



**Department of
Environmental
Conservation**

Preview of Potential Revisions to 6 NYCRR Part 375

November 2018

Part BB of Chapter 56 of the Laws of 2015

- Authorizes an additional \$1 billion over 10 years in bond authorization for State Superfund. Up to \$100 million per year may be appropriated.
 - Up to 10 percent of those funds can be used for the Environmental Restoration Program (ERP).
- Continues Brownfield Cleanup Program (BCP) tax credits for 10 years with program reforms.
- Clarifies (redefines) the definition of brownfield site.
- Creates new eligibility requirements for tangible property tax credits for BCP sites in a city with a population of a million or more (New York City).

Part BB of Chapter 56 of the Laws of 2015

- Limits eligible costs for the redevelopment tangible property tax credit and restructures tax credits.
- Makes changes to the ERP.
- Grants authority for a BCP-EZ Program:
 - Subpart 375-5 can be used (currently reserved);
 - Intended to provide a “Lite” version of the program; and
 - Legislation requires same comprehensive liability release.

2016 Regulatory Changes

- DEC completed a first rule making as required by 2015 legislation.
- Defined “affordable housing” and “underutilized” at 375-3.2.
- Used to determine eligibility for tangible property tax credits in New York City. Sites must be:
 - located in designated En-Zone; or
 - an affordable housing project; or
 - upside down/underutilized.
- Amended “brownfield site” definition - Exceed Soil Cleanup Objectives (SCOs) instead of complicating development.
- Final regulations: Adopted July 13, 2016; Effective August 12, 2016.

Overview: 2018-19 Proposed Changes

Second rule making would amend Part 375 to:

- Incorporate provisions as specified in Chapter 56 of the Laws of 2015 as they pertain to the Environmental Remediation Programs in Part 375.
- Increase consistency across all remedial programs administered by the Division of Environmental Remediation (DER).
- Incorporate needed changes, clarifications, and modifications based on the experience developed during first decade of implementing the BCP.
- Incorporate SCO changes resulting from the statutorily required five-year review.

Organization of Part 375

6 NYCRR 375 Environmental Remediation Programs

Subpart 375-1 General Remedial Program Requirements

Subpart 375-2 Inactive Hazardous Waste Disposal Site
Remedial Program (a.k.a. State Superfund Program)

Subpart 375-3 Brownfield Cleanup Program

Subpart 375-4 Environmental Restoration Program

Subpart 375-5 Reserved

Subpart 375-6 Remedial Program Soil Cleanup Objectives

Subpart 375-1

General Remedial Program Requirements

Subpart 375-1: General Remedial Program Req'ts

- **Change of Use** – Definition will be consolidated and placed in the definitions section (375-1.2). This currently is defined in the different subparts.
- **Responsible Party** – Definition will be moved from Subpart 375-2 to Subpart 375-1.
- **Historic Fill** – Definition will be deleted since it is not used in Part 375. It has already been deleted from Part 360.

Subpart 375-1: General Remedial Program Req'ts

- **Payment of State Costs** – Clarify several areas related to timelines, addressees and contact information.
- **Termination of Agreements** – Clarify that DEC has the authority to terminate agreements/orders. Under current regulations this is not specified.
- **Dispute Resolution (Order/Agreement)** – Clarify that requests for a dispute resolution should be sent to DER Division Director who will then designate the individual to hear the dispute.

Subpart 375-1: General Remedial Program Req'ts

- **Ground floor use** – When ground floor use will differ from upper floor use, the less restrictive use (e.g., residential rather than commercial) shall apply, unless otherwise approved by DEC.
- **Environmental Easement (EE)** – An EE will not be required where the only restriction to be placed on a site is a prohibition on the use of groundwater and the local municipality has a groundwater use prohibition in statute or ordinance.

Subpart 375-1: General Remedial Program Req'ts

- **Site Classification (All Remedial Programs)**
 - DEC has always had the authority to create administrative classes.
 - Definitions will be included at 375-1.7 for Class A, C, N and P.

- **Work Plans and Reports – Clarify engineer's responsibilities and specify:**
 - all work plans must include specified schedules, and
 - daily reports are required for all work completed under a work plan.

Subpart 375-1: General Remedial Program Req'ts

- **Final Engineering Report (FER)** - Specify that the FER must include:
 - a summary of all Interim Remedial Measures (IRMs);
 - a description of the work completed in accordance with the work plan and any work that did not comply with the work plan;
 - list of the wastes and documentation of disposal/manifests, etc.; and
 - clarify who the certifying party is and the level of oversight required to be the certifying party.

Subpart 375-1: General Remedial Program Req'ts

- **Certificate of Completion (COC)**
 - Revisions specify that DEC may revoke a COC if there is a misrepresentation of material fact demonstrating that the applicant was a volunteer or that the site met the criteria for the tangible property credit.
 - Clarify that the COC may be transferred to a successor to a real property interest, including legal, equitable or leasehold in all or part of the site.
 - Expressly state that the COC may not be transferred to a responsible party.

Subpart 375-1: General Remedial Program Req'ts

- **Plume Containment/Stabilization** - Clarify that while a BCP volunteer does not need to remediate off-site, if there is a plume migrating off-site, the volunteer must prevent further migration off-site (to the extent feasible).
- **Permits** - The 2006 Part 375 regulations intended to provide DEC the discretionary authority to exempt other entities from permit requirements when completing a cleanup under DEC oversight. Revisions clarify and state that DEC can waive permit requirements for projects led by DEC.

Subpart 375-2

Inactive Hazardous Waste Disposal Site
Remedial Program (State Superfund)

Subpart 375-2: Inactive Hazardous Waste Disposal Site Remedial Program

- **Cash Out Authority** - Revisions clarify that DEC has the authority to enter into a “cash out” consent order in circumstances where it is implementing a remedy.
- Allow the State to use institutional controls on existing residential properties.

Subpart 375-3

Brownfield Cleanup Program

Subpart 375-3: Brownfield Cleanup Program

- Since its creation in 2003, the BCP has been a powerful tool to remediate contaminated sites and spur economic and environmental rebirth in cities across the State.
 - DEC has received 1,124 applications.
 - Issued 364 Certificates of Completion (COCs) to parties who have successfully completed their remedial projects.
 - About 400 sites remain active in the program.

Subpart 375-3: Brownfield Cleanup Program

With its success, the BCP continues to evolve.

- Reforms to the program were made in 2008 and 2015 in part to address generous redevelopment tax credits and help ensure that sites in blighted or low-income neighborhoods received needed tax credits to advance a project.
- DEC is proposing more changes with additional revisions to Part 375.

Subpart 375-3: Brownfield Cleanup Program

- **Eligibility**
 - Changing the description of eligible sites to harmonize with the changes to the statute (e.g., removed presence of contamination and replaced it with SCO exceedances). Further defines the information required to demonstrate “contamination” for eligibility purposes.
 - Class 2 sites may now be eligible if owned by a volunteer, unless a potentially responsible party (PRP) search reveals a viable PRP.

Subpart 375-3: Brownfield Cleanup Program

- **Applications**

- Requirements being revised to make clear that a Volunteer applicant must provide information relative to the PRP search for Class 2 sites.
- TPC and application approval - For sites seeking a Tangible Property Tax Credit (TPC) determination, the notification for TPC eligibility would be made at the same time as BCP eligibility.
- Public Interest Consideration - Include the factors that DEC may use to evaluate whether an application will serve the public interest (e.g., Consent Order already in place).

Subpart 375-3: Brownfield Cleanup Program

- **Definitions:** DEC is defining the following terms to align with the intent of 2015 legislation.
 - **Cover system requirements** - clean soil cover 1-2 feet thick based on intended use with a clear demarcation layer as a visual cue defining clean soil from remaining contamination where possible/appropriate.
 - **PRP search** - outline expectations for a potentially responsible parties (PRP) search.
 - **Site preparation costs** - while this definition is revised and pertinent, it will not be included in 375-3 because Part BB of Chapter 56 of the Laws of 2015 specifically defined site preparation costs in the Tax Law, where this definition can be found.

Subpart 375-3: Brownfield Cleanup Program

- **(NEW) Tangible Property Tax Credits (TPCs)**
 - Formalize the requirements related to TPCs from the statute related to the source of contamination.
 - Include the additional requirements for TPCs (for sites in a city with a population of million or more) to demonstrate need for substantial government assistance when applying for TPCs under the “underutilized” gateway.

Changes to Tangible Property Tax Credits

Tangible Property Tax Credits	Accepted prior to June 23, 2008	Accepted after June 23, 2008	Accepted after July 1, 2015
Baseline	10-12%	10-12%	10%
Plus the sum of the following:			
Environmental Zone	8%	8%	5%
Track 1 Cleanup	2%	2%	5%
BOA	N/A	2%	5%
Affordable Housing	N/A	N/A	5%
Manufacturing	N/A	N/A	5%
Maximum Percentage	22%	24%	24%
Cap - Manufacturing	N/A	\$35M or 3X Site Prep	\$35M or 3X Site Prep
Non-Manufacturing		\$45M or 6X Site Prep	\$45M or 6X Site Prep



Subpart 375-3: Brownfield Cleanup Program

- **Remedy Selection Class 2 Sites** - For Class 2 sites admitted to the BCP where:
 - Record of Decision has been issued, the BCP applicant would implement the on-site elements of the selected remedy, subject to DEC approval of what constitutes the on-site elements of the remedy; or
 - Site remedy is to be developed under the BCP, a feasibility study would be required in place of the alternatives analysis, and remedy selection would be made by DEC.

Subpart 375-3: Brownfield Cleanup Program

Cleanup Tracks

- “Conditional Track 1”
 - Currently, volunteers would be allowed to achieve a Track 1 cleanup through implementation of long term IC/ECs for soil and groundwater.
 - In future, volunteers would only use IC/ECs to address groundwater concerns, and would first receive a Track 2 COC. After 5 years, if groundwater contamination is reduced to asymptotic levels, then a Track 1 COC would be issued.

Subpart 375-3: Brownfield Cleanup Program

Cleanup Tracks [continued]

- **IC/ECs for Track 2**
 - Specify that site cover cannot be used as a long term EC to achieve applicable SCOs, but ICs (e.g., Environmental Easement) may be used to address contamination below 15 feet.
 - Remedial program may use long term IC/ECs to address groundwater or soil vapor contamination.

Subpart 375-3: Brownfield Cleanup Program

Cleanup Tracks [continued]

- **Track 4 Cover system and Tax Credits**
 - Clarify how exposed soils on a Track 4 site would be addressed.
 - For example, building slabs used to meet the cover system requirements for restricted residential uses would be deemed to be equivalent to 2 feet of soil cover.
 - Similarly, buildings on a commercial Track 4 site will be treated as the equivalent of 1 foot of soil cover for tax credit purposes.

Subpart 375-3: Brownfield Cleanup Program

- **IC/ECs (NEW)**
 - For sites with required IC/ECs, the environmental easement (EE) shall be executed within 180 days of the commencement of the remedial design or at least 3 months prior to the anticipated date of the COC, and then subsequently recorded.
- **Off-site investigation:** Clarify that a volunteer may be required to complete an off-site investigation to complete the exposure assessment including groundwater and SVI sampling.
- **375-3.11 Miscellaneous:** Clarify that remediation not subject to SEQRA, but redevelopment is.

Subpart 375-4

Environmental Restoration Program

Subpart 375-4 Environmental Restoration Program

- Since the program's creation in 1996, 129 sites have been remediated under the ERP. About \$180M committed from the 1996 Bond Act.
- However, due to lack of funding, DEC had not been accepting new ERP applications over several years. With the new funding commitment, DEC reinstated the program in 2018 for sites with completed RODs.
- DEC received 5 grant applications and expects to announce awards in December 2018.

Subpart 375-4 Environmental Restoration Program

- **Definition:** Revise the definition of “State Assistance” to clarify that the State (specifically DEC) can:
 - undertake the cleanup using ERP funds,
 - complete the remediation,
 - incur the costs on behalf of the municipality, and
 - be paid by the municipality through the ERP.
- **Other:** Allow DEC the authority to prioritize ERP applications based on need and environmental benefit.
- **375-4.11 Miscellaneous:** Clarify that remediation is not subject to SEQRA, but redevelopment is.

Subpart 375-6

Soil Cleanup Objectives

Soil Cleanup Objectives

- Most changes are less than a factor of 10.
- Ready for PFOA, PFOS if a Maximum Contaminant Level is announced.
- Contract-Required Quantitation Limit (CRQL) issue:
 - Currently references the Analytical Services Protocol (ASP), which is no longer maintained.
 - Querying labs to see what they actually are capable of reporting, which should be completed in Fall 2018.
 - DEC will compare the results to EPA's Contract Laboratory Program.

Major changes in the SCOs: Metals

- Hexavalent chromium:
 - Ecological increased from 1 to 20.
 - Calculated residential 0.033.
- Mercury:
 - DOH proposed to separate elemental, organic and inorganic salts.
 - Decision has been made not to, but a footnote is provided.

Major changes in SCOs: Volatile Organic Compounds

- Many chemicals lowering by a factor of 2 or 3.
- 1,1-DCE: Residential lowered from 100 to 0.41.
- Trimethylbenzene: Residential lowered from 47 to 0.51.
- 2 New Chemicals:

Chemical	CASN	Resid.	RR	Com	Ind.	Eco	GW
Aniline	62-53-3	6.7	8.1	36	36	32	0.038
Nitrobenzene	98-95-3	0.77	1.8	8.9	8.9	2	0.08 ^f



Outreach Activities (Completed & Planned)

- During the past year, DEC completed preliminary outreach with various organizations. DEC received valuable feedback on proposed revisions.
- DEC will conduct additional outreach after publishing the proposed rules:
 - possible webinars; public meetings for stakeholders; and posting key revisions pertaining to this rule making on DEC's website.
 - Public Hearings: DEC is required to hold at least two public hearings for this proposed rule making. Hearing dates, times and locations will be published in the *State Register* and posted on its website and in the *Environmental Notice Bulletin*.
- DEC looks forward to future discussions as the proposed rule making package is completed and released for public comment (in 2019).

Thank You

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Section

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