

ASSESSMENT OF PUBLIC COMMENTS - SUMMARY

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 (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. Revised Part 375 also will now include the regulation to implement the BCP. The draft regulation and supporting documentation was available for a public comment period of 120 days at repositories and on the Department website.

The 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 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. The following public availability sessions were held on the proposed rule:

November 29, 2005 - Radisson Hotel, 200 Genesee Street, Utica;

November 30, 2005 - Syracuse Genesee Grande Hotel, 1060 East Genesee St., Syracuse;

December 1, 2005 - Adams Mark Hotel, 120 Church Street, Buffalo;

December 5, 2005 - U.S. Customs House, One Bowling Green, New York City;

December 6, 2005 - SUNY Farmingdale, 2315 Route 110, Farmingdale;

December 7, 2005 - Yonkers Public Library, 1 Larkin Center, Yonkers; and

December 13, 2005 - NYSDEC, 625 Broadway, Albany.

Additionally, the Department conducted 3 hearings as follows:

March 6, 2006 - CUNY Graduate Center, 365 5th Avenue, New York City;

March 9, 2006 - Monroe Community College, 1000 E. Henrietta Road, Rochester; and

March 15, 2006 - NYSDEC, 625 Broadway, Albany.

The Department received written comments through March 27, 2006. The comments and responses are presented by topic in six parts, which parallel the subparts generally:

Part A – Comment on Part 375 Generally;

Part B – Comments on Part 375-1 (provisions applicable to all subparts);

Part C – Comments on Part 375-2 (State Superfund Program);

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

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

Part F – Comments on Matters Outside Part 375.

This summary highlights the central issues raised by commenters. For additional detail, the full text of the Response to Comments should be consulted.

PART A: COMMENTS ON PART 375 GENERALLY

COMMENT: What is the affect of this rule on the Petroleum Spill Program and the Voluntary Cleanup Program (VCP)?

RESPONSE: The proposed rule does not apply to the Spills program or the VCP, these sites are not affected by this rule. While the VCP program is no longer accepting new applications. Sites currently in the VCP continue to implement their remedial programs under existing guidance. Current regulations and/or guidance for these programs remain unchanged and will continue to be applicable.

COMMENT: Many comments were received calling for a program to replace the administrative voluntary cleanup program for sites not eligible for the BCP or which desired a less structured program.

RESPONSE: The Department agrees and has created the Remediation Stipulation Program patterned after the concept of stipulations currently in use in the petroleum spill program. The Remediation Stipulation Program, a new Subpart 5 to this rule, is the subject of a separate, ongoing rulemaking.

COMMENT: The applicability of the Soil Cleanup Objectives (SCOs) to the other remedial programs (SSF, ERP, VCP, petroleum spill program) and Solid Waste programs was questioned.

RESPONSE: The Department proposes to apply the SCOs to all programs covered by this rule; provided, however, that the manner in which the SCOs apply is different depending on the program. A new subpart (Subpart 375-6) has been incorporated into this rulemaking which includes the SCO Tables previously included in Subpart 3 and which provides detail on the application and use of the SCO tables.

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

COMMENT: Parties should not be obligated to address contamination coming on the site from off-site sources.

RESPONSE: The Department agrees and has revised the proposed rule relative to this requirement.

COMMENT: The remedial programs need to incorporate more citizen participation.

RESPONSE: The Department has incorporated additional language from the existing regulations and the statute and clarified that the 1988 guidance document that was rescinded did not change our commitment to citizen participation – it was simply outdated.

COMMENT: The regulation needs to strengthen the institutional and engineering controls language.

RESPONSE: The Department has added additional language and detailed our commitment to viable and reliable institutional and engineering controls that endure the test of time.

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

COMMENT: The goal of the SSF program should not be pre-disposal.

RESPONSE: The proposed remedial goal is taken from the current goal, and the Department does not intend to change the revised rule.

COMMENT: Land use should not be considered in the SSF and ERP.

RESPONSE: The Department disagrees and has not changed the proposed rule. Land use is only considered when pre-disposal conditions are not achievable in the SSF. The ERP is consistent with the BCP in considering land use, and applies a similar approach.

COMMENT: The Department lacks the authority to require various remedial components from the BCP in the SSF; and, if included in the SSF, such remedial components should be limited to addressing significant threats.

RESPONSE: The Department's authority is clear and the Department does not intend to change this approach. These practices have been employed in remedial programs conducted pursuant to the SSF for the past quarter century. This rule merely memorializes long-standing requirements and practices.

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

COMMENT: The statutory preference for permanence has been lost.

RESPONSE: The proposed rule does not weaken the preference for permanence set forth in ECL 27-1403. In fact, the rule reiterates the preference verbatim: "a remedial program that achieves a permanent cleanup of a contaminated site, including the restoration of groundwater to

its classified use, is to be preferred over a remedial program that does not do so”.

COMMENT: BCP eligibility issues were 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 were 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: That the 15’ limitation for soil remediation in Track 2 is not permitted by statute.

RESPONSE: The Department disagrees. This provides a practical approach to soil remediation and is fully protective of public health and the environment. The response to comments details the rationale.

COMMENT: The Department has weakened Track 4 cleanups by allowing the consideration of site background in the evaluation.

RESPONSE: The Department intends to carry this approach forward considering site background is consistent with our remedial approaches over decades, not inconsistent with the statute, and consistent with both State and federal guidance and approaches.

COMMENT: Excluding farms and having a separate column for the protection of ecological resources in Track 1 (unrestricted) is inconsistent with the ECL.

RESPONSE: The Department has revised Track 1 SCOs to include the farm pathway in the

development of the unrestricted use (Track 1) SCOs and has also modified the unrestricted use SCO Table to include only one column of SCOs, representing the lowest SCO for all calculated concerns [Protection of Public Health (PPH), Protection of Groundwater (PGW) or Protection of Ecological Resources (PER)]. The unrestricted Table will now have only one SCO column.

COMMENT: Providing SCOs for Restricted Residential in Track 2 is inconsistent with the ECL.

RESPONSE: The Department intends to carry the restricted residential scenario forward, and has modified the restricted use SCO Table to provide for a second residential scenario in Track 2 (representing the former Track 1 PPH SCOs). This new use of a site is identified as “residential use” and provides a category of use which will allow single family home development, with only limited restrictions, only allowing restrictions on the use of the property for farming and groundwater use. The Restricted use Table will now have six SCO columns.

COMMENT: The Department is not protecting groundwater according to its classification given the separate protection of groundwater (PGW) SCOs; and given the application of generic assumptions (i.e., attenuation, depth of groundwater, type of soils). While other commenters argued that the obligations to address groundwater exceed current and statutory approaches/authorizations.

RESPONSE: The Department intends to carry the proposed approach forward. Subpart 6 has been added which includes a more detailed explanation of the use of the PGW SCO to better reflect the protective and practical nature of this approach.

COMMENT: The Department is not protecting ecological resources given the separate protection of ecological resources (PER) SCOs. Conversely, others argued that the PER SCOs as drafted, will be overly protective.

RESPONSE: The Department intends to carry this approach forward. Subpart 6 has been added which includes a more detailed explanation of when the PER SCOs will apply, as well as the use of the PER SCO to better reflect the protective and practical nature of this approach .

COMMENT: The Department has failed to adequately consider “indoor air,” while other comments argued we inappropriately are considering “indoor air.”

RESPONSE: The Department discussed indoor air in the Technical Support Document and concluded that the science and models are not sufficiently developed or predictive to justify incorporating this pathway directly into the SCOs. Rather, the Department will require an evaluation of soil vapor and the potential for vapor intrusion as part of the remedial program for every site consistent with Division of Environmental Remediation and NYS Department of Health guidance. The Department has revised the regulation to further support the need to evaluate this on a site-by-site basis.

COMMENT: The Departments failed to consider mixtures, additivity and synergistic affects as required by law.

RESPONSE: The Department has added a discussion in the Technical Support Document which details the consideration of mixtures, additivity and synergistic affects. However, the Department has not changed its approach.

COMMENT: The Department fails to adequately consider adjacent residential properties.

RESPONSE: The SCOs, except for commercial and industrial, do not account for residential uses on-site – which by extension would be protective of adjacent residential uses. However, the Department discussed in the Technical Support Document, and in the regulation, that such adjacent uses need to be considered on a site-by-site basis in the selection of a remedy. This approach was adopted given the significant variability between sites.

COMMENT: The Department fails to adequately consider surface water.

RESPONSE: The SCOs were not adjusted to account for this consideration. However, the Department has added a discussion in the proposed rule, clearly requiring that this media be considered as part of the overall remedy. This approach was adopted given the significant variability between sites.

COMMENT: The Department has not adequately protected sensitive populations, including children.

RESPONSE: SCOs for the protection of human health for all land use categories were calculated based on the behaviors and characteristics of children. The Technical Support Document and the response to comments details the exposure scenarios employed.

COMMENT: The SCOs were developed using outdated information.

RESPONSE: The authoritative bodies may change from time to time; however, the ones used are those currently accepted and relied upon. The Department does not intend to change the SCOs based upon this comment.

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

COMMENT: The ERP should not be use based, rather it should follow the SSF pre-disposal goal.

RESPONSE: The Department disagrees. The proposed goal is not inconsistent with the statute and is protective of public health and the environment.

PART F: COMMENTS ON MATTERS OUTSIDE PART 375

The Department reviewed comments received on several matters that do not pertain directly to the Part 375 rulemaking (i.e., Brownfield Opportunity Areas, Tax Credits). Responses to these comments are included in this section.