



Department of
Environmental
Conservation

Brownfield Cleanup Program (BCP)

Regulations: 6 NYCRR Part 375

Program Policy:

BCP Applications and Agreements

January 24, 2018

Air Waste Management Association
Niagara Frontier Section
Annual Enrichment Seminar

Part BB of Chapter 56 of the Laws of 2015

- Authorizes an additional \$1 billion over 10 years for State Superfund, and up to \$100 million per year
 - Up to 10 percent of those funds can be used for the ERP
- Continues BCPs tax credits for 10 years with program reforms
- Clarifies (redefines) the definition of a 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)

Preview of Potential Revisions to 6 NYCRR Part 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 (ERP)

Subpart 375-5 Reserved

Subpart 375-6 Remedial Program Soil Cleanup Objectives

Part BB of Chapter 56 of the Laws of 2015

- Limits eligible costs for the redevelopment TPCs and restructures tax credits
- Established a requirement for certain legacy BCP sites to complete the program and obtain certificate of completion by end of 2017
- Makes changes to the ERP

2016 Regulatory Changes

- As required by the 2015 legislation, DEC completed a first rule making with amendments to Part 375 which
 - Defined “affordable housing” and “underutilized” as used in the BCP
 - definitions are used as part of eligibility requirements for TPCs for brownfields in New York City. Sites must be:
 - upside down/underutilized;
 - located in designated En-Zone; or
 - an affordable housing project
 - Amended “brownfield site” definition.
 - Final regulations were adopted July 13, 2016 and became effective August 12, 2016

2017-2018 Proposed Regulatory Changes

DEC is currently developing* a second rule making to address additional regulatory changes that will amend Part 375 to:

- Incorporate provisions as specified in Chapter 56 of the Laws of 2015 as they pertain to the ERP 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 the first decade of implementing the BCP
- Incorporate legislative mandates, which modify the tax incentives offered under the BCP
- Incorporate soil cleanup objective (SCO) changes resulting from the statutorily required five-year review

Subpart 375-1: General Remedial Program Requirements

- **“Change of Use”** – Definition will be consolidated and placed in the definitions section (375-1.2). This was previously defined in the different subparts.
- **Site Classification (All Remedial Programs)** – DEC has always had the authority to create administrative classes to classify a site. A new section will be added at 375-1.7 to describe the specific categories that DEC may use and add information that is on DEC’s website.
- **Dispute Resolution (Order/Agreement)** – Clarifies 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 Requirements

- **Termination of Agreements** – Clarifies that DEC has the authority to terminate agreements/orders. Under current regulations this is not specified.
- **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 TPCs.
 - Expressly states that the COC may not be transferred to a responsible party.

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

Only one major revision:

- **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.

Subpart 375-3: Brownfield Cleanup Program

- **Definitions:** DEC is defining the following terms to be in line with the intent of 2015 legislation.
 - **“Cover system requirements” or “site cover”**- clean soil cover 1-2 feet in thickness based on intended use with a clear demarcation layer to serve as a visual cue defining clean soil from remaining contamination where possible/appropriate.
 - **“PRP Search”** - outlines expectations for a PRP search.

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 they are owned by a volunteer, unless a PRP search reveals a viable PRP.

- **Applications**

- Requirements being revised to make clear that the applicant must provide information relative to the PRP search.
- TPC and application approval - For sites seeking a TPC determination, the notification for TPC eligibility would be made at same time as BCP eligibility.
- Public Interest Consideration - Includes 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

•(NEW) Tangible Property Tax Credits

- Formalizes the requirements related to TPCs from the statute related to the source of contamination.
- Adds the additional requirements for TPCs (for sites in a city with a population of million or more) to demonstrate economic hardship.

•(NEW) Institutional Controls/Engineering Controls (IC/ECs)

- For sites with required IC/ECs, the 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.

DEC Program Policy

DER-32

Brownfield Cleanup Program Applications and Agreements

Program Policy DER-32: History

- June 22, 2010 – Initial Issuance
- June 17, 2015 – Rescinded
 - In April 2015, New York State budget included statutory reforms to the BCP
 - DER-32 no longer reflected current legislation
- On April 19, 2017 - Proposed revisions were available for 30-day public comment period until May 19, 2017
- Latest Revision dated: July 28, 2017

Program Policy DER-32

- DER-32 was revised to clarify:
 - Controlling date per statute to determine mandatory dates for achieving COCs at both Generation 1 and 2 sites is dictated by date in which a Brownfield Cleanup Agreement (BCA) was signed by DEC
 - Site's En-Zone status is considered locked-in as of the date of the original BCP application acceptance.
 - For payment of remaining costs due to the State per BCA:
 - Volunteer remains responsible until July 1, 2015
 - Participant remains responsible until date of BCA termination

Program Policy DER-32

- July 28, 2017 – Revised policy issued
- September 8, 2017 – Effective date
- Issued by the Division of Environmental Remediation
- DEC's guidance on BCP Applications and Agreements
 - Includes info on the amendment and termination process

DER-32: Pre-App meeting

- Goals
 - Overview
 - Basis for Acceptance
 - Eligibility and TPC Eligibility
 - Discuss Remedial Strategy
- Other Benefits
 - Your clients hear it first-hand
 - Set Expectations
 - Strategize

DER-32: How to get the most out of your Pre-App Meeting

- Provide pre-app worksheet at least 24 hours prior to meeting; further in advance is better
- Provide any data that you have in advance.
 - Need sufficient data to meet eligibility standard:
 - Exceedances of SCOs
 - Reasonably anticipated use

DER-32: Submitting the Application

- Application is submitted to Albany, Site Control Section
- Site Control makes the determination when the application is complete
- Letter of Completeness is issued, along with Notice, which must be circulated and published
 - Application materials are distributed
 - PM completes and circulates an eligibility memo
 - PA completes an eligibility memo
 - Eligibility meeting is held and Regional Hazardous Waste Engineer, PM and PA discuss the application

DER-32: Applications

- One application per development project
- May result in noncontiguous parcels being in one application
- DEC may consider more than one application in certain scenarios:
 - Exceeds 25 acres
 - Does not negatively impact the remedial program
 - Approach is not advanced to increase tax credits

DER-32: BCA Approval or Disapproval

- DEC will use its best efforts to notify the requestor regarding acceptance or denial* within 45 days of receipt of a complete application (60 days if a final Remedial Investigation or Remedial Action Work Plan is submitted with the application)
- Issues that may result in disapproval or the request for additional information:
 - Insufficient information to meet requirement of ECL 27-1405.
 - Requestor is subject to an enforcement action, see ECL 27-1407
 - Insufficient geographical description
 - Insufficient information to determine if the applicant is a volunteer
 - Insufficient information to determine whether the site is eligible for TPCs (primarily NYC with one exception)

DER-32: BCA Volunteer vs. Participant

Generally:

- Participants are responsible for off-site contamination and reimbursing DEC for oversight costs
- Volunteers not responsible for off-site contamination*
- Volunteers do not reimburse DEC for oversight costs
- If the BCA is issued to a Participant, any subsequently added party will also be a participant

DER-32: COCs

- One COC per site
 - no early COCs
 - no partial COCs
 - no contingent COCs
 - no splitting sites for COCs

BCA Amendments Chart

Amendment Needed

- Additional Applicant
- Change/Addition of Site Owner
- Change/Addition of Tax Parcel Numbers
- Change in Site Name
- Change in Site Address
- Minor Change in Acreage
- Significant Addition of Property*
- Property will be sold prior to COC issuance
- Property description has changed
- Substantial discrepancy with BCA is discovered
- Owner is not a party to BCA

*See DER-32, Section V.F.4.a

Amendment Not Necessary

- Change in Owner Address
- Change in Applicant Address
- Additional Contacts
- De minimus Change in Acreage
- Changes in Email Addresses

Major v. Minor Amendments

- Three* Generations of BCPs
 - Make amendment determinations more complex
- In addition to usual factors (new parcel added, amount of acreage added, anticipated future land use of new area, etc.) DEC must also determine which Generation of BCP will apply
- Major amendments require submission of full BCP application under the “3rd Generation” BCP

* As of January 1, 2018, there are only two generations of BCPs.

Effect of 3rd Generation BCP

- Major Amendments to a BCA will result in a separate Generation 3 site, or a combined site all subject to Generation 3.
- Being a 3rd generation site could have benefits for applicants (reuse of structure, different definition of site prep)
- Minor Amendments require amendment form, and sites will continue to be treated as 2nd generation, depending on when they entered the program
- DEC will attempt to reduce administrative burdens on two separate sites to the extent possible

Failure to meet 2017 COC deadline

- Generation 1 BCP sites (2003-June 2008) were required to obtain a COC by 12/31/2017 (per 2015 statutory amendments to BCP) - there are no remaining Generation 1 sites
- If a site failed to meet this deadline, it became subject to Generation 3 tax credit criteria
- DEC still maintains original BCA date for calculating accrual of eligible remedial/site prep costs
- Department of Tax & Finance continues to retain final authority and determinations on tax credits

Considerations/Clarifications and things that can trip you up

- BCP schedules and timelines
- How contamination unrelated to your site can unexpectedly impact your project (off-site groundwater plumes, soil vapor intrusion)
- Interim Remedial Measures (IRMs)
- General Questions

BCP Schedules

- Not too slow.....but not too fast!

Too Slow:

- The BCP incentivizes cleanup of known contamination ...so get to it or get out.
- Extended periods with no progress toward a COC will result in what we call 'An Opportunity to Cure' letter...you probably do not want one.

BCP Schedules (con't)

Too Fast:

- You are ready to get to work but do you have an approved work plan?
- Almost all work on a BCP site must be completed under an approved work plan.
- Completing work 'at risk' only means one of two things:
 1. you are risking the Department seeking to terminate your BCA!
 2. you are risking not receiving tax credits for the work you completed.

How Contamination Unrelated To Your Site Can Unexpectedly Impact Your Project

Soil: Soil must be evaluated at every BCP site not just to determine site related impacts but also to complete an off-site exposure assessment

Groundwater: Groundwater quality must be assessed at every BCP site...and not just to determine site related impacts.

Soil Vapor: Soil vapor will need to be assessed whenever DEC/DOH believes it may be a concern...even from an off-site source.

IC/ECs to address impacts from an off-site source can affect cleanup track.

Interim Remedial Measures (IRMs)

Definition (abbreviated) – Remedial action that can be undertaken without extensive investigation and evaluation.

IRMs are limited in scope:

- IRMs adversely limiting final remedy options are typically not allowed (most often assuming a track 4 cover remedy will be approved as final remedy).
- Must be a relatively defined area of contamination that can be addressed without extensive investigation.

IRMs (con't)

IRMs must be completed under an approved work plan:

- It is Required!
- Our approval of a work plan is the most direct means of proving allowable site preparation costs for tax credit calculations. Therefore the scope of the IRM must be defined in the work plan.

IRMs that are anticipated to be a significant portion of the final remedy require a 45-day comment period.

If all RI work is complete, the Department may require preparation of an alternatives analysis and final remedy.

Thank You

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