ENVIRONMENTAL AND ENERGY LAW SECTION OF THE NEW YORK STATE BAR ASSOCIATION

Comments on the Proposed Revisions to 6 NYCRR Part 375 Regulations

The Environmental and Energy Law Section ("EELS") of the New York State Bar Association wishes to thank the Department of Environmental Conservation ("Department") for the opportunity to comment on its proposed revisions to 6 NYCRR Part 375. We respectfully request that the Department consider these comments in promulgating its final Part 375 regulations. As we have discussed with the Department, the EELS is available to meet with the Department to discuss the comments below and any new draft regulations before promulgation.

GENERAL COMMENTS

The New York State Brownfield Cleanup Program ("BCP") is one of the most vibrant programs of its kind in the nation, serving to advance the goals of protecting the State's natural resources, enhancing public health and welfare, and encouraging economic development. The Program depends on a collaborative relationship between the State and the private sector, and we submit these comments with that collaborative relationship in mind.

We commend the Department for undertaking the time-consuming and difficult task of reviewing the regulations governing its various remedial programs, reorganizing them into a coherent structure, and addressing inefficiencies and shortcomings. As practitioners who are "in the trenches" in helping to implement the BCP, we know that it is a complex program that is often challenging to administer.

Many of our comments support the proposed changes. Other comments suggest improvements that can be made to help strengthen the program. One global suggestion, not mentioned below, is that the Department use gender-neutral language, and we therefore recommend the use of "their" rather than "his/her" in appropriate locations.

We look forward to continuing to work with the Department to build on the successes of the BCP.

COMMENTS ON SPECIFIC PROPOSALS

6 NYCRR Subpart 375-1

- **§ 375-1.2(a) – Reference to "All Appropriate Inquiries" –** The phrase "all appropriate inquiry" should be changed to "All Appropriate Inquiries" to reflect the title of 40 C.F.R. Part 312, from which the phrase originates.

- **§ 375-1.2(a)(1) – Reference to ASTM –** The reference to ASTM should be changed ASTM E1527-21 for transactions occurring after the effective date of this rulemaking. It should reference ASTM E1527-13 for transactions that occurred on or after December 30, 2013 until the effective date of this rulemaking.

- **§ 375-1.2(c) – Definition of "Brownfield [S]ite [R]emedial [P]rogram" –** The added language in the proposed definition, "pursuant to a brownfield site cleanup agreement," should be withdrawn and replaced with "in conformance with § 375-1.6."

- **§ 375-1.2(e) – Change of Use Definition –** The proposed Change of Use definition tracks the statutory definition in ECL § 27-1425(3)(a) with the exception of this phrase: "any change to the tax lot designation or boundary." We recommend limiting the definition to the statutory definition, preferably by reference to the statutory section, rather than repeating the statutory definition in the regulations, in order to ensure that the term remains consistent with the statute in the event of statutory amendments. The statutory intent of a Change of Use notice pursuant to ECL § 27-1425(3)(b) is to "adequately apprise the department of the contemplated change of use of such site and how such change of use may affect the site's proposed, ongoing, or completed remedial program" and therefore a sixty-day prior notice is required. Recently, there have also been other instances when the Change of Use form has been required such as when there is a change of site address, the remedial parties change, demolition commences, or a Real Property Tax Law § 421-a foundation element installation needs to be commenced at a BCP site. However, the events described above that are not otherwise specified in the statutory definition do not affect the site's proposed, ongoing, or completed remedial program and it is unclear why sixty days advanced notice is required. Broadening the term and the events to which the sixty-day notice applies exceeds the statutory intent on this

point. We agree that other circumstances also call for notice to the Department, and some of those warrant work plans, but the proposed broadening of the statutory term and the added requirements of the proposed revisions to § 375-1.11(d) far exceed the statutory intent on this point. Perhaps a new defined term that more closely reflects the category of events intended to be covered should be added to address the most common events that trigger the need to notify the Department of a change in facts or circumstances with a different mechanism than the Change of Use form and with shorter notice periods appropriate to such changes.

- **§§ 375-1.5(b)(3)(i) and (vi) – Payment of and Objections to Department Invoices –** The proposed revision provides that Department invoices are payable within the timeframe specified on the invoice or associated order or agreement, and that the default period of forty-five days after receipt an invoice still applies. We recommend that the time frame for payment and submittal of objections be no less than forty-five days after receipt of an itemized invoice, unless otherwise specified in the associated order or agreement. State cost invoicing procedures often create significant and unnecessary burdens that warrant a different payment schedule. Specifically, while it is generally the intent of the Department to issue invoices on a regular schedule, remedial parties are rarely advised of that schedule, and often receive a copy of invoices long after they are issued, which has the effect of shortening the time to arrange for payment of sometimes very large amounts in less time than commercial "payment within 30 days" terms.

- **§ 375-1.5(b)(3)(ii)(c) – Requirement to Itemize Department Invoices –** We recommend that the Department withdraw its proposal to remove the categories of expenses that currently must be specified in Department invoices to remedial parties. We also recommend that a new item be added to provide that invoicing for outside contractor services must be accompanied by a description of the work performed by such contractor, providing sufficient detail to confirm the remedial party's responsibility for such costs.

- **§ 375-1.5(b)(6) – Department Authority to Terminate Agreements –** We recommend that the Department withdraw or modify language which gives it overly broad authority beyond that provided in the statute, *see, e.g.*, ECL § 27-1409(5), to terminate orders, agreements, and State assistance contracts based on, among other things, a failure to complete a remedial program in

accordance with a pre-determined schedule. For example, in the BCP, the Department only has been provided with statutory authority to terminate a BCA for substantial non-compliance, not failure to meet a non-mandatory scheduled date. ECL § 27-1509(12) provides that the Department may terminate BCAs where an applicant "fails to comply substantially" with the terms and conditions of the BCA. Merely falling behind a proposed schedule does not rise to the level of a failure to substantially comply with the terms of a BCA. The proposal goes against the spirit of voluntary cleanups and may chill lenders' willingness to finance the cleanup and redevelopment of contaminated sites since commencement of work is often linked to project financing. Tethering program participation to a contemplated remedial schedule ignores the reality of project construction and remediation. BCP projects are complicated and can have schedule changes for a variety of reasons. Coordinating a remedial project concurrently with a redevelopment project, which often includes local land use approvals, is a complex undertaking, with numerous intangible variables that require flexibility. Moreover, pursuant to 6 NYCRR 375-1.5(b)(2), remedial parties are at a minimum entitled to dispute resolution before termination of an order, agreement or contract if there is a valid dispute. This proposal, as drafted, deprives the remedial party of their due process rights and an opportunity to cure minor scheduling delays. If not withdrawn, the Department should revise its proposal to ensure consistency with existing due process provisions and account for the flexibility necessary for parties making good faith efforts to comply with schedules and terms.

- **§§ 375-1.6(c)(4)(ii)-(iii) – Certification of Final Engineering Reports –** We recommend that the Department withdraw or modify the proposal to require that final engineering reports are certified by professional engineers that are in the same firms as the personnel that engaged in the inspection and engineering of a remedial project. The proposal contradicts State Education Law, and it may disproportionately impact small businesses and businesses that are certified in the Minority- and Women-Owned Business Enterprise Program. If improvements in the quality and consistency of report submittals is the intended purpose of the Department's revisions, the proposed language is unclear and should be revised to focus on the quality of submissions rather than the size and/or ownership of environmental firms.

- **§ 375-1.7(a) – Site Classification and Administrative Designations –** The proposed section 375-1.7(a) refers to inactive hazardous waste disposal sites, but it includes sites that do not fall within that category. We recommend that this section refer to "Environmental Site Remediation Database."

- **§ 375-1.8(d)(1)(iii) – Efforts by Volunteers to Address Off-Site Contamination –** We support the proposal to clarify that Volunteers are required only to address on-site sources of groundwater contamination and to prevent further migration off-site, but the phrase "at the site boundary" should be omitted. Several remedial technologies are available that may address the source of the contamination and prevent off-site plume migration but that are not required to be implemented "at the site boundary."

- **§ 375-1.8(d)(2)(ii)(c) – Actions Addressing Off-Site Contamination –** This proposed revision to this section requiring remedies to address off-site contamination should be amended to omit the reference to "environmental or" because it conflicts with § 375-1.8(d)(2)(ii)(a).

- **§ 375-1.8(g)(2)(ii)(a)(2) – Single-Family Restricted Residential Use/Common Ownership of Property –** We support this proposal to clarify that restricted residential uses prohibit single-family unless the land is commonly owned in perpetuity.

- **§§ 375-1.8(g)(6) – Department Determination of Appropriate Land Use –** We object to the proposed amendment to the extent that it would give the Department the authority to determine the appropriate land use category for a site. And therefore, the proposed change should not be made.

- **§ 375-1.8(h)(2)(iii) – Environmental Easement Unnecessary in Some Circumstances –** We support the clarification that an environmental easement is not needed where the only restriction imposed by the easement would be a restriction on using groundwater, and there is already a local prohibition in place.

- **§ 375-1.9(e)(1)(iv) – Revocation of Certificate of Completion in Some Circumstances –** We object to this proposal because exceeds the scope of specific statutory language set forth in the ECL. It is unclear why this regulation is in Part 375-1 (General Remedial Program Requirements) when

the edits are based solely on the BCP tax credits. Moreover, we recommend that this regulation be deleted since ECL § 27-1419(5)(a-d) already provides the grounds for revocation of a COC and includes a catch all "good cause" provision. This draft regulation goes far beyond the statutory provision specifically in ECL § 27-1419(5)(b), which permits the Department to modify or revoke a certificate of completion ("COC") if an applicant for a New York City site makes a misrepresentation of a material fact relating to one of the eligibility "gates" pursuant to 27-1407(1-a) for the "tangible property credit component of the brownfield redevelopment tax credit". In contrast, the proposed regulation would allow the Department to modify or revoke a COC for any applicant who makes any misrepresentation related to *"elements thereof of the brownfield redevelopment tax credit.*" The proposed language suggests that the COC can be revoked based on any disagreement between an applicant and the Department regarding *any* component of a tax credit claim, a result which we believe would be unjustifiably punitive since a party that has earned a COC has completed the remediation on the Site. If not withdrawn completely, we recommend that the language in this proposal be revised to mirror the language of ECL § 27-1419(5)(b).

- **§ 375-1.11(d) – Work Plans Required for All Changes of Use –** The language requiring a work plan submission significantly broadens and is inconsistent with ECL § 27-1425, which only requires *notice* of a proposed change and then allows the Department to reject the proposed change. We recommend that the Department abandon the proposal to require a work plan for all changes of use. Most changes should not require even the presumption that a work plan is necessary and therefore a waiver is needed. The only instances when the presumptive submission of a work plan would be justified is where the change will in fact affect the site's proposed, ongoing, or completed remedial program, such as disturbance of a temporary cover system. While the Department states in the Regulatory Impact Statement accompanying the changes that this proposal is meant to address physical changes "that could potentially create an exposure to contamination," parties already must certify compliance with all institutional controls and engineering controls. *See* ECL § 27-1415(7). As an alternative, the Department should consider clarifying and limiting the requirement for submission of a work plan and also indicating when, and how, a waiver can be requested. Additionally, work plans for proposed changes of use should

require thirty days for Department review, rather than sixty days to avoid unnecessary delays.

- **§ 375-1.11(d)(3) – Change of Use Notification Not Required in Some Circumstances –** The proposal provides that after a COC is issued, a Change of Use notification is not required if notification requirements in a site management plan are followed. We support this change.

- **§ 375-1.12(a)(1) – Permit Exemptions/Terminology –** This proposal would extend the Department's authority to exempt the requirement to obtain certain State and local permits for "investigation and/or remediation of contamination on or emanating from a site which the department is handling." We note that the Department has sometimes used the phrase "migrating" rather than "emanating," and we suggest using the term "migrating" here.

6 NYCRR Subpart 375-2

- **§ 375-2.7(d)(3) – Notifications Regarding the Reclassification or Modification of a Site –** The proposal provides that notifications of site reclassifications or modifications should be made to "local governments of jurisdiction" within ten days. The proposal should be revised to clarify who should provide this notice (e.g., the Department or responsible parties).

- **§ 375-2.7(e)(1)(iv) – Notifications Regarding the Delisting of a Site –** The proposal provides that notification of the reclassification of a site should be made to "local governments of jurisdiction" within ten days. The proposal should be revised to clarify who should provide this notice (e.g., the Department or responsible parties).

- **§ 375-2.5(e)(4)(ii)(b)(2) – Department May Delist a Site When Soil Vapor Intrusion Measures Are in Place –** We support this change to provide that a site may be delisted in certain circumstances even if there are engineering controls in place to address potential soil vapor intrusion.

6 NYCRR Subpart 375-3

- **§ 375-3.2(e) – New Definition of "Cover [S]ystem [R]equirements or [S]ite [C]over" and § 375-3.6(f) – Requirement to Calculate the "[C]ost of the Equivalent Soil Cover System" –** We strongly urge the Department to withdraw each of these proposals. The first proposal seeks to add a new definition of "cover system requirements" which does not appear to serve any legitimate environmental purpose. The second proposal seeks to rewrite by regulation a statutory definition in the New York Tax Law in a manner that exceeds the Department's authority. Viewed together, it is clear that these proposals are for the sole purpose of dictating tax outcomes—a role for the Department that is neither permitted nor directed by statute, and one that has been expressly and repeatedly deemed off-limits by the courts.

  With respect to the definition of cover system requirements, it is clear that the proposal does not serve any legitimate environmental purpose. Compared with the existing regulations in place prior to the Department's proposed revisions, application of the proposed site cover definition would not change the process or details of defining the remedial program for a brownfield site. In the absence of any impact on the administration of remedial programs, the proposed definition is superfluous and should be omitted. These facts make it clear that the sole purpose of the new definition is to dictate tax outcomes which, as described in more detail below, is beyond the Department's authority.

  The second proposal would require applicants to conjure a hypothetical cost for one or two feet of soil without reference to the site's ***actual remedial program***, and would mandate the hypothetical cost be used for purposes of applying Section 21(b)(2) of the Tax Law. Under this proposal applicants would be required to essentially guess the cost "necessary to implement a site's investigation, remediation or qualification for a Certificate of Completion" under the Tax Law before the final cost of the remedy can be reasonably known, and without reference to the actual remedy approved by the Department under the site's remedial program. The proposal in effect seeks to rewrite the statutory definition of site preparation costs under the Tax Law.

  The Department's proposals are in conflict with the clear language and intent of the 2015 BCP statutory amendments. The 2015 BCP amendments

updated the definition of "site preparation costs" under Section 21(b)(2) of the Tax Law to ***expressly include*** a portion of the cost of remedial action cover systems, including building foundations, acting as an engineering control as part of the site's remedy. In addition, Section 21(a)(3)(iv) as amended in 2015 expressly provides that the cost of "the foundation of any buildings constructed as part of the site cover that are not properly included in the site preparation component" are able to be claimed as qualified tangible property. Read together, these provisions evince a clear intent by the Legislature to allow the inclusion of remedial action cover systems consisting of building foundations in two parts: (1) a site preparation cost amount equal to the equivalent cost of a remedial action cover system for the area on the site that is covered by the foundation slab; and (2) a qualified tangible property cost amount equal to the balance attributable to building construction serving no remedial purpose–that is, the foundation cost that exceeds the remedial cost (e.g., the excess cost for very thick foundation slabs). The plain language of the Tax Law thus directs taxpayers to include a portion of building foundation costs in site preparation costs where the building foundation is functioning as an engineering control on the site.

By contrast, the Department's proposals ignore the statutory mandate of the Tax Law by disregarding non-soil engineering controls altogether. The result would be to ignore reality on many brownfield sites where hardscapes, sidewalks, portions of buildings slabs, and the like are actually installed and are the only feasible remedy that is protective of human health and the environment. To put it simply, the Department's proposals would incentivize applicants to implement ***less protective remedies*** in the name of managing tax outcomes. Moreover, the Department's proposal would apply the new site cover definition to the entirety of a brownfield site. This disregards the relevant language of Section 21(b)(2) which focuses on building foundations and does not expressly mention the portions of brownfield sites outside of a building footprint.

The Department's proposals seem to stem from a misapprehension of the last sentence of Section 21(b)(2) of the Tax Law: "Site preparation costs shall not include the costs of foundation systems that exceed the cover system requirements in regulations applicable to the qualified site." This provision does not direct the Department to issue new regulations defining cover system requirements. To the contrary, it refers to "the regulations," which strongly implies reference to regulations in force at the time of the

amendment. Certainly this reference would apply to future revisions of the Department's remedial regulations applicable to brownfield sites, but it is not a directive from the Legislature for the Department to make tax rules.

In addition, these proposals would retroactively apply to sites that may have long ago received their COC and tax credits. Any change should have a future effective date to make it clear that prior actions taken under the law as then in effect will not be disturbed. The Bar Association's proposal to address this issue, which includes the use of the RS Means commodities database of actual costs for asphalt and/or concrete multiplied by a 1- or 2-foot thickness is the proposed methodology that should be used to calculate the cost of a remedial concrete or asphalt cover system.

In summary, the Department has stated in its regulatory statement that these proposals exist for the sole purpose of managing tax outcomes. The proposals are contrary to the Legislature's intent with respect to the above-referenced provisions of the Tax Law and are a plain attempt by the Department to dictate tax outcomes as a "fiscal watchdog." For the foregoing reasons, the proposal exceeds the Department's authority and should be withdrawn and replaced with reference to a minimum thickness of concrete or asphalt as described above.

- **§ 375-3.2(j) – Definition of "PRP Search" –** As discussed below regarding § 375-3.3(b)(2), the Department should withdraw the proposal to require applicants to conduct searches for potentially responsible parties ("PRPs") because the proposal contradicts ECL § 27-1405(2)(a). Additionally, applicants do not have as much access to information as the Department does in order to perform PRP searches, nor do applicants have the ability to conduct generator or transporter searches. Further, applicants already submit information regarding historical owners and operators in connection with their applications to be accepted into the BCP.

- **§ 375-3.2(m) – Definition of "Underutilized" –** The Department's definition of underutilized remains problematic and it has effectively eliminated this gate from the statute, as only a handful of sites have qualified for the gate since the term was adopted. To align this definition to the legislative intent, we recommend that the Department revise the definition as proposed in EELS' BCP Extender and Omnibus Proposal, the relevant portion of which is attached hereto as Exhibit 1.

- **§ 375-3.3(a)(2) – Definition of "Contaminant" –** The Department is attempting to exclude materials from the regulatory definition of "contaminant" for which there is no statutory basis. The statutory definition of "contaminant" at ECL § 27-1405(7-a) refers to "hazardous wastes" and "petroleum" as defined in that section. The term "hazardous waste," in turn, references the statutory definition in ECL § 27-1301. There is no statutory basis for the Department to exclude contamination of structures from asbestos, lead, paint and electrical equipment. Indeed, Tax Law § 21(b)(2) expressly includes the costs of disposing asbestos, lead paint and PCBs. Thus, the exclusion of these type of contaminants is ultra vires.

- **§ 375-3.3(a)(3) – Eligibility for the BCP Based on an Investigation Report Showing a Site "Requires Remediation" –** The Department's proposal would require an investigation report to show that a site is eligible for the BCP because it "requires remediation" for "the reasonably anticipated end use of the site." ECL § 27-1407(1), however, requires an investigation report to show only that a site "requires remediation in order to meet the remedial requirements of this title." The Department's proposal should be modified to track the applicable language of Section 27-1407(1).

- **§ 375-3.3(a)(4) – Eligibility for the BCP Based on Whether a Site "Requires Remediation" –** The Department's proposal would give it subjective authority to determine, based on a list of five factors, if a site is sufficiently contaminated such that it "requires remediation" and should qualify for the BCP. Pursuant to ECL § 27-1405(2), however, a "Brownfield site" is simply a site with contamination "at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance." Moreover, ECL § 27-1407(1) provides that an applicant must simply show that a site "requires remediation in order to meet the remedial requirements of this title."

- **§ 375-3.3(a)(5) – Determining the Reasonably Anticipated Use of a Site –** The proposal sets forth a non-exhaustive list of five factors for determining eligibility based on the "reasonably anticipated use of the site." Pursuant to ECL § 27-1407(1), however, the department must "determine eligibility and the current, intended and reasonably anticipated future land use of the site pursuant to Section 27-1415 of this title." Section 27-1415(i) in turn sets of forth a non-exhaustive list of sixteen factors for making this determination.

The Department's proposal therefore should be revised to reflect Section 27-1407(1) and Section 27-1415.

- **§ 375-3.3(b)(2) – Requiring Applicants to Conduct PRP Searches** –A discussed above regarding § 375-3.2(j), applicants should not be required to perform PRP searches because ECL § 27-1405(2)(a) places this responsibility on the Department. Additionally, applicants do not have as much access to information as the Department does in order to perform PRP searches, nor do applicants have the ability to conduct generator or transporter searches. Further, applicants already submit information regarding historical owners and operators in connection with their applications to be accepted into the BCP.

- **§ 375-3.3(b)(5) – Adding Interim Status Facilities to the Categories of Eligible Brownfield Sites –** We support this proposal.

- **§ 375-3.4(b)(1)** – **Date of Completeness of Applications for Class 2 and Other Sites** – We object to the proposal that an application would not be considered "complete" until the Department completes its PRP viability determination. Brownfield projects are time-sensitive, and this proposed approach could cause undue delay, which in turn would delay the start of the public notice period. Instead, we propose that applications be deemed complete with submittal of PRP search results, if the Department requires applicants to conduct such searches.

  § 375-3.4(d) – Rejecting BCP Applications Based on the "Public Interest" – We object to the proposal to alter the existing regulation regarding the "Public interest consideration" basis upon which the Department may reject a BCP application. In the first instance, the proposed amendment of the existing regulation is not consistent with ECL § 27-1407(9). Perhaps more important, however, the proposed addition of subsection (d)(i) is an impermissible attempt to overturn the final, non-appealable, decision of the Appellate Division, Second Department, in *Wythe Berry LLC v. New York State Department of Envtl. Conservation, et al.*, 188 A.D.3d 1225 [2d Dep't 2020], *lv. den.*, 2021 Slip Op 71445(U) [2d Dep't 2021]. In a full-length decision, the Second Department unanimously rejected the concept proposed in subsection (d)(i):

Here, with respect to the "public interest" exclusion set forth in ECL § 27–1407(9), it is evident that the Legislature did not intend to limit the DEC to considering only those factors specifically enumerated in that statute (see ECL 27–1407[9][a–g]). Nevertheless, **the DEC's determination that the public interest would not be served by granting the petitioner's application because National Grid had already agreed to remediate the site pursuant to the consent order was irrational and unreasonable**. We hold, consistent with the determinations reached by several other courts, that **a "brownfield site" is not ineligible for acceptance into the BCP "on the ground that it would have been remediated in any event"** (Matter of East Riv. Realty Co., LLC v. New York State Dept. of Envtl. Conservation, 68 A.D.3d 564, 564, 891 N.Y.S.2d 359 [internal quotation marks omitted]; see Matter of Destiny USA Dev., LLC v. New York State Dept. of Envtl. Conservation, 63 A.D.3d at 1570–1571, 879 N.Y.S.2d 865; Matter of HLP Props. LLC v. New York State Dept. of Envtl. Conservation, 21 Misc.3d 658, 671, 864 N.Y.S.2d 285). In addition, to the extent that the DEC denied the petitioner's application because, as the Supreme Court concluded, it would impose an "unnecessary" financial burden on the state, that consideration should not have factored into its determination. The legislative history reveals that the purpose of enacting the BCP was to, among other things, "enhance the health, safety, and welfare of the people of the state and their overall economic and social well being" (ECL 27–1403). The Division of Budget, when endorsing the BCP, noted that "[b]rownfields are abandoned, idled, or under-used properties where redevelopment is complicated by real or perceived environmental contamination ... [and they] often pose not only environmental, but legal and financial, burdens on communities. Left vacant, contaminated sites can diminish the property value of surrounding property and threaten the economic viability of adjoining properties" (Budget Report on Bills, Bill Jacket, L 2003, ch 1 at 38). "[R]eal property qualifies as a 'brownfield site' for purposes of acceptance into the BCP so long as the presence or potential presence of a contaminant within its boundaries makes redevelopment or reuse more complex, involved, or difficult in some way" (Matter of

> Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Envtl. Conservation, 14 N.Y.3d at 177, 897 N.Y.S.2d 693, 924 N.E.2d 801). With this in mind, **any "financial misgivings" (id. at 167, 897 N.Y.S.2d 693, 924 N.E.2d 801) concerning the fiscal impact of a property being accepted into the BCP on the state is irrelevant to the question of whether the public interest would be served by the granting of an application to participate in the BCP**. The DEC is not tasked with acting as "a fiscal watchdog" (Destiny USA Dev. LLC v. New York State Dept. of Envtl. Conservation, 19 Misc.3d 1144(A), 2008 N.Y. Slip Op. 51161[u] [Sup. Ct., Onondaga], *16, 2008 WL 2368085, affd 63 A.D.3d 1568, 879 N.Y.S.2d 865).

Wythe Berry LLC, 188 A.D.3d at 1229-30 (emphases added). Finally, the attempt to overturn this binding decision through administrative regulation rather than legislative action violates the Separation of Powers doctrine of the New York State Constitution. *See*, *e.g.*, *Boreali v. Axelrod*, 71 N.Y.2d 1 [1987].

- **§ 375-3.4(d)(ii) – Rejecting BCP Applications Based on the Need for Urgent Action –** The proposed addition of subsection (d)(ii) should be withdrawn. No correlation exists between the need of the Department to perform an emergency response pursuant to a summary abatement order and the overall eligibility of a site for inclusion in the BCP. Furthermore, in the event the Department becomes aware of the need for an emergency response during its review of a BCP application, the requestor should be provided the opportunity to perform that response pursuant to an interim remedial measure.

- **§ 375-3.5(c)(4) – Termination of Brownfield Cleanup Agreement Due to Non-Approved Work –** This proposed regulation is ultra vires because the ECL § 27-1409(5) only provides the Department with authority to terminate a brownfield cleanup agreement at any time during the implementation of such agreement if the applicant implementing such agreement fails to *substantially comply* with such agreement's terms and conditions. As drafted, this provision would allow the Department to terminate a BCA for minor deviations from Department-approved work plans or for conducting other work that may have been conducted in accordance with the remedial program requirements, but, due to exigent or unknown conditions, could not

feasibly have been added into an approved work plan. ECL § 27-1409(3) entitles applicants to a process for resolving disputes arising from the evaluation, analysis, and oversight of the implementation of a work plan. By eliminating the ability to participate in a dispute resolution process for minor work plan issues, the Department would deprive applicants of due process through the dispute resolution process without an opportunity to cure. Therefore, this provision is a breach of the applicants' rights under the prescribed terms required in a BCA pursuant to ECL §§ 27-1409(3) and (5). Finally, this provision is so vague and would provide the Department with so much unfettered discretion if it were to be adopted that it alone could discourage lenders from providing financing for brownfield transactions since the Department could eliminate the contractual agreement with the applicant based on acts of third parties such as their consultants or contractors. Minor deviations in the field occur every day during active remediation, which is the purpose of the existing required communication provisions.

- **§ 375-3.8(b)(2)(i)** – **Requirement for Volunteers to Perform Off-Site Quantitative Assessments** – This proposal is inconsistent with ECL § 27-1411(1), which provides that volunteers are only required to perform qualitative assessments off-site. In addition, since this work is being requested to be performed outside of the BCP site, it is unclear if the costs incurred would be eligible for tax credits.

- **§ 375-3.8(c)(5) – Cleanup Process for Class 2 Sites –** We object to this proposal because it would require feasibility studies that would add substantial costs and delays for BCP projects and would only serve to further discourage the further redevelopment of these sites. In addition, the proposal would strip Volunteers from proposing remedies consistent with BCP projects.

  A volunteer is entitled to bring a Class 2 site into the BCP as a "Brownfield Site" pursuant to ECL § 27 1405(2)(a). However, this proposed regulation appears to be designed to continue to treat a Superfund Site admitted into the BCP as if it remained a Class 2 site in the Superfund program. For Class 2 sites admitted into the BCP before a remedy has been selected, this new provision states "the remedy will be selected by the department in accordance with section 375-2.8(e) of this Part." If a Volunteer has decided to bring a Class 2 site into the BCP, it should be entitled to utilize the BCP

process instead of the more onerous and time-consuming Superfund process in section 375-2.8(e). In addition, a Volunteer bringing a Class 2 site into the BCP is likely planning a project for the site, and the Volunteer should have some ability to select a remedy consistent with the proposed project pursuant to the BCP remedy selection process. The Superfund process is not driven by project-based remedies. While the Department does have the final remedy selection authority for significant threat sites in the BCP pursuant to ECL§ 27-1413(4), it is unclear why the Superfund process must be utilized and why the Department needs to have sole discretion to select the remedy.

- **§ 375-3.8(e)(1)(iii)(b) – Elimination of Conditional Track 1 Remedies –** Elimination of Conditional Track 1 remedies is inconsistent with ECL § 27-1415(4) which states "that 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, shall qualify for Track 1." (Emphasis added.) The legislature understood that despite a Track 1 soil source removal remedy, some residual groundwater contamination may remain and allowed for long term groundwater engineering controls to be in place. This regulation eviscerates a party's ability to achieve a Track 1 remedy if in the Department's discretion "the volunteer has not demonstrated to the department's satisfaction that there has been a bulk reduction in groundwater contamination to asymptotic levels at the time the certificate of completion is issued". Instead of converting a valid Track 1 remedy into a Track 2 remedy if there is any residual groundwater contamination, which will discourage the implementation of Track 1 remedies and is contrary to the overall intent of the program to achieve a permanent remedy as stated in ECL § 27-1403, this regulation should define what it means to achieve asymptotic conditions since it is rarely possible to achieve drinking water standards in an urban environment. Moreover, there is no mechanism in the Tax Law (which would have to be simultaneously amended to accommodate this regulation) to give a party additional tax credits years later if they are earned after a party's cleanup status changes from a Track 2 to a Track 1. Tax and Finance can claw back credits far more easily under the current conditional Track 1 approach than to retroactively authorize additional tax credits. The conditional Track 1 approach has been used by the Department

for a number of years without issue and should continue to be implemented. This approach should be codified in regulations.

- **§ 375-3.8(e)(2)(iii) Cleanup Tracks – Track 2 Remedy Ends at 15 Feet –** This new provision, which states that "soil below 15 feet cannot represent a source of contamination," is inconsistent with the statutory definition of a Track 2 site in ECL § 27-1415(4), which states: "The remedial program may include restrictions on the use of the site or reliance on the long-term employment of engineering and/or institutional controls, but shall achieve contaminant-specific remedial action objectives for soil which conform with those contained in one of the generic tables developed pursuant to subdivision six of this section without the use of institutional or engineering controls to reach such objectives." The origin of the fifteen foot rule is unclear since if a large underground storage tank is present on a site that has leaked, the contamination typically only starts at fifteen feet. This regulation appears to be an attempt to prevent a party from digging any deeper than 15 feet for purposes of site preparation costs in order to achieve a true Track 2 remedy in compliance with the Track 2 SCOs at the bottom of the excavation, while also potentially depriving the party of cover system site preparation costs.

- **§ 375-3.8(f)(4)(ii)** – **Efforts by Volunteers to Address Off-Site Contamination** – Consistent with our comment above regarding proposed Section 1.8(d)(1)(iii), this proposal should be revised to omit the words "at the site boundary" in the first sentence. Additionally, the proposal should be revised to clarify that a Volunteer need not prevent soil vapor emanating beyond the edge of a plume and that its efforts should be addressed to a plume itself.

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- **§ 375-6.8 – Soil Cleanup Objective Amendments –** A large number of soil cleanup objectives ("SCOs") have been amended. The draft regulations do not state when these new SCOs will become effective or if they will retroactively apply. We respectfully request that new SCOs become effective one year after the final regulations are promulgated so that parties and projects can effectively plan for the changes. In addition, it would be helpful for the Department to disclose the methodologies and rationales used to determine the new SCOs.

We understand that, at some sites, the Department is already implementing the substance of these proposed regulations on a case-by-case basis. We urge that, consistent with settled principles of administrative law, the Department refrain from putting these regulations into effect unless and until they are formally adopted pursuant to this rulemaking process.

CONCLUSION

We thank the Department for the opportunity to comment on these proposed regulations.

Exhibit 1

30. "Underutilized" shall ~~be defined in regulation by the department, after consultation with the business community and the city of New York. Such regulations shall be adopted no later than October first, two thousand fifteen and take into consideration the existing use of a property relative to allowable development under zoning, the need for substantial government assistance to redevelop and other relevant factors.~~ **mean, as of the date of application,**

(a) a Site on which no more than fifty percent of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zoning or as a non-conforming use for at least three years prior to the application, which zoning has been in effect for at least three years; or

(b) the proposed future use is at least seventy-five percent for industrial or commercial uses; or

(c) the proposed development project on the Site could not take place without substantial government assistance, as certified by the municipality in which the Site is located, and for purposes of this provision, substantial government assistance shall mean a substantial loan, grant, land purchase subsidy, land purchase cost exemption or waiver, or tax credit, from a governmental entity; or

(d) a Site on which one or more primary structures have been condemned, or presently exhibits documented structural deficiencies, as certified by a professional engineer; or

(e) a Site on which there are no structures or the buildings have not been occupied or used for at least twelve months; or

(f) an industrial or commercial Site that is no longer functional for its initially intended use due to factors such as functional obsolescence that affects the Site itself or the Site's relationship with other surrounding property, and for purposes of this provision functional obsolesence means that the Site is unable to be used to adequately perform the function for which it was intended due to a substantial loss in value resulting from factors such as overcapacity, changes in technology, deficiencies or superadequacies in design, lack of demand for this type of use such as office space due to a pandemic, or other similar factors that affect the Site itself or the Site's relationship with other surrounding real property.

32. "Conforming BOA site" shall mean a site located within an area designated by the Secretary of State as a brownfield opportunity area pursuant to section nine hundred seventy-r of the general municipal law and for which the Secretary of State has issued an affirmative conformance determination pursuant to subdivision ten of section nine hundred seventy-r of the general municipal law.

33. "Renewable energy facility site" shall mean a site that is primarily used for a renewable energy facility as described in subparagraph (C) of paragraph (7) of subdivision (b) of the tax law.

§ 3. Subdivision 1-a of Section 1407 in Article 27 of the environmental conservation law, as amended by section 2 of part A of chapter 577 of the laws of 2004 and by section 2 of part BB of chapter 56 of the laws of 2015, is amended as follows: