New York City Brownfield Partnership

Comments on New York State Department of Environmental Conservation's

Proposed Part 375 Revisions

The New York City Brownfield Partnership ("NYCBP") is a New York State nonprofit organization whose mission is to serve as a primary resource for information on brownfields and brownfields redevelopment in New York City, advance public awareness and understanding of benefits, opportunities, and best practices of brownfield redevelopment, promote excellence in brownfield redevelopment by honoring successful brownfield projects, support the education and training of brownfield professionals, workers, and students, and foster collaborative relationships among brownfield developers, property owners, government agencies, and community groups. Its membership includes the leading environmental, scientific and engineering practitioners, governmental agencies and community groups who regularly work on remedial investigation, remediation, and redevelopment projects throughout New York.

The NYCBP and its members have a strong interest in the continued success of the New York State Brownfield Cleanup Program (BCP). To monitor its progress, in 2021, the NYCBP commissioned an update of the groundbreaking 2014 study (updated in 2015) analyzing the impact of the BCP on the cleanup and redevelopment of brownfield sites in New York State. The study, authored by Barry F. Hersh, Clinical Associate Professor at New York University's Schack Institute of Real Estate, analyzes the overall NYS BCP, emphasizing what has occurred since 2015, which is the third generation of the program. The updated 2021 study confirmed the importance of the BCP, which has fostered the cleanup and redevelopment of sites in all regions across New York State and 40 counties. BCP projects in New York City alone have supported development of 20,000 residential units, of which 6,400 are affordable housing units. More than half of all BCP projects have been located in economically distressed En-Zones, with the proportion of projects in En-Zones increasing since 2015; many BCP projects are also in Environmental Justice and Brownfield Opportunity Areas. Remediation and redevelopment under the BCP has generated more than $17 billion in economic development throughout New York State. The study has further shown that for every dollar in brownfield tax credits earned, the State and public are receiving almost seven dollars in economic investment in return, and this does not even include the new tax revenue and jobs being generated by these new projects which are transforming parts of the State that are most in need. The study overwhelmingly confirmed that the BCP has been and continues to be a success and model for programs throughout the Country.

On April 9, 2022, New York State Governor Kathy Hochul signed into law a ten-year extension of the BCP including the associated tax credit incentives as part of the 2022-23 NYS Budget. This makes the proposed revisions to the BCP regulations found at 6 NYCRR Part 375 all the more important. The NYCBP supports and applauds the New York State DEC of Environmental Conservation's ("DEC") in its recent efforts to revise and the update BCP regulations and welcomes the opportunity to offer these comments on its proposals. To review DEC's proposed amendments to 6 NYCRR Part 375, the NYCBP created a Legislative/Regulatory Committee Part 375 Task Force (the "Task Force"). The Task Force reviewed the proposed amendments and offers its comments,

on behalf of the NYCBP, as set forth below, which are focused on thirteen regulatory amendments the Task Force concluded needed to be withdrawn or revised.

1. § 375-1.6(c)(4)(ii-iii) – Certification of Final Engineering Reports - The NYCBP recommends that DEC withdraw or modify this amendment since the proposed language, does not appear to address the purported issue it is meant to address, contradicts State Education Law, adds to confusion among Environmental and Professional Engineering firms, and disproportionately impacts small and MWBE certified businesses. According to DEC's Regulatory Impact Statement, it has been DEC's experience that inconsistent and/or lacking supervisory practices by the remedial party have resulted in Final Engineering Reports which do not provide the information necessary to accurately document remedial activities. The proposed amendments attempt to address this issue by requiring that the certifying engineer "must be the person in the firm with direct responsibility for personnel engaged in the inspection and engineering provided by the same firm to assure the implementation of the project was in accordance with the approved remedial design and/or remedial action work plan". This new requirement would adversely impact many professional engineers and environmental professionals alike. The proposal contradicts State Education Law, which expressly acknowledges that professional engineers may rely on the services of qualified third-party consultants. This view has been confirmed by the New York State Society of Professional Engineers its letter, dated April 7, 2022, requesting that DEC reconsider this regulatory amendment, see attached. If improvements in the quality and consistency of report submittals was the intended purpose of DEC'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. Without further revision, this provision is potentially discriminatory against minority and female owned firms.

2. § 375-3.3(a)(3) – BCP Eligibility - Requirement of Investigation Report - The NYCBP recommends that DEC modify this proposed amendment. DEC'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) requires an investigation report to show that a site requires remediation, based on the "current, intended and reasonably anticipated future land use of the site." The DEC's proposal should be revised to accurately track the statutory language set forth in Section 27-1407(1).

3. § 375-3.3(a)(4) – BCP Eligibility – Factors to determine if a Site Requires Remediation - The NYCBP recommends that DEC modify this amendment because the 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 whether a site "requires remediation" depends on "the remedial requirements of this title," and the DEC must determine "eligibility and the current, intended and reasonably anticipated future land use of the site pursuant to section 27-1415." Accordingly, the proposed regulation exceeds the DEC's authority to determine whether a site requires remediation, and the proposed regulation should

be withdrawn or revised according to the above-referenced statutory provisions. Further, DEC testified during the April 5th regulatory hearing that the purpose of this provision was to reduce the number of sites participating in the program. However, the new $50,000 fee to participate in the BCP that was enacted by Governor Hochul on April 9 should provide more than sufficient resources to resolve DEC's staffing issues. Therefore, the goal of these new regulations should be to maximize participation in the State's only true voluntary remediation program.

4. § 375-3.3(a)(5) – Reasonably Anticipated Use of Site - The NYCBP recommends that DEC modify this amendment. The proposed amendment 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, eligibility turns on "the current, intended and reasonably anticipated future land use of the site pursuant to section 27-1415 of this title." Section 27-1415 of the ECL already sets forth a non-exhaustive list of sixteen factors for making this determination. The DEC's proposal, therefore, should be revised to reflect Section 27-1407(1) and Section 27-1415.

5. § 375-3.2(e) – New Definition of Cover System Requirements or Site Cover and § 375-3.6(f) – Requirement to Calculate the Cost of the Equivalent Soil Cover System – The NYCBP recommends that DEC withdraw or modify this amendment. The NYCBP has reviewed comments made to these regulatory sections by the Environmental and Energy Law Section of the New York State Bar Association and concurs with its assessment and comments, which are summarized below for convenience. 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 DEC's authority. Viewed together with the intentions set forth in DEC's Regulatory Impact Statement, these proposals focus on dictating tax outcomes—a role for the DEC that is neither permitted nor directed by statute, and one that has been expressly and repeatedly deemed off-limits by a number of court precedents that cannot be overturned by regulation.

   With respect to the definition of cover system requirements, DEC's proposal does not appear to provide an environmentally-focused purpose since soil is far less of a protective cover material than a hardscape material such as concrete or asphalt. Similarly, the second proposal would require applicants to create 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. This disconnect from the actual remedy is contrary to the definition of site preparation costs under the Tax Law, which allows for a portion of the foundation to count toward site preparation costs.

   The DEC's cover system proposals conflict with the clear language and intent of the 2015 BCP statutory amendments, which specifically 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 DEC'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 DEC's proposals would incentivize applicants to implement less protective remedies in the name of managing tax outcomes. Moreover, the DEC'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.

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 costs for asphalt and/or concrete updated on an annual basis 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 or use of the actual costs multiplied by a 1- or 2-foot thickness since the 2015 amendments directed for the promulgation of regulations (to the extent none existed) to create such a formula so that site preparation costs can be more readily calculated.

In summary, the DEC has stated in its regulatory statement that these cover system proposals have been designed to manage tax outcomes. Such a focus, and the related amendments proposed, 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 DEC to dictate tax outcomes as a "fiscal watchdog." For the foregoing reasons, the proposal exceeds the DEC's authority and should be withdrawn and replaced with reference to a minimum thickness of concrete or asphalt as described above.

6. § 375-3.8(e)(1) – Conditional Track 1 Cleanups - The NYCBP recommends preserving the existing regulatory language. DEC is proposing to eliminate the provision in the existing

regulations (§375-3.8(e)(1)) allowing sites to receive a Track 1 COC despite the use of short-term institutional or engineering controls provided remedial objectives are expected to be met within 5 years. This proposed amendment would make it very difficult to obtain Track 1 tax credits for sites in brownfield neighborhoods burdened with area-wide groundwater and soil vapor pollution as there is currently no statutory or regulatory mechanism to upgrade to a higher track cleanup in the Tax Law in the event the institutional or engineering controls are no longer needed. Therefore, we recommend that the existing regulations permitting Conditional Track 1 cleanups continue to be implemented.

7. § 375-3.8(e)(2)(iii) - Preserve Track 2 Statutory Intent in Regulations - 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 depth referenced in the current regulations is unclear and does not appear to correspond to any particular scientifically or engineering-determined depth. On certain sites with large and deep underground storage tanks, contamination may only start at 15 feet below grade surface. 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.

8. § 375-3.3(b)(2)(ii) – Requiring Applicants to Conduct PRP Searches - The NYCBP recommends that DEC withdraw the proposed amendment requiring Applicants to Conduct PRP Searches for Class 2 Sites. The proposed revision to §375-3.3(b)(2)(ii) creates a requirement that is inconsistent with ECL § 27-1405(2)(a), which clearly indicates that this responsibility lies with DEC, not a brownfield applicant.

9. § 375-3.8(b)(2)(i)) – Off-Site Sampling by Volunteers - The NYCBP recommends that DEC withdraw the proposed amendment that a Volunteer may be required to perform quantitative off-site sampling of soil groundwater and soil vapor as opposed to the statutorily required qualitative assessment of off-site contamination. These proposed amendments undermine the policy considerations of the program and are contrary to the express intent of the legislature to limit remedial obligations of Volunteers. A qualitative assessment is clearly defined in Environmental Conservation Law §27-1415 and is primarily concerned with exposure pathways, not assessing contaminant levels off-site. Further, the Environmental Conservation Law provides that the onus of investigating and remediating off-site contamination falls upon either the responsible party, or DEC in the event they are unable to locate a responsible party. Lastly, the protections that Volunteer status provides to a *bona fide* prospective purchaser have driven the assumption of remedial obligations by innocent actors seeking to reinvest in communities impacted by brownfields. Without the certainty that remedial activities will be

contained within the four corners of the BCP Site, the risk of investing in brownfield projects increases. Without such participation, the State would have to rely primarily on the enforcement actions to drive the remediation of brownfield sites, which are far less efficient and more costly than privately driven brownfield cleanups.

10. §375-1.5(b)(6) and 375-3.5(c)(4) – Termination of Agreements and COCs - The NYCBP recommends that DEC withdraw or modify this amendment. The broad termination authority proposed goes against the spirit of voluntary cleanups and may chill lenders' willingness to finance the cleanup and redevelopment of contaminated sites. Tethering program participation to the contemplated remedial schedule ignores the reality of project construction and remediation. Coordinating a remedial project concurrently with a redevelopment project is a complex undertaking, with numerous intangible variables that warrants flexibility. If not withdrawn, DEC should revise its proposed regulations to account for the flexibility necessary for parties that are making good faith efforts to comply with schedules and terms. This regulation also deprives the remedial party of their right invoke dispute resolution if there are disagreements over a work plan implementation. Moreover, terminating a rightfully earned COC due to a statement about the tax credits made by a remedial party, which the DEC in its solely discretion views as a misrepresentation will truly chill investment and goes way beyond the COC termination authority provided to the DEC in ECL § 27-1419. We respectfully recommend the deletion of these two new regulations.

11. § 375-1.2(e) – Change of Use - The NYCBP recommends that DEC withdraw the proposed requirement for submission of work plans for any "Change of Use". This requirement is inconsistent with ECL § 27-1425, which only requires notice of the proposed change. ECL § 27-1425 states that DEC has 45 days after receipt of the complete notice to provide the person giving such notice with a written determination that such change of use will or not be authorized, together with the reasons for such determination. Submittal of an additional Work Plan for any and all Changes of Use (as opposed to the current "Change of Use form") is not only onerous for the preparer but will result in unnecessary increased paperwork for DEC staff. In addition, parties already must certify compliance with all institutional and engineering controls. *See* ECL § 27-1415(7). A Work Plan should only be required when the proposed Change of Use results in a higher level of use (i.e. residential use to unrestricted use) or has a physical impact on the Site's remedial action.

12. § 375-1.6(a)(3) - Daily Reports for All Activities Under Work Plans - The NYCBP recommends that DEC withdraw the proposed requirement for submission of daily reports during all field activities under a Work Plan. All activities during the remedial investigation phase of a project are included in the remedial investigation report; completion of additional daily reports is repetitive and burdensome to the environmental professional.

13. § 375-1.1(g)(1) – Reference Updated ASTM Standard - The NYCBP reminds DEC that the U.S. Environmental Protection Agency ("EPA"), on March 14, 2022, issued both a final rule incorporating revised ASTM International standard practices, ASTM International's E1527–21 "Standard Practice for Environmental Site Assessments: Phase I Environmental

Site Assessment Process," and a proposed rule soliciting comment on this action. We recommend that DEC's regulations anticipate incorporation of this updated standard in anticipation of the final EPA rule going into effect in the Summer of 2022.