

REGULATORY IMPACT STATEMENT

Amendments to 6 NYCRR Part 375

Environmental Remediation Programs

INTRODUCTION

6 NYCRR Part 375 describes the requirements for environmental remediation programs, including those performed under an order, agreement, stipulation or State assistance contract entered into by the New York State Department of Environmental Conservation (DEC) and all work plans, reports, certificates, and other remedial program documents approved, accepted, or issued by DEC. The DEC Division of Environmental Remediation (DER) proposes to revise portions of this regulation to support DEC's mission to protect public health and the environment in New York State (State).

1. STATUTORY AUTHORITY

Part BB of Chapter 56 of the Laws of 2015 ("the 2015 Amendments") amended and added new language to the Environmental Conservation Law (ECL) and the various other laws of the State. This rule making amends 6 NYCRR Part 375 (Part 375), Environmental Remediation Programs, to conform with the 2015 Amendments with respect Brownfield Cleanup Program (BCP) at ECL Article 27, Title 14; addresses and enhances requirements pertaining to the Inactive Hazardous Waste Disposal Site Remedial Program (also known as State Superfund Program, SSF) at ECL Article 27, Title 13 and the Environmental Restoration Program (ERP) at ECL Article 56, Title 5; and updates the soil cleanup objectives (SCOs) based on review and comments received by DEC staff and the New York State Department of Health.

DEC's general authority to adopt any necessary, expedient, or desirable rules to carry out the environmental policy of the State is provided by ECL Article 3, Title 3, Section 3-0301(2)(a) and (m); additionally, the DEC's specific authority to adopt rules of procedure for adjudicatory proceedings is provided by State Administrative Procedure Act (SAPA) § 301(3).

2. LEGISLATIVE OBJECTIVES

In furtherance of its commitment to environmental protection and economic revitalization, the State created an array of programs and resources to help clean up and reuse contaminated sites. These State-administered programs provide for financial assistance, technical assistance, and liability protection for the investigation, remediation, and redevelopment of contaminated sites. This rule making will support the continued protection of public health and the environment. It will also continue to ensure the most efficient use of public and private funding sources for the investigation and remediation of sites under such remedial programs, while enabling remediation efforts to be completed as swiftly as possible.

Specific to the Part 375 rulemaking, the State administers the SSF, created in 1979; the BCP, created in 2003; and the ERP, created in 1996. General provisions that apply to all programs are found in subpart 375-1, while provisions specific to the SSF, BCP and ERP are found in subparts 375-2, 375-3 and 375-4, respectively.

The SSF identifies and characterizes suspected inactive hazardous waste disposal sites. Once identified, the program provides for the investigation and remediation of inactive hazardous waste disposal sites that pose a significant threat to public health or the environment; subparts 375-1 and 375-2 govern the cleanups under this program.

The BCP encourages private-sector remediation of contaminated sites and reduces development pressure on “greenfields.” The BCP addresses abandoned, idled, or underutilized brownfield sites that are often located in already industrialized or urban areas and restores these properties to productive use in the community. Local

economies are improved by encouraging use of existing infrastructure rather than creating new infrastructure to reach “greenfields.” The BCP encourages a cooperative approach among the DEC, current property owners, lenders, developers and prospective purchasers to investigate, remediate, and return contaminated sites to productive use. The BCP addresses the environmental and financial barriers and legal liabilities that often hinder the redevelopment of contaminated properties by providing financial incentives. Incentives include tax credits for remediation, related development and real property taxes.

The ERP was created as one of 17 programs under the 1996 Clean Water/Clear Air Bond Act. This remedial program provides increased financial assistance and incentives to municipalities for investigation and clean up at municipally-owned sites, as well as more favorable terms of participation in the program.

3. NEEDS AND BENEFITS

The proposed amendments to Part 375 are mandated by the 2015 Amendments. DEC is making additional amendments to Part 375 to incorporate clarifications and modifications based on the experience developed during the first decade of implementing the BCP and continued implementation of the SSF and ERP. The amendments will increase consistency across remedial programs administered by DER and provide DEC with the tools necessary to more effectively implement the programs. These changes are detailed in the Summary of Express Terms; the most notable amendments are summarized below.

Subpart 375-1.2(b) will revise the definition of a brownfield site, based on the 2015 Amendments. Previously, a site was considered a brownfield site if redevelopment was complicated by actual or potential contamination. A brownfield site must now have contamination present above applicable standards, criteria and guidelines. The 2015 Amendments also added a provision limiting eligibility to property that is contaminated and “requires remediation”. Since a single, marginal exceedance of SCOs will not typically require a site to be remediated, subpart 375-3.3(a)(4) clarifies that DEC may consider the number of samples at a site that exceed applicable

standards, the magnitude by which standards are exceeded, the potential for human or ecological exposure to contaminants, and the potential for off-site migration when considering a site's eligibility to the BCP and when determining if a site requires remediation.

Subpart 375-1.6(a) will add a requirement for daily reports to be submitted for all field activities completed under a work plan. The existing regulations require that work be supervised and documented in the Final Engineering Report (FER) by a qualified environmental professional. It has been DEC's experience that inconsistent and/or lacking supervisory practices by the remedial party have resulted in FERs which do not provide the information necessary to accurately document remedial activities. This new requirement encourages remedial parties to adequately and consistently supervise and document daily field activities.

Subpart 375-1.11(d) will require sites to submit a work plan for any proposed change of use activity. When it is not technically or financially feasible to remove or treat all contamination at a site, contamination remaining after the remediation of a site is controlled by institutional and engineering controls. DEC has experienced challenges managing these sites when a physical change of use is proposed that could potentially create an exposure to contamination. Requiring the owner or regulated entity to submit a work plan will provide the information and control necessary for DEC to ensure public health and the environment are protected. DEC will also maintain the ability to waive the work plan requirement if a change of use does not involve physical alteration of the site.

A provision requiring habitat reconstruction will be added to subpart 375-1.12(f) to clarify that habitats disturbed during remedial activities will require reconstruction pursuant to the regulations found in 6 NYCRR Parts 182, 608, 661 and 663. This provision will clarify these regulations are "applicable or relevant and appropriate requirements" for the purpose of federal cleanups.

A definition for "site cover" has been added to subpart 375-3.2 to describe the site cover costs that are eligible for tax credits for BCP sites. The definition of "site preparation costs" in the New York State Tax Law was

refined in 2015. The amendments clarify the distinction between site preparation costs and tangible property costs where a site cover is a component of the remedial program. Site preparation is the cost of remediation, demolition, excavation, fencing, security and other capital account costs to make the site usable for redevelopment and to obtain a certificate of completion (COC). Tangible Property costs include the costs of buildings and improvements (including structural components of buildings) that are placed into service within 10 years after the COC is issued. Depending on circumstances, a site in the BCP may be eligible for site preparation tax credits but not for tangible property tax credits. To maximize site preparation costs, some BCP applicants have sought to include development work unrelated to a cover system or unnecessary for a site to obtain a COC. The definition for cover system in Part 375 will clarify that site preparation costs do not include construction of the building, and thereby limit site preparation tax credits for a cover system to the value of an effective soil cover and any excavation associated therewith.

The 2015 Amendments allowed Class 2 SSF sites, which represent a significant threat to public health or the environment, to enter the BCP program with specific requirements. These requirements are explained in Subpart 375-3.3(b)(2), including the requirement that there is not a viable potentially responsible party (PRP) that can pay for investigation and remediation. Subpart 375-3.4(b)(1) requires applicants to perform and provide findings of a PRP search for Class 2 sites to document that this requirement is met.

An amendment to subpart 375-3.8(b) clarifies that a volunteer is required to perform a qualitative exposure assessment to analyze contamination emanating from the site. When on-site data is insufficient in determining the off-site migration of contamination, off-site groundwater and soil vapor sampling may be required to complete the qualitative exposure assessment. Occasionally volunteers and participants in the BCP have questioned DEC's authority to require groundwater and soil vapor sampling, both of which are required to fully understand off-site exposure and public health impacts, resulting in the need to have revisions to explicitly state that this sampling may be required as part of this qualitative exposure assessment.

An amendment to Subpart 375-3.8(e) will change which cleanup track a site is eligible for when Institutional Controls/Engineering Controls are used. Track 1 cleanups in the BCP are intended to allow unrestricted use of the remediated site. There is a provision in the existing regulations (6 NYCRR 375-3.8(e)(1)) allowing the use of short-term employment of institutional or engineering controls provided remedial objectives are expected to be met within 5 years. This has been interpreted to allow a site remediated to Track 2, 3 or 4 standards to receive a Track 1 COC, along with the accompanying, higher tax credits, while the remedial party attempts to achieve Track 1 requirements. A change is proposed to record the Track that is accurate at the time of COC issuance, with a provision to upgrade to a Track 1 if applicable criteria are met within 5 years, which is consistent with the existing statutory scheme.

Subpart 375-6 Tables 375-6.8(a) and (b) include revisions to SCOs as a result of DEC's requirement to periodically review and update the SCOs, as necessary. Changes have been proposed for the majority of SCOs and were made based on factors including revised reference doses, partitioning coefficients, and exposure calculations. Of particular note is the addition of 4 new chemicals: aniline, nitrobenzene, perfluorooctanoic acid (PFOA) and perfluorooctanoic sulfonate (PFOS). The changes are summarized and explained in the July 2020 Addendum to the Technical Support Document (issued in September 2006), which is included in this package. Additional minor, non-substantive, grammatical, and formatting changes will also be made to each subpart of Part 375 as needed.

4. COSTS

The updates to Part 375 will implement the statutorily created remedial programs without substantive changes, and therefore will result in only nominal additional costs to the regulated community or other branches of local or State government. Further, for purposes of the BCP and ERP, the programs are not compulsory programs, i.e., participation in ECL Article 27, Title 14 and ECL Article 56, Title 5 is voluntary.

This rule making is not expected to result in significant measurable costs to the State, local governments, regulated community or private entities. Costs to State government, local government, private regulated parties and DEC are discussed below.

a. Costs to Regulated Parties

Promulgation of these regulations are anticipated to have minimal fiscal effect on private regulated parties beyond what they already experience under existing law. Some examples of fiscal effects are provided below. Costs provided were developed by the DEC based on our own contracting experience, and reviewed by engineering firms working in these programs:

- i. Daily Reports – The amendment to Part 375 regarding daily reports is not intended to increase oversight or costs but is intended to provide consistency in reporting methods and the oversight necessary to successfully complete the program. Some BCP sites currently submit daily reports during remedial activities as described in the site’s Remedial Action Work Plan. Furthermore, the information and documentation provided in the daily reports is also required information for the FER. In most cases, there will be no change in process, and, therefore, no change in cost. In other instances where daily reports were not being submitted or were insufficient, there may be some marginal increase in cost, estimated at \$150 per day, for regulated parties to prepare and submit the documents. Total potential costs for each project will depend on variables such as a site’s remedy, size, and duration of remedial activities.
- ii. Change of Use Work Plans – Subpart 375-1.11(d)(2) will require sites to submit a work plan for any proposed change of use activity. This will create an increase in costs to the regulated party for the document preparation of roughly \$25,000 to \$40,000. Costs will vary based on the proposed activity, size, extent of potential exposure, and other variables, and can be waived if the change of use does not involve a physical alternation of the site.

iii. Habitat Reconstruction – The requirement of reconstructing habitats disturbed during remedial activities will not increase costs for SSF, BCP, or ERP sites, as this is an existing requirement in State laws and regulations outside of Part 375 and costs of such habitat reconstruction are already incurred under existing projects.

iv. PRP Search – Requiring Class 2 sites applying to the BCP to submit a PRP search with their application will increase costs to applicants. A PRP search is estimated to cost a minimum of \$25,000 and could be significantly more for sites where ownership and corporate succession is complicated. The PRP search is required prior to acceptance into the BCP and is currently being completed by DEC; this rule change will result in shifting the burden of completing the PRP search from DEC to the applicant. The applicant should already have information on prior owners or operators of sites, as applicants typically have already performed title searches and Phase I Environmental Assessments as part of the purchase of potential BCP properties. The cost of the PRP search cannot be directly offset by tax credits, as it will be completed prior to the execution of the Brownfield Cleanup Agreement.

v. Off-Site Investigation – The clarification in subpart 375-3.8(b)(2) that may require BCP Volunteers to complete a qualitative exposure assessment of contamination that may have migrated off-site will result in costs for some sites in the program; however this work is required by ECL §27-1415(2)(b) and does not expand the existing requirements. For sites with on-site data that allows for a complete exposure assessment, no additional costs will be incurred. For sites where additional, off-site data is needed to determine whether off-site contamination represents a significant threat to public health or the environment, costs will be incurred for these investigation activities. The cost to the remedial party for work to complete this assessment is estimated to be \$25,000 on average but could range up to \$50,00-\$75,000 for sites with technical or logistical challenges. A portion of the cost of this investigation is recoverable by the remedial party in the form of tax credits (the investigation will be considered a site preparation cost). Clarifying and enforcing the responsibility for a volunteer to collect off-site data (when necessary) to complete the exposure assessment as required by ECL

§27-1415(2)(b) will ensure efficient use of resources in determining the need to list and investigate if a significant threat is posed by the off-site portion of some BCP sites. The amount of the off-site investigation costs will vary based on the on-site data, type and extent of contamination at the site, surrounding land use, and site conditions such as geology and groundwater flow.

vi. Establish SCOs for PFOA and PFOS (Subpart 375-6) – PFOA and PFOS were added to the list of hazardous substances in 6 NYCRR Part 597 on April 26, 2016. The Regulatory Impact Statement for that rulemaking recognized that “where PFOA or PFOS has been released into the environment, regulated entities may be subject to costs associated with remediation of these hazardous substances under Part 375.” PFOA and PFOS were added to the standard analyte list in March 2019. Additionally, DOH recently adopted a maximum contaminant level for PFOA and PFOS. Establishment of an SCO for PFOA and PFOS will provide the regulated community with certainty and help remedial parties understand the financial implications of remediation of these hazardous substances. However, a true accounting of the costs will not be possible until the extent of PFOA and PFOS contamination is determined.

vii. Change of SCOs (Subpart 375-6) – For the SCOs whose values were adjusted to be lower, there may be some increase in costs associated with site remediation. The amount of additional cost will be site-specific and will vary based on the level of contamination present at the site, the site’s end use, and the cleanup track being pursued. The lower SCOs, along with site-specific variables, may result in the need for additional material to be excavated and disposed of, both of which have associated costs. Properties that previously had minimal or no SCO exceedances may now have exceedances based on the lower SCOs; this may result in additional sites being eligible for the BCP. For the SCOs whose values were adjusted to be higher, there should be a decrease in costs associated with site remediation.

Overall, the Part 375 amendments are anticipated to result in minimal cost changes to regulated entities. For the parties electing to participate in the BCP, costs associated with the program are eligible for various tax credits

which offset costs that the parties may incur. Costs to local municipalities participating in the ERP are similarly offset by State funds. The cost of SSF work is borne in the first instance by the parties responsible for the contamination or by the State if there is no viable responsible party.

b. Costs to DEC, State and Local Governments

There will be continued costs incurred by DEC that exist under current statutes and regulations in administering the Part 375 remedial programs. There will be some transient costs to DEC as staff learn the proposed regulatory changes as well as costs for additional time associated with review and approval of documents such as:

- i. Daily reports during remedial activities;
- ii. Change of use work plans for sites where remediation is complete but new activities have the potential to expose contamination;
- iii. PRP search results included in BCP applications for Class 2 sites;
- iv. Off-site investigation data submitted by Volunteers in the BCP that are required to collect this data to support the exposure assessment; and
- v. Documents that may result from lower SCOs (e.g. additional BCP applications and additional waste manifests and bills of lading related to additional soil excavation).
- vi. The costs associated with DEC's review of these documents will be site specific and based on conditions such as site size, type of contamination, extent and severity of contamination, site history, geology, groundwater depth and flow, and remedial activities. DEC's regulation and administration of the remedial programs in Part 375 currently necessitates extensive review of documents and data; therefore, the additional documents resulting from the amendments are proportionally inconsequential.

Furthermore, the proposed rulemaking requires no additional statutory authority, does not create new regulatory programs, does not expand existing regulatory programs, and does not expand the regulated community. Promulgation of these regulations is required by statute and the proposal will allow the State to implement the program in a more efficient and consistent manner.

These regulations generally will not impose any additional direct costs on local governments. To the extent that a local government is a regulated entity under one of DEC's remedial programs, the costs associated with the implementation of the regulations will be similar to those described in "Costs to Regulated Entities" in 4a above. Participation in the ERP reduces the fiscal burden to municipalities associated with the investigation and remediation of contaminated properties. State assistance grants are available to local governments covering up to 90 percent of the eligible on-site and 100 percent of the eligible off-site costs. The remaining portion can be covered through additional federal, State, or non-responsible party private party monies. A new benefit to municipalities is the option to have DEC directly manage ERP projects. This will significantly reduce the financial responsibility of the municipality for both the remedial management and oversight of the project and for DEC's administrative costs.

5. LOCAL GOVERNMENT MANDATES

This rule making is not a mandate on local governments. Local governments have no additional compliance obligations compared to other subject entities. Furthermore, no additional monitoring, recordkeeping, reporting, or other requirements not created by statute will be imposed on local governments by this rule making beyond what is required from regulated entities. Participation in the BCP and ERP is voluntary; therefore, any obligations under the BCP or ERP are either required by statute or imposed as a result of a party's choice of action to apply for and participate in those programs.

To the extent that New York City certifications are required for projects to meet the definitions of underutilized or affordable housing, these certification programs are in place or are developed and implemented at the discretion of the local government.

6. PAPERWORK

Additional paperwork associated with the proposed amendments to Part 375 will be related to the requirements for the submittal of daily reports during all field activities and change of use work plans at sites where remediation has been completed. No other reporting requirements are being added, although there is some new documentation and clarification of existing DEC required reporting. For instance, if a party wishes to apply for a brownfield cleanup project, an application must be completed and submitted with requested information and supporting documentation. Statute has always required these application forms for the BCP and ERP, but slight changes will be made such as the requirement for PRP search results where a proposed BCP site is designated Class 2 site, as discussed in Item 3 above (Needs and Benefits).

7. DUPLICATION

The proposed rulemaking is not intended to duplicate, overlap, or conflict with any other State or federal requirements. There are no federal regulatory programs that are similar to the BCP or ERP. There is federal superfund program administered by the United States Environmental Protection Agency, however it does not overlap with New York State's SSF program as administered by DEC. Furthermore, the Part 375 changes affecting SSF are minor and inconsequential.

8. ALTERNATIVES

Many of the proposed changes to Part 375 are the result of the 2015 Amendments and required by statute to be incorporated. For these changes, the only alternative considered was “no action” which would not have satisfied the statutory requirement and therefore is not feasible. Proposed changes to Part 375 unrelated to the 2015 Amendments were subject to extensive internal review for several years as well as public outreach efforts. During this process, alternatives specific to each individual change were evaluated. The result of this process is the proposed regulations that DEC considers protective of the environmental resources in a manner that limits the cost to the regulated community.

9. FEDERAL STANDARDS

The proposed regulations will not exceed any minimum federal standards where applicable or where there is no comparable federal standard.

10. COMPLIANCE SCHEDULE

Many of the changes in Part 375 reflect the 2015 Amendments and have been in effect since that law was enacted (e.g. changes to BCP eligibility and tax credits). Other changes document or clarify DEC interpretations, procedures, or processes which are also already in practice, including requirements for:

- a. daily reports (Subpart 375-1.11(d));
 - b. investigation work needed to complete qualitative human health exposure assessment (Subpart 375-3.8(b));
 - c. workplans for sites where remediation has been completed, and activities are proposed that could potentially increase exposure to contamination (Subpart 375-1.11(d)); and
 - d. habitat reconstruction (Subpart 375-1.12(f)).
- e. Changes made to these regulations that are not already in practice will be implemented when the regulations become effective.

11. INITIAL REVIEW OF RULE

DEC will conduct an initial review of the rule within 3 years as required by SAPA §207.