resulting new SCOs are now between 5.42 and 7.33 times higher than previous SCOs. There is no reference in DEC's response or in the TSD of this change, and no meaningful explanation why the Department chose to make this alteration. Given the widespread presence of this dry cleaning chemical throughout the state, and its known health effects, the Department should return to its original SCO for this chemical.

Response: The rationale for re-visiting the oral cancer potency factor derives from our continuing work to develop guidance for evaluating and mitigating soil vapor intrusion for tetrachloroethene (PCE), trichloroethene (TCE) and other chemicals (see NYS DOH, 2005a). Through this work, we observed differences in the relative magnitude of the NYS DOH air guidelines for PCE (NYS DOH, 1997) and TCE (NYS DOH, 2005b) and the SCO values for these chemicals. Therefore, we analyzed the relative potencies of PCE and TCE to cause non-cancer or cancer effects after oral or inhalation exposures. This analysis (summarized in the table below) indicated that the potencies of TCE to cause non-cancer or cancer effects via inhalation or non-cancer effects via oral doses are greater than those of PCE. In contrast, the draft oral potency factors indicated that the potency of PCE to cause cancer was 75-times greater than that of TCE. An expanded review of information from authoritative bodies identified an oral potency value (the US EPA value) that, in comparison to the Cal EPA value was derived in a manner more consistent with the approach for selecting toxicity values that is described in Section 5.1 of the Technical Support Document. This resulted in the revised potency value and SCOs for PCE. The technical basis for the selection of the oral cancer potency factor for PCE is presented in Appendix A of the revised Technical Support Document (see Oral Cancer Toxicity Value Documentation fact sheet for tetrachloroethene). Additionally, we note that as a consequence of this change the differences described above have been reduced.

References

- NYS DOH (New York State Department of Health). 1997. Tetrachloroethene Ambient Air Criteria Document. Albany, NY: Bureau of Toxic Substance Assessment.
- NYS DOH (New York State Department of Health). 2005a. Guidance for Evaluating Soil Vapor Intrusion in the State of New York. Troy, NY: NYS DOH, Center for Environmental Health, Bureau of Environmental Exposure Investigation. Public Comment Draft. February 2005.
- NYS DOH (New York State Department of Health). 2005b. Draft Report. Trichloroethene Air Criteria Document. Troy, NY: Center for Environmental Health, Bureau of Toxic Substance Assessment.

Comparison of Toxicity Values for Trichloroethene (TCE) and Tetrachloroethene (PCE)

Toxicity Values from Appendix A of Technical Support Document	TCE Value	PCE Value	Relative Difference in Potency
Oral Cancer Potency Factor (November, 2005)	5.7 x 10 ⁻³ per mg/kg/d	0.43 per mg/kg/d	PCE 75 times more potent than TCE
Oral Cancer Potency Factor (August, 2006)	5.7 x 10 ⁻³ per mg/kg/d	0.05 per mg/kg/d	PCE 9 times more potent than TCE
Reference Dose	0.0015 mg/kg/d	0.01 mg/kg/d	TCE 7 times more potent than PCE
Inhalation Unit Risk	0.000002 per mcg/m ³	0.000001 per mcg/m ³	TCE 2 times more potent than PCE
Reference Concentration	40 mcg/m ³	100 mcg/m ³	TCE 2.5 times more potent than PCE

Footnotes

F.8.9 Comment: Footnotes “g” in Tables 1 and 2 are not needed since the SCO for DDT, DDD and DDT are not based on the sum of these 3 compounds but are limited by the CRQL, as noted by footnote “e”. Also delete footnote “l” of Table 2 which is a duplicate of the unnecessary footnote “g”.

Response: These footnotes have been deleted from the tables as noted. Footnote “k” of Table 375-6.7(b) has also been redesignated as footnote “g” in this table and footnote “k” has been eliminated.

F:9 Comments on Section 375-6.9

F.9.1 Comment: If no site cleanup objective exists for a contaminant, section 375-6.9 states NYSDEC may require an applicant to develop one. If a regulated contaminant is discovered onsite, developing a site-specific cleanup objective is logical. However, requiring an applicant to develop a soil cleanup objective that applies to all sites is an inappropriate delegation of regulatory authority. The provision should be clarified accordingly. Moreover, an applicant should be able to use a TAGM 4046 standard as a default for a contaminant that is not one of the 86 contaminants covered by the new tables.

Response: If a compound not included on the tables in subdivision 375-6.7 is identified by the remedial investigation and the Department determines that it is a contaminant of concern for the site the applicant has two options. The applicant may elect to pursue a Track 4 cleanup and identify a site specific soil cleanup objective that is protective of human health and the environment, which may involve the use of TAGM 4046 or other available guidance. Alternatively, the applicant may choose to pursue a Track 1 or 2 cleanup. If they elect this option they have no choice but to develop a SCO for the compound, pursuant to the procedures set forth in the Technical Support Document. Application of any soil cleanup objective developed pursuant to this section at other remedial sites would be subject to Department approval, as set forth at subdivision 375-6.9(f). Also see Response to Comment D.8.98 in the June 2006 RTC.

F.9.2 Comment: The intent of the statute in directing DEC to establish cleanup tables was to reduce the uncertainty associated with site cleanups. DEC should amend the regulations by explicitly stating that they will only require development of new SCOs for chemicals that drive the remedy under any track and for SCOs under Track 1 where ecological receptors have been identified and for chemicals that drive the remedy.

Response: The Department has considered this comment and declines to make any revision to the regulations. See also Response D.8.98 in the June 2006 RTC.

PART G – COMMENTS ON MATTERS OUTSIDE PART 375

G.0 General Comments

G.0.1 Comment: We appreciate the Department's commitment to the Superfund Handbook and to the development of handbooks for brownfield and environmental restoration sites. We strongly recommend that a 60 day public comment period, public hearings and sessions be held to involve the interested public in the development of the handbooks.

Response: The Superfund Handbook is beyond the scope of these regulations and will be developed at some future date in accordance with the procedures set forth by the Department for the development of guidance, which includes opportunity for public comment.

G.0.2 Comment: Class 2 sites should not be statutorily precluded from the BCP.

Response: This is a matter to be addressed by the legislature and is beyond the scope of these regulations.

G.1 Comments of the Draft Generic Environmental Impact Statement

No comments

Appendix A

A notice of revised rule making was submitted for this rulemaking action and appeared in the State Register on July 12, 2006. The following comments were previously addressed in the assessment of public comment included in that notice of revised rulemaking, and need not be addressed again by this assessment of public comments.

In the calculation of SCOs for a commercial or industrial and use setting, the commenter believes that the appropriate starting points in the analysis is the acceptable worker exposure levels, namely acceptable workplace air concentrations for the inhalation pathway. The commenter recommends the use of workplace exposure levels established by the Occupational and Health Safety Administration (OSHA) and best practices guidelines in place to protect worker safety.

Non-native, exotic, and/or invasive species should be excluded from the definition of "ecological resources." (See 375-1.2(m))

1. 375-2.3(d)(5), which requires a municipality to assist the State to develop "evidence or legal argument" in order to recover costs from a responsible party, should include the following exception: "except that nothing in this section shall require the municipality to waive, in whole or in part, the attorney-client, attorney work product, or deliberative process privilege."
2. The basis for adding the second sentence in the groundwater definition regarding perched water is unclear. Does this definition already appear in other regulations or guidance.
3. The previous draft required consideration of "any written and oral comments submitted by members of the public on the applicant's proposed use." It was requested that this language be qualified, as it is in ECL § 27-1415(3)(i)(vi), which requires public comments to be addressed only when provided "as part of citizen participation activities performed by the applicant pursuant to this title." DEC should conform the language of this regulation to that of the governing statute, as recommended in our prior comment.
4. 375-2.7(f)(2)(iii) should refer to change of use.
5. The proposed 375-1.8(b)(4) would require useful products (e.g., transformer oil or oil-containing transformers), even with minute concentrations of petroleum product or hazardous substances to be removed from the remediation site and disposed of even if they are used or could be used for their intended purpose at the remediation site or even if they could be used elsewhere. There is no indication in the plain language of the proposed regulation that the Department would or could allow such products to be used on the remediation site or at another site.
6. Eligible costs under 375-2.3(e) should be those that are incurred consistent with the NCP. We suggest that NYSDEC consider adding language that compliance with the requirements of the program shall carry a presumption that the costs were incurred in compliance with the NCP.
7. Ineligible costs under 375-2.3(f) should be those that are incurred not consistent with the NCP.
8. DEC and DOH should re-calculate the soil cleanup standard to ensure that remediated soils at commercial and industrial sites will not pose a threat to adjacent residential uses. DEC's proposed approach of protecting adjacent residential uses through site specific erosion control measures is not adequate because some degree of water and wind erosion is bound to occur, even if soil is planted with grass or other measures used to control erosion.
9. Subparagraph (1)(v) states a COC may be modified or revoked "for good cause". Examples were requested of what is meant by "good cause." We continue to believe examples are appropriate.
10. We believe that parties carrying out remedial obligations under the 1986 EQBA are not required to indemnify the state. (See 375-2.5(a) (3) (I)).
11. Another commenter indicated that modification or revocation of a COC for good cause should be used only in extremely egregious situations. We continue to recommend that NYSDEC consider limiting the use of its COC revocation authority to situations of intentional or willful violation of the terms of the COC, where the party has filed for bankruptcy and does not have adequate resources to maintain any ongoing institutional or engineering controls, or NYSDEC has determined that the party does not have the financial resources to comply with the requirements of the COC.

12. We continue to recommend that the Department describe how it will use its discretion in determining whether or not only a portion of a site is eligible for the BCP.
13. We continue to recommend that sites impacted by offsite sources be eligible for the BCP.
14. We continue to recommend that TSDF and interim status facilities be eligible for the BCP, provided that they have not been subject to enforcement actions, which would make them ineligible under the statute.
15. We again recommend a provision that indicates that if the Department does not provide comments within the time frames provided, the document should be deemed as having been approved.
16. In the June draft regulations the NYSDEC elected not to address the need to articulate a process to approve settlements initiated under the indemnification and liability protections provided in the statute. In the absence of outlining the entire process needed to meet the test for Attorney General approval of settlement costs, the NYSDEC, simply by indicating in the regulations how a successor owner can initiate a request for a 56-0609 claim or settlement, would create needed certainty. This step would be beneficial to every real estate transaction for property addressed under the Environmental Restoration Program.
17. A commenter reiterated its request that invoices be itemized, be submitted in a timely manner and that if documents need to be retrieved through a Freedom of Information Law (FOIL) request, that the payment due date be suspended until the FOIL documents are provided.
18. Another commenter reiterated that DEC should have discretion to exempt municipalities from some or all State costs.
19. Many commenters reiterated previous comments on the Department's eligibility for the Brownfield Cleanup Program (BCP). Comments included, much like the first round of comments, statements that the Department should not limit its review to on-site contamination, that it should explain "complication", that it should consider "economic considerations" and be more liberal in its application of the criteria, that DEC must clarify in the regulations that properties contaminated with constituents above SCOs that present a risk to public health or the environment are eligible to participate in the BCP regardless of whether such constituents are defined as hazardous waste or petroleum or historic fill; DEC should carry out their responsibility to transparently administer the BCP by establishing programmatic parameters to guide decision-making related to "complicating factors" rather than relying on site-by-site decision-making; that DEC should permit sites contaminated by historic fill into the BCP while instituting safeguards against developer windfalls. DEC should not narrow eligibility.
20. A commenter stated that the tax credits need to be adjusted to consider need.
21. One commenter reiterated its previous comments to add some clarity to the 2003 statutory language that specifically sought to make the ERP more robust by encouraging municipalities to partner with Community Based Organizations (CBOs).
22. Although the "public interest" provision has been moved from the "Eligibility" section into the "Applications" section, it still poses the same problem by providing DEC the ability to deny BCP applications for seemingly eligible sites for undefined reasons. [D.3.10]
23. The proposed regulations should be revised to state that tax credits will not be awarded where the DEC determines that a site would be remediated in the absence of such credits.
24. 375-6.9(b) It remains unclear without specific reference to statutory language that DEC has the authority for imposing caps in lieu of SCOs that are purportedly derived to protect health, groundwater and ecological resources. Even if the Department is authorized by the statute to impose caps, the caps proposed by the Department are not necessarily appropriate or warranted as SCOs. It is suggested that the Department eliminate caps entirely and base SCOs on the conservative calculated values. If the Department determines that caps are appropriate after reconsideration of our comments, we suggest that caps for organic chemicals be set at a minimum of 1000 ppm for all uses and all scenarios (health, ecological, and groundwater protection).
25. DEC has declined to include the definition of "permanent cleanup" provided in Subpart 375-3 in Subpart 375-1. This does not make sense, since Subpart 375-1 makes use of the term "permanent cleanup" and "permanent" in a number of places.
26. We disagree with the agency's decision not to include the risk failure analysis we outlined in our previous comments and we continue to call on the DEC to incorporate such analysis in the final regulations.

27. The revised regulations have retained the policy that the appropriate land use category for a site will be determined taking into consideration activities which occur “(i) on the ground level of any structure; (ii) on the surrounding land; or (iii) in the subsurface to a depth of 15 feet below the site” (*revised draft 375-1.8(g)(5)* emphasis added). My concerns about mixed use buildings that may have residential or commercial uses on upper level floors remain. All of a site’s current and future uses should be considered when determining the appropriate land use category for the site, not just activities “on the ground level.”
28. The revised draft regulations fail to list the two sets of criteria established in statute for the development of SCOs. I remain concerned about DEC and DOH’s failure to provide, in the body of the regulations, a clear list of these criteria.
29. I continue to believe that ecological resources should be defined to include all biota, including pets, livestock, agricultural and horticultural crops and should be protective of aquatic as well as terrestrial organisms. As I noted previously, the statute clearly includes “fish” in its definition of “ecological resources.”
30. I remain concerned about the large discrepancy between the proposed standards for restricted use and those proposed for the protection of groundwater.
31. Commenters reiterated their concern that there wasn’t a groundwater strategy that addresses important urban groundwater issues, such as ubiquitous groundwater contamination set forth in the rule.
32. I repeat my original recommendations regarding the utilization of a more sophisticated groundwater model and requiring that all soil standards be protective of groundwater, at least over the long-term
33. The Department has determined to require a site specific “evaluation” of the fate and transport of soil from the site to surface water bodies rather than requiring the SCOs to be protective of surface water. As I previously stated, this approach is in contravention of statutory intent, therefore I repeat my previous recommendation: DEC and DOH should re-calculate the soil cleanup standards to ensure that remediated soils will not pose a threat to surface water quality.
34. DEC and DOH should re-calculate the soil cleanup standards proposed for volatile organic chemicals to help ensure that they are low enough not to result in vapor intrusion.
35. I continue to believe that barriers and signs will help the public, especially parents, reduce the incidence and duration of trespassing events.
36. The Department should re-calculate the soil cleanup standards using up-to-date toxicity information, more appropriate uncertainty factors, upper range values to estimate exposure, more protective assumptions regarding intentional soil ingestion, a more valid approach to route-to-route extrapolation, and more appropriate physiological parameters. I urge the agencies to include a reference to Hazwoper training in regulation or guidance and to provide guidelines for the training of workers at remediated sites in the avoidance of take-home exposures.
37. I remain convinced that a full evaluation of the uptake of contaminants by plants, especially for those contaminants where data is available, is warranted. A large quantity of data and analysis has been performed at the federal level on heavy metals in order to establish standards for the land application of sewage sludge. I find it hard to believe that the use of such data would not result in the development of more accurate and protective standards to protect home gardeners.
38. DEC should use the more accurate methods of laboratory analysis suggested by Dr. Murray McBride to calculate background values for cadmium, lead and other chemicals whose values are abnormally high. These more accurate testing methods should also be used by site cleanup contractors. At a minimum, the 95th rather than the 98th percentile value should be used to estimate background values. Consideration should be given to using the 50th percentile, particularly if comparable percentile values are used to estimate exposure rates for children and adults. I believe that the original intent of the statute’s directive to use only “rural background” soils was to avoid anthropogenic levels of contamination. Use of the 50th percentile would be more reflective of naturally occurring contaminant levels and in better keeping with the statute’s original intent.
39. DEC should revise the soil cleanup standards to protect against exposure to common mixtures of chemicals, including mixtures with lead.
40. DEC should re-calculate the soil cleanup standards taking feasibility into account.

41. I repeat my original recommendation, and urge the Department to ensure that any proposal to exempt soils below 15 feet not pose a threat to groundwater.
42. DEC should revise the regulations to require that all exposed surface soils cleaned up under Track 4 must meet protective standards developed for Tracks 1, 2 or 3. Contaminated site background levels should not be used as the basis for determining surface soil cleanup at Track 4 sites.
43. In our March 27th comments, we urged the DEC to require that exposed surface soils on Track 4 residential sites meet the SCOs for unrestricted use sites, as opposed to those for the proposed Track 2 “restricted-residential” use category ((original Draft 375-3.8(e)(4)(iv)(a)). We continue to advocate this position.
44. We recommend that the regulations also specify that controls must be described in the remedial work plan
45. The regulations should be amended to explicitly state that soils merely covered by grass or other vegetation shall be treated as “exposed surface soils” and must comply with soil cleanup standards developed for Track 1, 2 or 3.
46. DEC should amend the definition of “grossly contaminated media” to replace “strong odor” with “perceptible odor” and “without laboratory analysis” with “by field instrumentation or other means,” as established in law.
47. I commend the Department for revising the regulations to include adjacent property owners on the site contact list, however, a number of additional parties, including occupants of adjacent property as well as local government officials, the county clerk, community organizations, local and regional environmental groups and local news media, should also be included.
48. The regulations should include a public participation requirement for non-emergency interim remedial measures. Other comments took the position that there should be public participation requirement for non-emergency interim remedial measures.
49. The regulations should require parties to post signs at active and restricted-use sites to help stop exposures.
50. The regulations should use the same remedial goal for the ERP as for the State Superfund program.
51. The existing, long-standing, and time-honored regulatory language which guides the determination of significant threat must be retained.
52. We are particularly concerned that the Department has not addressed the concerns raised during the previous comment period about the failure of the regulations as proposed to support the revitalization of low-income communities through the redevelopment of brownfields for affordable housing, and to meet other community needs.
53. We believe that DEC has not only the authority, but the responsibility to craft regulations that target financial assistance to public purpose projects, while encouraging the broadest possible participation in the Brownfield Cleanup Program.
54. The definition of “contaminant” (375-1.2(g)) includes petroleum. Since ECL 27-1301 does not apply to petroleum, it appears that this definition should not be included in the definitions of subpart 375-1. Alternatively, NYSDEC might consider using the definition of “contaminant” appearing in DER-10 (i.e., any discharged hazardous substance as defined pursuant to ECL 37-0101, hazardous waste as defined pursuant to ECL 27-1301 or petroleum as defined in ECL 17-1003 or section 172 of the Navigation Law). [B.2.4]
55. The definition of “contamination” (375-1.2 (h)) includes “indoor air”, which is not applicable to ECL 27-1301.
56. The definition of “disposal” (375-1.2(l)) contains a reference to “contaminant”. Either “contaminant” should be deleted or the definition of “disposal” should be removed from this subpart and placed in the subpart for the applicable remedial program. NYSDEC should consider using the definition of “disposal” appearing in DER-10.
57. In the definition of “emergency” (375-1.2(o)and 375-1.5(6)(i)), DEC removed reference to “imminent” and replaced it with “immediate.” We previously recommended that the term “imminent and substantial endangerment” be used in place of “emergency.” We also recommended deleting “contaminant” consistent with our other comments about the applicability of this term in the general section. We repeat our recommendation, also DEC interchangeably continues to use “imminent” and “immediate”.

58. The definition of “grossly contaminated media” (375-1.2(u)) refers to “elevated contaminant vapor levels.” Certain types of sampling equipment might not detect soil gas vapor, yet there could still be significant contamination in the soil or groundwater. The definition then goes on to state “or is otherwise readily detectable without laboratory analysis”. Grossly contaminated media is likely to be identifiable by laboratory analysis and probably visually as well as olfactory. This definition is confusing. We recommend that this term be defined as the presence of hazardous waste or petroleum at concentrations above applicable cleanup standards that can be detected visually or by strong odors. Another comment notes the definition is overly vague and ambiguous.
59. The definition of petroleum (375-1.2(ah)) should be removed from this subpart since it does not apply to ECL 27-1301. It should be located in subpart 3 and simply refer to the Navigation Law Section 172 as defined in DER-10.
60. The definition of “remedial program” (375-1.2(ap)) references “wastes and contaminated materials”. NYSDEC should consider using defined terms such as “hazardous wastes or petroleum” where applicable.
61. The phrase “post-remediation management” (375-1.2(ap)(5)) should be changed to Operations, Maintenance and Monitoring” since is the terminology used in DER-10.
62. The definition of “sediment” (375-1.2(ar)) should refer to “organic matter” and not “particulate matter”. To be consistent with NYSDEC guidance, it should exclude material found in enclosed sumps, sewers or piping systems not accessible to fish and wildlife, and that does not form any benthic or aquatic habitat for purposes of comparison to the NYSDEC Technical Guidance for Screening Contaminated Sediment.
63. 375-1.8(a) states that all remedial programs addressed in Part 375 “shall address...source removal...” Source removal is not, but should be, a defined term.
64. 375-1.8(a)(3) requires that all bulk storage tanks and vessels be addressed regardless of the authority under which the site is being remediated. ECL 27-1301 does not address petroleum spills or releases from chemical bulk storage facilities. Accordingly, the requirements in this subsection should be moved to the applicable parts of 6 NYCRR.
65. 375-1.8(b)(1) requires the registering of all petroleum storage tanks appears to go beyond the requirements of the Petroleum Bulk Storage Act, which is limited to facilities storing 1100 or more gallons of petroleum.
66. 375-1.8(b)(3) should be amended to provide that it does not apply to tanks that were taken out of service or closed prior to the promulgation of 613.9 or 598.10.
67. 375-1.8(c) appears to be inconsistent with the hierarchy set forth at ECL 27-1301 and may not be consistent with the NCP.
68. 375-1.8(c) (3) applies to “the elimination of volatilization into buildings”. This is a new, undefined term. Moreover, the only limitation on this requirement is feasibility. Action should not be required for volatilization that results in indoor air concentrations below target concentrations.
69. 375-1.8(f) (2)(ii) refers to applicable NYSDEC guidance. The commenter believes that the NYSDEC’s continuing reliance on guidance documents for critical decision-making is a violation of the State Administrative Procedures Act. We strongly encourage the NYSDEC to promulgate these critical remedial decision guidances through formal rulemaking.
70. NYSDEC is proposing that state or local permits may be waived if the permit would substantially delay the project or present a hardship. (See 375-1.12(c)) We believe that NYSDEC may not have the statutory authority for this provision, and it may unduly infringe on the prerogatives of local government.
71. We remain uncertain as to why the NYSDEC continues to insist on using the term “contaminant” throughout subpart 2 in place of “hazardous waste”. Title 13 only applies to hazardous wastes while “contaminant” includes petroleum.
72. The definition of contaminant (375-2.2(b)) should be deleted from this subpart. Changing the definition to fit this subpart can lead only to confusion and is unnecessary.
73. Because of the existence of subpart 4, 375-2.3(a) can be confusing. We suggest that NYSDEC explain that subsections 3 and 4 are intended to apply to the 1986 EQBA and not ECL 56-0101.

74. The phrase “areas of critical environmental concern” (375-2.7(a)(3)(x)) is undefined. DER-10 refers to “Significant Habitat”. We suggest NYSDEC use a defined term to eliminate ambiguity and vagueness. In addition, this provision should be renamed 2.7(a)(3)(xi).
75. NYSDEC eliminated the reference to “inconsequential amount” of hazardous wastes 375-2.7(b)). We suggest NYSDEC consider restoring this term or clarifying the significance of its omission.
76. Disregarding cleanups that have been done prior to site classification is not only arbitrary and capricious but is also inconsistent with the NCP.
77. 375-2.7(d)(2) should be further revised to clarify how a change in use may affect a previous delisting decision.
78. 375-2.8(a) states that the goal of Title 13 remedial programs is “to restore that site to pre-disposal conditions, to the extent feasible.” We wish to point out that the existing regulatory language indicates that that this goal applies only “where authorized by law.” We suggest that NYSDEC restore the original language or clarify the meaning of this change.
79. Liability relief under ECL 27-1301 (see 375-2.9(a) should apply to the State of New York and not just NYSDEC.
80. While a document clarifying the completion of a Superfund remedial project is advisable, it is unclear that NYSDEC has the statutory authority under Title 13 for NYSDEC to issue a COC.
81. We renew our prior suggestion that NYSDEC remove any language that would create potential inconsistencies between the underlying statutes and the regulation (e.g., the difference between the definition of “brownfield site” as set forth in the statute and as proposed in the regulations, and time periods required for NYSDEC determinations). [A.3]
82. We renew our comment that this provision delete the new term, “requestor”. This new term does nothing to clarify—and may in fact add confusion to—the administration of the program.
83. 375-3.3(a)(3)(ii) allows NYSDEC to require a Phase II ESA prior to determination of eligibility is not consistent with the statutory definition of a brownfield. By referring to “potential presence”, the legislature clearly contemplated that sites where contamination has not been confirmed are eligible for the program. [D.3.7]
84. NYSDEC determinations on site eligibility and site boundaries should explicitly be made subject to dispute resolution under 375-1.5(b) (2).
85. NYSDEC claims the authority to require remedial action to minimize risks of contamination from offsite, even for volunteers. Compare Section 3.3, which deems a site not eligible as a result of contamination from an offsite source. These two provisions are inconsistent.
86. Requiring an applicant to develop a soil cleanup objective that applies to all sites is an inappropriate delegation of regulatory authority. Moreover, an applicant should be able to use a TAGM 4046 standard as a default for a contaminant that is not one of the 86 contaminants covered by the new tables.
87. Track 3 cleanups unduly limit opportunities to employ site-specific data.
88. The soil cleanup criteria and attendant “look up tables” set out in Subpart 375-3 are purportedly intended to apply only to the BCP. However, we recommend the application of these criteria as applicable or relevant and appropriate requirements (“ARARs”) to cleanups performed under other remedial programs.
89. NYSDEC should clarify whether vapor mitigation systems will be categorized as engineering controls. If NYSDEC deems a vapor mitigation system an engineering control, parties that otherwise qualify for Track 1 cleanups cannot meet the Track 1 engineering control criteria.
90. The rule inappropriately only allows consideration of land use in the remedy selection for state superfund sites “where cleanup to pre-disposal conditions is determined not *feasible*.”

91. Other commenters argued that it was inappropriate to consider land use at all in the Superfund or ERP program.
92. The draft rule carries forward a definition of “environment” (draft Part 375-1.2(q)) that includes “humans.” The inclusion of “humans” in this definition, and by extension, the inclusion of human health impacts within the concept of “environmental impacts,” is inconsistent with the statutory definition of “environment,” and the general distribution of statutory authority in Title 13.
93. I have learned that DEC is considering rule change regarding toxic cleanups where abandoning them and paving them over may be allowed. I strongly oppose this. They must be cleaned to prevent any possibility of contaminating groundwater or adjacent properties.
94. Revised Part 375-2.2(i) continues to illegally include within the definition of "responsible party" under the State Superfund program anyone who "is responsible according to . . . CERCLA." The reference to CERCLA should be omitted.
95. Revised Part 375-2.2(a), however, imposes the BCP definition of “change of use” on the SSF and impermissibly expands it to also include “any activity that is likely to . . . increase direct . . . environmental exposure” without limiting that increased environmental exposure to only those exposures that “expose the environment . . . to a *significantly* increased threat of harm” per ECL §27-1317 and ECL §27-1425(2).
96. The dispute resolution procedures should be revised to offer remedial parties the alternative of invoking more formal dispute resolution provisions than the ones currently included in Draft Part 375. What is missing from the procedures is the opportunity for the remedial party to raise a dispute to a neutral hearing officer from the Office of Hearing and Mediation (“OH &M”).
97. 375-1.8(f)(9)(iii) should include "consultation with elected officials and/or agencies of the municipality" in its list of enumerated "consideration" factors. Further, the DEC should not only consider, but should defer to, formally adopted local land use plans and zoning maps.
98. The distinction at 375-1.8(g)(2)(ii)(l) between "community vegetable gardens" and "vegetable" gardens is not clear. The regulations should also not assume that it is easier to enforce use restrictions for gardens on properties where there is common ownership or a single owner of the site. Moreover, DEC has not made clear how it will enforce these restrictions and ensure that new residents are receiving proper notice of them.
99. 375-1.1 l(c) should allow for an exemption for municipalities for providing financial assurance to DEC.
100. DEC should provide an exemption in the BCP for the eligibility of sites contaminated by fill prior to the 1954 (when the State's solid waste law was first enacted). The omission of such sites from the ERP based on the City's presumed status as a responsible party excludes a great deal of waterfront property from State assistance.
101. CBOs should be allowed to own the land under the ERP and still qualify if in a partnership with a municipality.
102. We reiterate our objection to the proposed regulations allowing DEC to conditionally approve a remedy if it “can be shown to the Department’s satisfaction that zoning changes are or will be sought, in which event the Department will conditionally approve the remedy but shall not issue a certificate of completion until such use is consistent with existing zoning laws or maps.” Draft 375-1.8(f)(9)(ii)(b).
103. We again request that the Department include the assessment definition in Subdivision 2 of Section 27-1415 in the regulations.
104. The Department must change the draft regulations to reinstate the current criterion, by removing "significant adverse impact to public health" from 375-2.7(a) (1) (vi).
105. We repeat our original recommendation that the Department resume publishing the annual Registry Report and expand it to include all three environmental remediation programs. Such information should be posted on the DEC website and also made available in print form to review at county offices and DEC regional offices in order to provide full and accessible public

- information sharing. The DEC should also make print copies of the annual Registry Reports available to the public upon request.
106. To provide full, timely and accessible information to *all* residents living or working near polluted Superfund and brownfield sites, DEC should require site owners to post prominent signs at all sites advising the public of any known or suspected contamination. The sign should also provide contact information and advise people on how they can be included on the Site Contact List.
 107. We recommend that the regulations include sign requirements for all remediated commercial and industrial sites and such signs should clearly state the acceptable exposure scenarios.
 108. The revised regulations again omit the provision requiring the Department to respond to site nominations from the public.
 109. The regulations should clarify that there will be a public notice and public comment opportunity on any proposed site control, the results of the control's Risk Failure Analysis, and the proposed control maintenance requirements in the site proposed Remedial Plan or Site Management Plan.
 110. Regarding the revised soil cleanup objectives continues to be the Department's ongoing and consistent use of assumptions and values that are not sufficiently protective of public health.
 111. We maintain our position that groundwater protection should be incorporated into each land-use category, and disagree that this would result in the same SCO level for all uses. We reiterate that the Department should incorporate consideration of long-term impacts on groundwater into all SCOs.
 112. DEC must adopt an approach to exposure assumptions that is protective, not predictive. Standards must protect people carrying out all plausible activities and who bring to the exposure scenario reasonably common susceptibility circumstances. For instance, exposure scenarios should consider pregnant workers, adolescent workers, and those working extra-long days. There should never be an automatic assumption that there is no exposure. The Department must revise its exposure calculations to consider those with the highest exposure, not just the average.
 113. The SCOs must protect children. Three pervasive problems were identified by the health experts and these related to both children and adult health concerns on all land uses and continue to apply to the revised draft SCOs:
 - a. inadequacy of the exposure parameters used, assuming far less exposure than is plausible, resulting in health-based SCOs that are too high and not sufficiently protective;
 - b. lack of use of current scientific information, including toxicological and epidemiological data, risk assessment methods, and occurrence of numerous highly exposed populations (e.g., subsistence fishers), resulting in SCOs that are too high and not sufficiently protective; and
 - c. absence of consideration of key health criteria covered in the governing laws, including the evaluation of acute toxicity, mixtures of similarly acting chemicals, and limits on risks that can be generated on a site (e.g., no more than one in one million risk of cancer per person).
 114. We refer the Department to our earlier comments, which we do not believe have been addressed in any substantive way. These needed actions include:
 - a. correcting underestimation of ingestion as a pathway of exposure, including using higher percentile values for ingestion (we specifically continue to recommend applying a 480 mg/day assumption for soil ingestion for outdoor workers);
 - b. correcting underestimates of inhalation exposure, including adjustment for adolescent workers' respiration levels and the general rates of respiration documented in the Exposure Factors Handbook using protective selection criteria, as recommended by Dr. Kathy Burns, toxicologist in previous comments.
 - c. DEC must adjust their exposure model to account for this doubling of respiration for the final SCOs.
 115. The SCOs must protect workers, without reliance on personal protective gear. DEC must set soil cleanup objectives to protect laborers exposed through their normal course of work without use of protective gear.
 116. We continue to recommend that DEC select a more conservative percentile—such as the “average” or 50th percentile—rather than the upper bound, in order to avoid basing the Rural Soil Background Survey levels on human-based contamination and not “naturally occurring” levels of chemicals.

117. The levels reported by the Department are at odds with earlier surveys of rural soil contaminant levels and should be reevaluated. We strongly urge the Department to reconsider the information presented in our comments and those of the technical experts referenced by them.
118. DEC arbitrarily omitted some chemicals frequently found at superfund sites. We are specifically concerned about the deletion of the class of chemicals known as dioxins.
119. One commenter stated that it continues to believe that the Department has a responsibility to address the eligibility issue to ensure that the BCP fulfills its promise as a tool for neighborhood revitalization that promotes community-supported, productive re-use of brownfield sites. With the Brownfield Cleanup Program, Environmental Restoration Program and Brownfield Opportunity Area Program, the Department is now administering one of the State's largest community development programs. We believe the Department has a responsibility to recognize that their policy and technical decisions have impacts that are far wider than their traditional regulatory role.
120. DEC should amend the regulations by explicitly stating that they will only require development of new SCOs for chemicals that drive the remedy under any track; an explicitly stating that they will only require development of SCOs under Track 1 where ecological receptors have been identified and for chemicals that drive the remedy.
121. The DEC must ensure that it gives much greater consideration to protecting public health, in accordance with its mandate.
122. The Department did not address the NCP compliance issue raised in this commenter's first comments.
123. Relative to the definition of Environmental Easement, do you mean "**in a manner consistent with engineering controls**" instead of inconsistent? Otherwise this definition is unclear.
124. This commenter assumes you are aware of this but there is no definition of grossly contaminated media in the October 2004 law. There is a definition of grossly contaminated soil, which you may consider adding here, because that definition is not limited to NAPL being present in soil, but also includes soil that has residual contamination but in high enough concentrations that you can see it or smell it.
125. The Director of the Division of Environmental Remediation should not have his decision on disputes reviewed by the Assistant Director.
126. A commenter again asked for stated time frames for approval of the Final Engineering Report and issuance of the Certificate of Completion.
127. The regulation should provide greater detail on the circumstances under which the Department will divide up a proposed site and declare part eligible and part ineligible.
128. The Department should preface statutory requirements set forth in the regulation with "in accordance with ECL Section" in order to avoid any conflict of law.
129. The Department should not return applications for the BCP which are incomplete and should be qualified with the word "substantially" before incomplete.
130. This commenter has no further comments on Subpart 3 other than what appeared in its original comments what is still missing from this Subpart; specifically, there is no detail on how the Department will implement its own off-site responsibilities with respect to off-site plumes, and there is no discussion of vapor as a new media.
131. A commenter had questions regarding the municipalities obligation under the regulations limiting the municipalities ability to indemnify a responsible party under the ERP, stating that this was new provision and should not apply retroactively or to innocent owners.

132. The phrase in the ERP regulation “municipality’s cost of the environmental restoration project” should include the costs to maintain the property during the very lengthy Bond Act process.
133. A commenter reiterated its earlier suggestion for revisions to the indemnification provision requiring the municipality to indemnify the State from any losses from claims, demands, payments, suits, actions recoveries and judgments.
134. A commenter expressed concern with the continued lack of a study on background concentrations of PAHs and metals in urban soils.
135. The requirement in Section 3.8(d) that the selected remedy must eliminate or mitigate recontamination from offsite sources is not derived from the statute. This concept is inconsistent with the statutory provision in ECL 27-1411 with respect to volunteers, which imposes the burden on NYSDEC through cost recovery to deal with off-site contamination emanating from the site [“Within six months of the determination that a site poses a significant threat, in the event that the applicant is a volunteer, the NYSDEC shall bring an enforcement action against any parties known or suspected to be responsible for contamination (other than such volunteer) at or emanating from the site according to applicable principles of statutory or common law liability.”]

Appendix B

The public comment period for those portions of the regulation that were subject to substantial revision closed on March 27, 2006. Because these comments addresses text of the proposed regulation that was not subject to substantial revision, it is untimely and will not be addressed as part of this assessment of public comment.

1. A commenter requested that the Department remove reference to “grossly contaminated media” as a criteria for determining the existence of a source area because relying on subjective sensory perceptions to determine a “threat to public health or the environment” is not appropriate. Further, the current and future contemplated use of a property and demonstration of complete exposure pathways should be considered in establishing a resulting “risk to public health or the environment”.
3. The definition of “Interim Remedial Measure” (375-1.2(ab)) includes a reference to “free product”. This term is undefined. We suggest that NYSDEC use the definition contained in DER-10. This definition also refers to “without extensive investigation”. It would be more accurate to refer to a “remedial investigation” or perhaps “during site characterization”.
2. 375-1.10(d)(4) should be revised to read, “Identification of any known major issues of public concern...” (proposed addition underlined), since the remedial party may not be aware of any major public issues at the time it prepares a citizen participation plan.
3. The proposed groundwater protection language raises a number of questions concerning the Department’s determination as to whether “controls or treatment” address off-site migration or whether groundwater quality will “improve over time” including: What type of treatment addresses off-site migration (re: plume mitigation)? What level of improvement, over what period time is adequate? Under what circumstances would DEC determine that groundwater would NOT improve over time?
4. Section 1313(3) allows the Department to issue an “order” if the commissioner finds that the hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment. It would be unlawful for the Department to attempt to impose civil penalties on the business community for violating a regulatory prohibition by simply failing to comply with a request of the Department under a statutory provision that deals with orders and not requests.
5. 375-3.2(h) adds the terms “permanent cleanup” or “permanent remedy” to the list of defined terms under this subpart. These new terms are used only once in subpart 3, but may introduce confusion or unnecessary redundancy to the cleanup level specified in Track 1. We suggest eliminating this defined term, and modifying § 375-3.8(a) (1) accordingly.
6. NYSDEC should clarify if an enforcement action or outstanding spill fund claim includes the assertion or recording of a lien on the brownfield site. Is a purchaser of a site with an existing lien or that is asserted after that person takes title relating to response actions taken prior to title ineligible under (c)(3)?
7. We recommend that the Department at minimum amend this definition (draft Part 375-1.2(g) to apply to petroleum that has been “disposed of,” “released” or that otherwise constitutes a waste product. Otherwise, provisions of this rule related to petroleum storage would apply to the on-site storage of petroleum products, rather than petroleum wastes or discarded petroleum.
8. Revised Part 375-1.11(b) prohibits any person from obstructing designated officer or employee from accessing the site, if the officer or employee is designated by the Department to do so *or* so authorized in writing by the Department. The "or" should be changed to "and" and the necessary notice provisions should also be incorporated into the prohibition because it should not be read to prohibit interference with any person who is not authorized to access a remedial party's site in accordance with the applicable statutes.
9. The "measure of last resort" for source removal found at Revised Part 375-1.8(c)(4) is being described as “treatment of the exposure . . . at the point of exposure”. This description does not make any sense because it is too late to “treat” if there is exposure.
10. 375-2.10(g) and 375-3.7 (a)(3)(i) use the word "may"; is this an indication that the provision of TAGs is discretionary rather than ministerial?
11. 375-2.10(g)(3)(v) and 375-3.10 (c)(3)(v) should be clarified that the group must be a membership **organization**. Some sort of community notification of a group’s TAG application should be required. Finally, the Department should also consider whether the group commits to reaching out broadly to the community in which it is located and not just to its own membership.

12. The indemnification provision used in the ERP regulations is more appropriate than the one used in the BCP regulations. The BCP indemnification provision should be the same as the proposed ERP indemnification provision.
13. Since the Department will allow for restrictions on groundwater use if the party can demonstrate there has been a bulk reduction in groundwater contamination to asymptotic levels; it should recognize the potential for a future release, and allow for the installation of soil vapor barrier and passive sub slab piping system as a protective measure for Track 1 cleanup sites.
14. Are ERP projects eligible for TAGs?
15. The law states that the Department may ask any person to provide a description of current and past waste disposal activities to secure information about possible Superfund sites. (Section 27-1307). The revised regulations are silent about this important investigatory information-gathering activity. It should be included to inform the public about the department's authority to seek waste disposal information and to hold the agency accountable on proactively obtaining such information to uncover any possible waste sites.
16. The Department's prohibition on extensions over 30 days is arbitrary and unreasonable, and should be rescinded. At a minimum, the Department should consider extensions up to 90 days.
17. If there is a conflict, the more program specific Subparts should supercede the generic Subpart 1.
18. It is unclear why the burning of a contaminant as fuel for the purpose of recovering usable energy is defined as "disposal".
19. Since you have added a definition of grossly contaminated media to the regulations, you may want to add "removal of grossly contaminated media" to the list of IRMs listed in this definition.
20. The financial assurance provision should be amended since there is no way an insurance broker will certify anything. The policy should speak for itself. This requirement should be omitted.
21. There is still no clear indication when the applicant will get the COC if a groundwater remedy is necessary. Clearly, the COC should be issued upon implementation of the remedy.
22. A commenter had questions on the cap on legal services for the ERP.
23. Subsection 375-3.8(a) (3) (i) indicates that the Department, in consultation with the New York State Department of Health (NYSDOH) may approve clean up standards in excess of an excess cancer risk of 1 in a million or a hazard index of 1, provided that the applicant can demonstrate that the increased standards are protective of human health and the environment. This is a subjective standard and we, therefore, recommend that NYSDEC indicate some of the methods that could be used to make the demonstration. Two such methods are exposure and risk assessments. A third is a thorough evaluation of site background levels. We further recommend that some objective standard be applied to risk assessments and that the range of acceptable risk be an excess cancer risk between 1 in 10,000 and 1 in a million, which is consistent with the USEPA's approach to remediation.
24. Formalize a procedure wherein sites will be assessed for groundwater vulnerability and, if vulnerable, assigned to more protective levels.
25. 3.9(d) -- The liability protections in ECL 56-0509, referenced in draft regulations 375-4.5(c) and 375-4.9(a) become effective when the municipality's Bond Act application is approved, not when the remediation is completed. In contrast, the liability protection in the BCP does not become effective until the COC is issued and only then make the liability protections retroactive to the date of application approval. NYSDEC should consider revising this section to be consistent with the statute.
26. Finally, we have concerns regarding the use of toxicity values for the technical grades of various pesticides, due to the decomposition that occurs over time with any chemical present in soil. All decomposition byproducts, as well as the parent compound and its major or minor structural relatives usually found in the original product need to be considered. The sum and total of the carcinogenic hazards posed by all of these chemicals must be considered when targeting an overall risk of one in one million. If specific cancer potency values are not available for all of the related chemicals, then the value that is most technically appropriate must be used and some cancer potency value assigned to each isomer and structural relative. In the absence of this, the cancer risks will be underestimated, which will yield an SCO that is in violation of the requirements of the law.

27. The Redrafted Regulations unnecessarily seek to limit the groups that are eligible for technical assistance grants (“TAG”). (*See* Redrafted Regulations, 375-3.10(c).) The requirement that a group be composed of area residents should be stricken; as long as the group is affected by the remedial program and represents the interests of the community, a group composed of non-residents that are otherwise on or near the brownfield site several days a week (*e.g.*, employees at a company, teachers and students at a school) should be eligible for TAG grants need respond.