

**NEW YORK
CITY BAR**

**COMMITTEE ON
ENVIRONMENTAL LAW**

CHRISTINE FAZIO
CHAIR
2 WALL STREET
NEW YORK, NY 10005
Phone: (212) 732-3200
Fax: (212) 732-3232
cfazio@clm.com

**COMMITTEE ON
LAND USE PLANNING
AND ZONING**

MARGARET P. STIX
CHAIR
11 PARK PLACE, SUITE 701
NEW YORK, NY 10007
Phone: (212) 253-6965
Fax: (212) 253-6968
mstix@nycetc.org

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Robert W. Schick, P.E.
New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, NY 12233-7014

**Re: New York City Bar Association Environmental Law and
Land Use Planning and Zoning Committees' Comments
on Proposed Regulations -- 6 N.Y.C.R.R. Part 375
Environmental Remediation Program**

Dear Mr. Schick:

The Environmental Law and Land Use Planning and Zoning Committees of the New York City Bar Association (the "Committees") respectfully submit these comments in response to the recently proposed brownfield regulations by the New York State Department of Environmental Conservation ("NYSDEC") to be promulgated at 6 N.Y.C.R.R. Part 375, the Environmental Remediation Program. The proposed regulations address NYSDEC practices associated with the New York State Superfund, the Brownfield Cleanup Program (the "BCP") and the Environmental Restoration Program.

The Committees first wish to commend the NYSDEC for preparing the proposed regulations, which define different cleanup tracks as envisioned under the Brownfield Cleanup Act, and set soil cleanup objectives for each cleanup track. The Committees believe that, overall, the proposed regulations do in fact clarify the State's requirements under the current proliferation of remediation programs, and that they will reduce confusion within the brownfield community and encourage the use of industry best practices. The proposed regulations should also promote consistency among NYSDEC regions, improve public awareness of what is required for each brownfield site's cleanup and lower transaction costs for both the agency and the user community.

Nonetheless, the Committees have some significant concerns with respect to aspects of the proposed regulations that they believe will adversely impact the use of the BCP in many contaminated sites in the New York City metropolitan area. First, while the eligibility guidelines set forth in the NYSDEC's Draft Brownfield Cleanup Program Guide are not included in the proposed regulations, the Committees continue to be concerned with the NYSDEC's decision to exclude sites with historic fill material from the BCP. In particular, NYSDEC is denying entry to proposals that would serve an important public purpose (e.g., facilitating the development of low income housing or public parks where the contamination on a proposed development site is comprised of historic fill, even though the site otherwise meets the statutory definition of a brownfield site). The purpose of the BCP is to help communities restore underdeveloped areas that are contaminated into economically revitalizing or public purpose projects. The eligibility guidelines effectively deny access to the BCP program to many sites in urban areas which suffer from environmental justice issues and which most need the revitalization envisioned by the statute.

Moreover, the Committees are concerned that the application of the eligibility guidelines in an across-the-board fashion exceeds the NYSDEC's authority in two ways. First, the use of these guidelines as determinative of a site's eligibility, despite the NYSDEC's deliberate failure to promulgate them as regulations, appears to violate the State Administrative Procedure Act. As the NYSDEC apparently intends to apply the guidelines, they constitute a "rule" for which a rulemaking procedure is required, as a "statement ... of general applicability that implements or applies law." SAPA §§ 102(2) and 202. Second, the Committees are concerned that the guidelines, particularly the "historic fill rule," undercut, rather than interpret, the broad definition of "brownfield site" contained in the statute, which is "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant." ECL § 27-1405(2). The existence of contaminant-laden historic fill on many sites will complicate redevelopment, especially considering the proliferation of E-designations in New York City, requiring developers to remediate properties to the satisfaction of the New York City Department of Environmental Protection. For projects with a low profit margin such as affordable housing, such requirements could actually prevent development without the availability of BCP tax credits. Excluding such sites because they are contaminated with constituents of historic fill does not seem to relate to the factors for consideration of the "public interest" that the NYSDEC is directed to consider pursuant to ECL § 1407(9), all of which address past acts of the applicant. While the NYSDEC's consideration is not limited to these precise factors, general rules of statutory construction dictate that any additional considerations would be of the same nature as the examples provided. Therefore, the eligibility guidelines should be subject to SAPA rulemaking, subject to public review and comment.

The Committees are also concerned about the draft regulations' requirement that groundwater be cleaned to the level of its classified use (i.e., drinking water) because New York City groundwater is not used for drinking water and has been contaminated by multiple users. Thus, the Committees do not believe that the restoration of groundwater to its classified use in New York City is feasible or reasonable, and believe that this requirement could potentially impact the ability of volunteers developing smaller projects to participate in the BCP.

Other specific comments are as follows:

1. NYSDEC does not currently offer a release or “no further action” determination for the voluntary cleanup of sites that are ineligible for the BCP. Presently, developers of such sites have the untenable choice of pursuing NYSDEC enforcement mechanisms or proceeding “at-risk” with no NYSDEC release or completion notice. There should be a process encouraging voluntary cleanup of contaminated sites. A new Voluntary Cleanup Program (“VCP”) is necessary to fill in the gap for BCP ineligible sites or sites that developers choose to clean up effectively without the delays occasioned by BCP public participation requirements.
2. The proposed regulations are silent regarding the availability of cost recovery under CERCLA for sites receiving a certificate of completion, which is a matter of particular concern given the U.S. Supreme Court’s decision in Cooper Industries, Inc. v. Aviall Services, Inc.
3. Vapor intrusion is mentioned in the proposed regulations, but there are no cleanup standards designed to address it.
4. The proposed definition for “Grossly Contaminated Soil” has been expanded to include soil, sediment, surface water or groundwater which contains free product or mobile contamination that is identifiable either visually, through strong odor, by elevated contaminant vapor levels or is otherwise readily detectable without lab analysis. This proposed definition is confusing because: (a) “mobile” contamination is not defined in the proposed regulations; (b) “strong odors” are inherently subjective; and (c) elevated contaminated vapor levels cannot be identified without lab analysis. NYSDEC should rely on quantitative data from remedial investigations to make remediation decisions.
5. Historic fill is defined in the proposed regulations, but there are no specific standards for excluding historic fill containing constituents above soil cleanup objectives from regulation or cleanup requirements. There are also no specific remedies identified for remediation of constituents in historic fill that exceed soil cleanup standards. In some cases, the proposed definition for “Grossly Contaminated Soil” could overlap with the definition of historic fill material. Historic fill may contain construction debris, dredge spoils, incinerator residue, demolition debris, fly ash and non-hazardous solid waste. Each of these historic fill materials may be identifiable visually or through strong odors, even though there is no connection to chemical production waste or waste from processing of metal or mineral ores, residues, slag or tailings.
6. The proposed dispute resolution process resides within NYSDEC, and terminates at the Assistant Director level of NYSDEC. At that point, the dispute resolution process does not extend, postpone or modify obligations unless the NYSDEC agrees in writing to an extension, postponement or modification; or a Court determines otherwise. There should be some identified administrative law process to resolve regulatory disputes outside of the NYSDEC.

General Remedial Program Requirements

375-1.2(a), Definitions

Why does “all appropriate inquiry” not have the same meaning the U.S. Environmental Protection Agency gives it? Due diligence standards are not defined in the proposed regulations, creating confusion over the use of competing “ASTM” standards.

375-1.12, Permits

NYSDEC’s authority to waive “Department-issued permits” that it awards pursuant to federal laws (e.g., SPDES permits in lieu of NPDES permits under the Clean Water Act or air permits under Part 201 as required under the EPA-approved State Implementation Plan) is doubtful. While the proposed regulations later state, “All required federal permits must be obtained” (see 375-1.12(f)), it is unclear what state permits could actually be waived as most state permits originate under federal law. While tidal or freshwater wetland permits may originate as a matter of state law, it is unclear why NYSDEC would want these permits waived. Overall, the waiver from permitting is unclear and does not make much sense. Further, it is hard to imagine what permits the NYSDEC is actually considering can and should be waived.

Inactive Hazardous Waste Disposal Site Remedial Program

375-2.2, Definitions

In the Inactive Hazardous Waste Disposal Site Remedial Program and the BCP, the regulations should clarify whether the term “public benefit corporation” applies only to local entities. This comment applies to 375-4.2(f) as well.

Brownfield Cleanup Program, 375-3

General Comments:

The regulations should clarify whether both owners and tenants need to be parties to a Brownfield Cleanup Agreement. It seems reasonable to require tenants to include owners in the process in some way.

NYSDEC is required to undertake enforcement against Potential Responsible Parties when a volunteer enters the BCP, pursuant to ECL § 27-1411(6). The regulations do not address this issue.

Does the dispute resolution process set forth in 375-1.5 apply to revocation and modifications of the certificate of completion?

The Committees appreciate the opportunity to comment on the proposed regulations and look forward to working with NYSDEC as it moves forwards on developing and implementing the New York Brownfield program.

Respectfully submitted,

Environmental Law Committee

By: Christine Fazio
Christine Fazio, Esq.

Land Use Planning and Zoning Committee

By: Margaret Stix CAF
Margaret Stix, Esq.