

ASSESSMENT OF PUBLIC COMMENT - SUMMARY
October 2006

Draft 6 NYCRR Part 375
ENVIRONMENTAL REMEDIATION PROGRAMS

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. The New York State Department of Environmental Conservation (Department) 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 rulemaking, the State has the Inactive Hazardous Waste Disposal Site Remedial Program (commonly known as the State Superfund Program (SSF)), created in 1979; the Brownfield Cleanup Program (BCP), created in 2003; and the Environmental Restoration Program (ERP), created in 1996.

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 were available for a 120-day public comment period at repositories and on the Department website.

That regulation is proposed to incorporate the statutory changes since the previous Part 375 rulemaking, 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 formally proposed 6 NYCRR Part 375 on November 16, 2005 and received written comments through March 27, 2006. In response to these comments substantial revisions were made to the proposed 6 NYCRR Part 375, including the creation of a subpart 375-6 to include the soil cleanup objectives

(SCO) previously included in subpart 375-3. Therefore the rule was again noticed for public comment on July 12, 2006 and a 45-day comment period was identified for the revised rule. During this comment period 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 Department received written comments through 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 Response to Comment;
3. Comments on portions of the proposed rule that 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 rulemaking (June 2006 Response to Comment). These comments need not be addressed again in this assessment of public comment. These comments are set forth in Appendix A of the October 2006 Assessment of Public Comment.

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 addressed 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 of the October 2006

Assessment of Public Comment.

Comments in the final category are 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, 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);

Part D – Comments on Subpart 375-3 (Brownfield Cleanup Program);

Part E – Comments on Subpart 375-4 (Environmental Restoration Program);

Part F – Comments on Subpart 375-6 (Remedial Program Soil Cleanup Objectives); and

Part G – Comments on Matters Outside Part 375.

This summary highlights the central issues raised by commenters. For additional detail, the October 2006 Assessment of Public Comment should be consulted.

PART A: COMMENTS ON PART 375 GENERALLY

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 Department 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, is set forth for the SSF, BCP and ERP and 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 the United States Environmental Protection Agency's (USEPA) approach to cleanups and background.

PART B: COMMENTS ON SUBPART 375-1 (provisions applicable to all subparts)

COMMENT: The definition of "historic fill" 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. 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.

RESPONSE: The definition of historic fill has been revised to clearly address these issues and closely track the Part 360 definition.

COMMENT: The requirement 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.

RESPONSE: The regulation does not require the Department to determine the "actual" off-site source of

contamination. Rather, the Department would consider a remedial party's demonstration that there is not an on-site source causing or contributing to the identified groundwater contamination, to be appropriate and consistent with what is required. The issue of ubiquitous contamination is more appropriately addressed in the groundwater strategy being developed pursuant to ECL 15-3109.

COMMENT: The Department 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.

RESPONSE: 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 Response to Comment, 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 protection of groundwater (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.

COMMENT: Where a remedial party makes the conservative decision to voluntarily install a soil vapor barrier, passive sub-slab venting system, or other protective measure as a voluntarily protective measures and not to address any remaining on-site contamination, the Department 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.

PART C: COMMENTS ON SUBPART 375-2 (State Superfund Program)

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 rulemaking is complete the final disposition of TAGM 4046 will be decided.” In addition, the revised draft regulations specify that the department will consider unrestricted use SCO’s as representative of pre-disposal conditions for Superfund cleanups.

RESPONSE: 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). The response to comment C.8.1 from the June 2006 Response to Comment appropriately addresses this comment relative to the consideration of land use in the State Superfund and Environmental Restoration Programs. As to TAGM 4046, the Department will be updating the information and procedures.

PART D: COMMENTS ON SUBPART 375-3 (Brownfield Cleanup Program)

COMMENT: 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 Department may require a volunteer to remediate conditions migrating from the brownfield site.

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”.

COMMENT: BCP eligibility issues were again commented on extensively. Requests to incorporate the current guidance, not to incorporate the current guidance, and to incorporate new factors (socio-economic, affordable housing, urban centers) were received. Additionally, there was requests to omit the “on-site” source requirement and define or delete the historic fill reference.

RESPONSE: The Department reiterates that this rule provides a framework for the consideration of eligibility. Further, that the Department’s Eligibility Guidance is appropriate and should be consulted.

COMMENT: The regulations should reference the regulatory definition of “remedial investigation.”

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 for 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).

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.

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 were 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 under the Track 1 requirements.

PART E: COMMENTS ON SUBPART 375-4 (Environmental Restoration Program)

No substantive comments were received.

PART F: COMMENTS ON SUBPART 375-6 (REMEDIAL PROGRAM SOIL CLEANUP OBJECTIVES)

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. As currently drafted it is very hard to follow and seems inconsistent. Clarification is needed.

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.

COMMENT: In a new section of the regulations the Department 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. There is no reason why only material determined by Department regulation to be “unregulated” can be used for backfill

RESPONSE: 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.

COMMENT: The new cleanup tables 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 soil cleanup objectives were calculated in accordance with the statutory provisions.

PART G: COMMENTS ON MATTERS OUTSIDE PART 375

The Department reviewed comments received on several matters that do not pertain directly to the Part 375 rulemaking. Responses to these comments are included in this section.