

July 31, 2002

NYS Department of Environmental Conservation
Division of Environmental Remediation
Attn: Andrew English
625 Broadway
Albany, New York 12233-7017

(e-mail: ajenglis@gw.dec.state.ny.us)

Re: Comments on DRAFT Voluntary Cleanup Program Guide (May 2002)

Dear Mr. English:

In response to the invitation to comment contained in the referenced DRAFT Program Guide, as published in the *Environmental Notice Bulletin* of May 29, 2002, the Broome County Environmental Management Council (BCEMC) is pleased to offer the accompanying comments.

The BCEMC is Broome County government's citizen advisory board on local environmental matters, with a mission to preserve, protect, and enhance the local environment. Our members are volunteers from a variety of occupational and professional backgrounds. In 2000, the BCEMC formed within its Natural Resources Committee a Brownfields Subcommittee (BFSC). The BFSC's membership consists of both BCEMC members and numerous "Guest Experts." The perspectives represented range from those of environmental lawyers, engineers, consultants, and university professors, to those of county and local planners and economic development officials, our County Health Department, the State DOT, our local electric utility, a national environmental group, and members of the public. Our meetings are open to the public and are often attended by students from Binghamton University, members of NYPIRG, and interested area residents.

Building on the efforts of our BFSC, the Broome County Department of Planning and Economic Development was recently awarded a U.S. EPA Brownfields Assessment Pilot Demonstration project grant. The County is also in the final stages of producing a consultant-generated Plan for Sustainable Economic Development, which is funded in part by a grant from the New York State Quality Communities Demonstration Program.

In short, Broome County (including the Binghamton metropolitan area) and its EMC have a deep and abiding interest in protecting and enhancing our natural beauty and quality of life (including environmental quality), while promoting sustainable economic development. The Department's Voluntary Cleanup Program and how it is structured and administered have a crucial bearing on our community's ability to strike a viable balance between our quality of life and sustainable development objectives.

It is from this vantage point and in this spirit that we offer the accompanying comments, prepared by the BCEMC's "Brownfields Subcommittee." We commend DEC for publishing the Draft Program Guide and for providing this opportunity for public review and comment—which affords the public its first opportunity to comment on the way the VCP is structured and administered. We hope DEC will act

promptly, following the close of the comment period, to issue a revised VCP Guide which reflects the valid and persuasive comments received.

We also hope that DEC will take advantage of the dialogue initiated by this process to convene—following the publication of a revised VCP Guide—public workshops around the State to exchange ideas on ways to further improve New York’s VCP and to make it more “user friendly.” (We stand ready to assist DEC in scheduling and hosting such a forum in Broome County.)

Our comments can be briefly summarized as follows:

- 1) The role of the State Department of Health (DOH) in the approval of VCP work plans and reports needs to be more carefully delineated to ensure that DOH’s inputs are timely, focused on relevant public health concerns, and consistent with the understandings established in the applicable Voluntary Cleanup Agreement (VCA).
- 2) DEC should take a more flexible role when it comes to issuing a liability release (or lesser form of assurance, such as a No Further Action letter) in appropriate cases (e.g., where a Phase II ESA properly concludes that all necessary response action has been taken), even where a property owner or prospective purchaser has not completed an investigation or other “substantive work” under a VCA.
- 3) It is not clear that existing law gives DEC the authority to enter into VCAs at “hazardous substance” sites that do not also involve State-regulated hazardous wastes and/or petroleum—at least without the knowing and explicit agreement of the volunteer to assume cleanup responsibility for these currently unregulated materials.
- 4) DEC should eliminate the anomalous SEQR coverage of voluntary cleanups undertaken by innocent non-owners (while responsible parties and owners are exempt), by amending the SEQR regulations to add such cleanups (at other than “Class 2” Registry sites) to the list of SEQRA-exempt “Type II” actions.
- 5) As an incentive to join the VCP, DEC should consider eliminating as reservations or re-openers in liability releases granted to innocent non-owners the discovery of previously unknown onsite or offsite contamination. Also, the Program Guide should add an exemption, similar to that recently established by federal law, absolving innocent owners from liability for contamination originating offsite on or under the property of an unrelated third party.
- 6) DEC should establish a firm policy against post-VCA Registry listings (or threatened listings) in circumstances likely to be counter-productive to the goals of the VCP. The threat of Registry listing should never be used to coerce innocent owners or non-owners to take responsibility for cleanup activities for which they have no legal liability or culpability.
- 7) The Program Guide should establish a clear role for “Qualitative Exposure Assessments” in setting risk-based cleanup standards or objectives appropriate (and protective) for the contemplated use, and in determining when there is a sufficient risk of downwind air emission exposures to justify the preparation of a Community Air Monitoring Plan.
- 8) In any case, the Program Guide needs to make more clear the intended role of the Community Air Monitoring Plan, which is referenced only in Appendix D.

- 9) DEC's insistence on the use of "licensed professional engineers registered in New York State," to the exclusion of all other environmental professionals, in the preparation of all remedial work plan documents, in personally overseeing and implementing the work plan and all construction activities, and in evaluating the adequacy of all remedies (whether or not involving engineering controls) is inappropriate and unnecessary.
- 10) If DEC decides to retain the use in the VCP, even for non-Registry sites, of the Part 375 remedy evaluation factors (many of which are not relevant and/or appropriate), it should at least add the following two factors (which ARE relevant and appropriate): (1) protectiveness of the remedy in light of the contemplated use; and (2) compatibility with opportunities for productive reuse.
- 11) Given the lack of VCP-specific cleanup standards, DEC should either drop the requirement that all of the "major SCGs for the site" [SCGs are State Standards, Criteria, and Guidance] must be listed and discussed, or allow cleanup volunteers to retain qualified environmental professionals (not limited to engineers) to document why some or all of these SCGs are inapplicable to a particular VCP site in light of site-specific conditions and/or the site's contemplated use. Fundamentally, however, the program needs VCP-specific cleanup standards. DEC should develop such standards (with or without DOH assistance), taking into account different types of sites, kinds of contamination, and anticipated uses.

Thank you for your consideration of these comments.

Respectfully submitted,

D. Duke Holdsworth
Chairman, Broome County EMC

Stacy Merola
Director, Broome County EMC

Attachment (pages 4 – 12)

**DETAILED COMMENTS OF THE BROOME COUNTY
ENVIRONMENTAL MANAGEMENT COUNCIL'S
BROWNFIELDS SUBCOMMITTEE**

Comments on DRAFT "Voluntary Cleanup Program Guide"
New York State Department of Environmental Conservation
Comment Deadline: August 27, 2002

Who We Are

The Broome County Environmental Management Council (BCEMC) was established in 1971 by the Broome County Legislature to preserve, protect and enhance the local environment. We are one of twenty-four EMCs in New York State.

The members of the BCEMC are County residents with a concern for the environment. While some of our members have formal training in the environmental field, many of us are self-taught. BCEMC volunteers are from a variety of occupational and professional backgrounds, including business, education, engineering, science, and homemaking.

The BCEMC's Brownfields Subcommittee (BFSC) was formed in the Fall of 2000. Its main objectives were to: develop a prioritized list of top brownfield sites [in Broome County] with redevelopment potential; develop a methodology for marketing developable properties, while flagging environmental liabilities; propose strategies for promoting redevelopment and reuse of high-value sites; and identify and pursue additional sources of funding and expertise. The BFSC is made up not only of interested BCEMC members, agency liaisons and staff, but also of a number of additional representatives of state and local governments (planners, economic development officials, and environmental specialists), university faculty and students, and private-sector attorneys, consultants, and business representatives.

General Comment

We commend DEC for releasing the *Voluntary Cleanup Program Guide* for public review and comment. The Voluntary Cleanup Program (VCP) is one of DEC's most important initiatives even though it does not yet enjoy a specific Legislative basis. Its importance to Broome County in particular cannot be overstated.

DEC Region 7, which includes Broome County, contains at least 40 known VCP sites and 13 known municipal brownfield (environmental restoration) sites. If these are collectively considered "brownfield" sites, this Region has the second highest *per capita* concentration of official brownfields among DEC's 9 regions (Region 6 has the highest). The BFSC has identified around 80 brownfield properties (not counting many private VCP sites and high-hazard federal and state Superfund sites). A recently awarded EPA Brownfields Assessment Pilot Demonstration program grant will enable Broome County to expand its site inventory and characterization effort.

Many more brownfield sites would participate in DEC's voluntary cleanup and environmental restoration programs if these programs were more "user-friendly."

The County has a shortage of new developable land with adequate infrastructure. The economic revitalization of the City of Binghamton, the Town of Union, and other urban parts of the County is

critically dependent on the ability of local governments and private owners to recycle previously used industrial and commercial land. Since many of these sites are or may be contaminated, DEC and the VCP could play a major role in returning these sites to productive use. Unfortunately, some elements of the existing VCP have prevented this program from realizing its potential.

The BFSC offers the following comments and suggestions out of a desire to strengthen both the environmental protection and the economic revitalization functions of DEC's voluntary cleanup program.

1. Role of the NYS Department of Health (DOH) Needs to be More Clearly Defined and Limited:

There is a basic disconnect in the roles and responsibilities of DOH as currently outlined in the Program Guide. On the one hand, DOH is not a party or signatory to the Voluntary Cleanup Agreements (VCA) entered into between cleanup volunteers and the DEC, and is therefore not subject to or bound by the terms of these Agreements. But, on the other hand, DEC (as reflected in the Program Guide) has given DOH considerable authority to participate with DEC in the oversight and approval (or disapproval) of voluntary cleanups.

Comment: We have no issue with DEC's desire to tap into DOH's considerable expertise on the public health implications of contaminated sites. Indeed, the concept of a cooperative effort by DEC and DOH is commendable. However, we do have major concerns with the mechanics of the proposed arrangement, which has been in place informally for several years.

We have been told that DOH representatives sometimes add significant delay and cost to the VCP process by taking too long to submit comments to DEC, by adding onerous new requirements beyond the scope of voluntary cleanup agreements (or their authority under the Public Health Law), and by not sufficiently explaining in writing to the cleanup volunteer (or DEC) the reasons for their comments or the need for additional measures.

If DEC desires to give DOH the power (i.e., by withholding or delaying its written concurrence) to block approval of VCP investigation and remedial action work plans (§§ 6.7.2, 7.5.2) and acceptance of investigation and remediation reports (§ 2.5), it should only do so subject to the following criteria and safeguards:

- (a) DOH's role (whether advisory or sharing in DEC's review and approval authority) should be specifically delineated in the Program Guide. It should be clear to all concerned what the issue areas are on which DOH comments and involvement are being sought. For example: evaluating site-specific exposure pathways with a potential to adversely effect public health (as set forth in a qualitative exposure assessment); and assessing the need for and adequacy of a Community Air Monitoring Plan at sites where VOC and/or particulate emissions are deemed to be a concern); etc.
- (b) DOH's concurrence should be sought only on issues within its scope and authority under the Public Health Law (see, e.g., PHL § 1389-b), or on closely related issues, where a VCP site poses "serious public health problems" or "conditions dangerous to life or health".
- (c) DOH should not be given veto power over a volunteer's work plan or submittal unless it has become a party to the VCA and agrees to be bound by its terms and by any resulting liability release (§ 4.4). If DOH is not a party to the VCA, any inputs it provides to DEC must be considered solely advisory and subject to the same timing, relevance, and explanation constraints as DEC is itself.
- (d) DOH could be of additional assistance to DEC if the two agencies collaborated on development of guidance on "presumptive remedies" for frequently occurring site contamination scenarios (e.g., sites

contaminated with dry cleaning solvents; heavy metal-contaminated sites; sites with petroleum contamination; sites with PAH contamination). Such presumptive remedies would allow cleanup volunteers to initiate a remedy more quickly. This would not only bring more rapid environmental and public health benefits, but it would reduce delay, save money, and allow more efficient allocation of agency oversight resources.

2. Release where no further action is needed:

The Program Guide provides that a liability release will be issued where an investigation is “completed under Department oversight and pursuant to a VCA” and it is determined that “no remediation is needed to meet the remedial goal of the VCP” (§§ 1, 8.2.2). It also specifies (§ 4.4) that “a Volunteer must perform substantive work under a VCA to receive a Release from the Department” and that work done without DEC oversight and approval “may not be usable” under the VCP and “may not be sufficient to warrant a release” from DEC. Section 6.3.1 makes clear that the only latitude DEC is prepared to provide in accepting “analytical data generated without Department oversight,” is where it is submitted in conjunction with new data generated by the volunteer under DEC oversight as part of the VCP.”

Comment: With the exception of Class 2 inactive hazardous waste sites, which are only allowed to participate in the VCP at the behest of a non-“PRP” [a “PRP” is a “potentially responsible party” in Superfund nomenclature], most sites in the VCP are only slightly or moderately contaminated. If a site is obviously clean or otherwise requires no further action, why should DEC be unwilling to *consider* (if so requested and given adequate documentation) granting a liability release or a less formal “No Further Action” letter, even in the absence of DEC oversight and approval or where “substantive work” has not been carried out under a VCA?

- (a) DEC should be promoting the identification and certification of no-risk and low-risk brownfield sites suitable for productive reuse. It should not matter what precise procedure was used to arrive at the no-risk or low-risk characterization, as long as it is adequately substantiated. The Program Guide should not rule out the possibility of providing some form of “No Further Action” letter (or even a full liability release) where DEC has reasonable assurance, based on appropriate quality control and other criteria set by DEC, that they pose no ongoing risk. One example where this approach may be warranted is a site on which a qualified environmental consultant has performed an ASTM-compliant Phase II environmental site assessment, and concludes, after reviewing sampling and analysis results that, if certain steps are taken by the site owner or prospective purchaser (e.g., removal and proper offsite disposal of stained soils and leaking tanks), there are no further environmental concerns. If a bank asks for “a letter from DEC” before it will finance a development project on the site, why should DEC not be willing or eager to provide one—as long as it is given the opportunity to review the Phase II report and concur in the adequacy of its analysis?

Indeed, in Section 6.3.1, DEC already recognizes that it is appropriate and advantageous for the Department to “accept analytical data generated without Department oversight,” where the Volunteer “show[s] that the results are valid and useable” (e.g., “through the submittal of validation reports or Data Usability Summary Reports”). Instead of limiting its acceptance of prior assessment results to cases where a Volunteer has decided to participate in the VCP, but has prior data it wants to incorporate, we encourage the Department to adopt a broader, more flexible policy on validation of privately-generated analytical results. (DEC might wish, for example, to limit its acceptance of privately-generated Phase II ESA results to situations in which the ESA consultant or the person retaining the consultant provided timely advance notification to DEC that Phase II sample-taking would be occurring and DEC was given the opportunity to be present and, if desired, to take split samples.)

(b) Although DEC may wish to concentrate its resources on higher-risk sites, low-risk sites of this kind should rather be viewed as “low-hanging fruit” that are ripe to be harvested. It is hard to imagine a more socially beneficial role for DEC to play (and take credit for) than to help clear the way for dozens (or even hundreds) of low-risk sites to be returned to productive use.

3. Hazardous substance site:

The Program Guide defines such a site (§ 2.1.1) broadly (similar to the federal CERCLA definition) to include any kind of “hazardous substance.” See also § 4.4.5 (extension of reopener to “hazardous substance” sites). However, as is generally recognized, New York’s State Superfund Law is not as broad as federal Superfund and does not include “hazardous substance” sites that contain neither hazardous wastes nor petroleum. *ECL § 27-1301 et seq.* This omission of hazardous substance authority under State Superfund is one of the problems the Governor is seeking to correct in his Superfund Reform proposals.

Comment: It is not clear whether it is appropriate under existing New York State law to include non-waste, non-petroleum “hazardous substance” sites within the ambit of the VCP.

4. SEQRA exemption except for innocent non-owners:

It is anomalous to subject cleanup volunteers who are innocent non-owners to SEQR review, while culpable responsible parties and (legally responsible) current owners are both exempt from SEQR review based on SEQRA’s enforcement exemption. (§ 2.4.)

Comment: This anomaly could be eliminated by making voluntary cleanups at the behest of innocent non-owners a “Type II” action under 6 NYCRR 617.13—at least where the site involved is not a “Class 2” State Superfund site. The SEQR “Type II” list is the list of actions NOT requiring review under the State Environmental Quality Review Act based on their presumptive lack of environmental significance. Given the nature of voluntary cleanups which are designed to *enhance* environmental quality, such a listing is entirely appropriate. It is especially appropriate where the cleanup volunteer is an innocent non-owner with no connection to the original contamination.

We recognize that this anomaly could also be eliminated by revoking ALL exemptions for VCP sites. Although this solution could be viewed as more protective of health and the environment than expanding the current exemption, we assume that repeal or modification of the existing enforcement exemption is not a near-term option. (Even if such a change could be engineered, some would argue that, delaying environmental enforcement action pending completion of SEQR review would be a “cure” that is worse than the current “disease.”) For purposes of these comments, we assume that this option is not realistically available at this time.

5. Re-openers for off-site migration and previously unknown conditions:

The Program Guide distinguishes between “PRPs” and innocent owners and non-owners with respect to off-site migration of contaminants (§ 6.1). “PRPs” are required to remediate such contamination; innocent owners and non-owners are not (but they have some investigation responsibilities). The Program Guide also provides for reopening a liability release for further investigation or remediation (§ 4.4.1) where contaminants migrate off-site and cause consequential impacts on environmental resources, human health, or other biota—but only if the cleanup volunteer is a “PRP”. (If the liability release was obtained by a non-PRP, DEC’s policy is to hold the PRPs, if any, responsible for needed cleanup. If no viable PRPs can be found, DEC will abate the offsite migration problem itself, using State cleanup funds.)

A liability release can also be reopened (§ 4.4.2) when previously unknown environmental conditions are discovered that limit the protectiveness of the previously implemented work plan.

The Program Guide does not address the situation where contamination of the subject site *originates* offsite on or under a contiguous property.

Comments: It is commendable that DEC has seen fit to limit the liability of non-“PRPs” for off-site migration of contaminants. This is fully in keeping with the principles that “the polluter should pay” and the innocent should not be punished. However, we urge DEC to consider going a step or two further:

- (a) The reopener for newly discovered environmental conditions does not distinguish between “PRPs” and innocent owners or non-owners. DEC should consider following its approach to OFFSITE migration of contaminants (where it absolves innocent owners and non-owners from cleanup responsibility), by freeing at least innocent non-owners from any further cleanup responsibility if newly discovered contamination is found ONSITE after receipt of a liability release. (The State of New Jersey goes even further, in absolving both innocent owners and non-owners from responsibility for newly discovered onsite or offsite contamination.)

As in the case of off-site releases, if additional cleanup is needed, DEC should pursue the responsible parties (or, if necessary, perform the necessary cleanup itself). Finding previously missed contamination that undermines a previous response action is not likely to be a frequent occurrence. However, the psychological importance of being able to assure a non-“PRP” (especially an innocent non-owner) that once a liability release has been issued it is (virtually) inviolate cannot be overemphasized. (It is one of the key factors cited by New Jersey officials as contributing to the success of their VCP.)

- (b) The Program Guide does not address the situation where contamination of the subject site *originates* offsite. DEC should add an exemption similar to that recently enacted in the new federal Brownfields Revitalization Act (P.L. 107-118) for contamination *originating* offsite on or under a contiguous property (new CERCLA § 107(q), 42 U.S.C. § 9607(q)). The federal approach is to not treat as a potentially responsible “owner” or “operator” a person who owns a property that was contaminated by the acts or omissions of unrelated entities on contiguous (or similarly situated) property. As under the federal approach, the property owner would only be relieved of liability if the owner had no “relationship” to the party responsible for the contamination, and if the owner did not know or have reason to know of the contamination when the property was acquired.

6. Relationship between the VCA and the Registry:

The Program Guide takes what may be a counter-productive approach in how it proposes to handle the possibility of Registry listing of a site being addressed under the VCP. It is appropriate to defer Registry listing (of a site that would normally be listed) to encourage investigation and remediation under the VCP (§ 6.1). Calling upon DEC (§ 8.1.2) to reconsider a site’s Registry status based on information generated during a VCA-generated investigation is more problematic (especially for an innocent non-owner). Even worse, is using the threat of Registry listing (§ 6.1) as a way to “encourage” an innocent owner or non-owner into taking responsibility for off-site contamination (for which they would not otherwise be responsible) simply to avoid the stigma of Registry listing.

Comments: The polluter should pay, but the innocent should not be punished or intimidated. Cleanup volunteers are more likely to come forward and investigate and remediate sites for which they are not responsible, if coming forward reduces rather than increases their liability exposure. Threatening

innocent non-“PRPs” with the stigma of Registry listing to coerce them into doing something they could not otherwise be required to do is both wrong and counter-productive.

- (a) DEC should consider following the example of the State of Maryland, which has had great success in involving sites in its VCP by (i) offering free (very thorough) baseline site assessments (funded by U.S. EPA), coupled with (ii) a commitment not to pursue non-PRPs no matter what the assessments turn up and even if the volunteer opts to withdraw from the VCA. This has allowed many more sites to be characterized, remediated and recycled than would otherwise have been the case.
- (b) Even if DEC does not adopt Maryland’s approach to site assessments, it should *at least* adopt a similar philosophy with regard to the proper relationship between the VCP and the Registry-listing process under State Superfund. Specifically, DEC should establish a firm policy *against* post-VCA Registry listings in circumstances likely to be counter-productive to the goals of the VCP. For example, after completing an investigation-VCA at a site that was never previously proposed or considered for Registry listing, an innocent owner or non-owner should not have to worry about the threat of the site being listed on the Registry as a result of information uncovered during the VCP process. If entering into an investigation-VCA can yield information that DEC will use to list the site, few volunteers will knowingly place themselves in that situation. (If an environmental hazard materializes, DEC can still pursue it in the same way off-site contamination is addressed under §6.1.)
- (c) As a matter of fairness and good public policy, DEC should also never use the threat of Registry listing as a way to coerce innocent parties to take responsibility for off-site contamination (where they would not otherwise be required to do so) simply to avoid the stigma of Registry-listing.

7. Qualitative exposure assessments:

The Program Guide requires (§ 6.6) all Volunteers to complete a “qualitative on-site and off-site public health exposure assessment.”

Comments: There are many useful roles (and some counter-productive roles) such an exposure assessment *could* perform, but the Program Guide does not explain how DEC plans to use it.

- (a) The Guide should recognize that the same magnitude of exposure assessment, or level of detail, should not be necessary in all cases.
- (b) One of the best uses of an exposure assessment in a VCP is to provide a basis for risk-based decisions on cleanup standards geared to particular end-uses. The Program Guide should state as explicitly as possible, how an exposure assessment will be used in defining cleanup goals.
- (c) If the requirement of preparing a “Community Air Monitoring Plan” (Appendix D) is to be retained in its present form, it should not be required in all instances. (See Comment 8, below.) At most, air monitoring of this type should be required only where a qualitative exposure assessment indicates that there is a site-specific risk of significant exposure by potentially dangerous VOCs and particulates of sensitive receptors.
- (d) The importance of exposure assessments also demonstrates the short-sightedness of forcing cleanup volunteers to choose registered Professional Engineers as their preferred environmental consultants. Many other disciplines are better suited to performing exposure assessments. (See Comment 9, below.)

8. Community Air Monitoring Plan (Appendix D):

The Program Guide makes no reference to “Community Air Monitoring Plans” (CAMP) other than in Appendix D. There is no indication as to where a CAMP might fit in the sequence of events relating to the development or implementation of Investigation Work Plans (§ 6) or the Remedy Selection process (§ 7), or how to determine when such a Plan is needed. Appendix D itself is ambiguous: “*Depending upon the nature of known or potential contaminants at each site, real-time air monitoring for volatile organic compounds (VOCs) and/or particulate levels at the perimeter of the exclusion zone or work area will be necessary. Most sites will involve VOC and particulate monitoring*” It also states: “Specific requirements should be reviewed for each situation in consultation with NYSDOH to ensure proper applicability.”

Comments: As stated in § 6.1, “Volunteers commit to completing the *specific activities* set forth in the Investigation Work Plan.” If the Work Plan lacks “specific activities,” with details to be provided later in consultation with DOH or DEC, one of the major purposes of the VCP will not be fulfilled: predictability and certainty as to cleanup goals and standards.

- (a) DEC should provide definitive criteria for determining when a CAMP is really necessary and when it would be overkill.
- (b) Alternatively, the qualitative public health exposure assessment (§ 6.6) would be the logical place to determine whether VOCs and/or particulates are present under circumstances which could potentially threaten the health of downwind receptors. If they are, a CAMP might be necessary and appropriate. If they aren't, preparing a CAMP would be an inefficient use of resources.

9. Certification by a licensed professional engineer:

The Program Guide requires: that all Remedial Design and Remedial Action work plan documents “be signed and sealed by a licensed professional engineer registered in New York State” (“P.E. Certification”) (§ 7.1.5); that there be an “Engineering Evaluation of the Remedy” (§ 7.3(2)); that a P.E.-certified Remedial Action Selection Report document evaluation of the remedy in accordance with the Part 375 remedy selection factors (§ 7.4); that a final engineering report and as-built drawings are provided within 90 days after the remediation is complete (§ 8.3.1); and that the Remedial Action Work Plan is implemented by the P.E. and all construction activities were personally witnessed by the P.E. (§ 8.3.1). The only exception to P.E. oversight and certification are certain underground storage tank closures. The Program Guide accepts no other form of certification, qualification, or training, and mandates the use of no other environmental or technical discipline.

Comments: The Program Guide’s approach on this issue is unnecessary and inappropriate.

- (a) It is reasonable to require a P.E. to stamp plans for “a full-scale remedial design” (§ 7.2) or other complex engineering designs. It is not reasonable to allow only a P.E. to certify that a proposed cleanup plan is the best way to minimize environmental and public health risks. No other state (to our knowledge) assigns such a major role to P.E.s in its VCP.
- (b) Requiring the use of State-licensed engineers is not the only way, or even the best way, to ensure the use of high-quality VCP consultants or to discipline sub-standard performance. For example, DEC could rely on professional certifications provided by various professional associations and standard-setting bodies. These are generally based on competitive examinations, education, and experience, and are often more rigorous than New York State’s procedures for licensing P.E.s.

- (c) The free marketplace already provides an efficient means of screening out substandard or unethical consultants. If the work-product of certain environmental consultants selected by Volunteers is routinely rejected by DEC and must be repeatedly redone at the Volunteer's expense, those consultants will become quickly identified as not producing results acceptable to DEC. Property owners, developers, and prospective purchasers will "get the word" and cease to utilize such consultants. The market will clearly favor those consultants who consistently produce results that are accepted by DEC. A marketplace mechanism of this kind is appropriate where voluntary cleanups are being carried out with private funding and no financial assistance from the State is involved.
- (d) If not content to rely entirely on the marketplace, DEC could readily develop a list or a database of approved or acceptable VCP consultants based on a published Request for Qualifications (RFQ) to the consultant community. Listings could be tailored to the particular areas of specialized expertise required for different elements of the VCP. DEC has already established a "Qualified Remedial Consultants (QRC) List," for use by municipalities in the environmental restoration (brownfields) program. Under this program, municipalities may also justify the use of an unlisted consultant by providing "a description of the consultant's experience in investigating environmental contamination." The description "must document that the firm employs a sufficient number of staff with experience of sufficient duration, diversity, and expertise to complete the proposed project." A similar approach could easily be applied to the VCP—however, it should be recognized that in the municipal brownfields program government involvement in the screening of consultants is viewed as appropriate only because extensive State funding is involved.
- (e) The Program Guide's insistence on P.E.s for certain VCP tasks, in addition to its questionable benefits, also flies in the face of many VCAs which contain no such restrictions. After a cleanup volunteer has reached an agreement with DEC as to what will be required of it in the VCP, it is both unfair and a violation of a binding agreement to impose additional requirements by means of after-the-fact policy pronouncements.

10. Evaluation of remedy against Part 375 factors:

The Guide requires (§ 7.4) the proposed remedy to be evaluated "against the factors given in 6 NYCRR 375-1.10(c)"- except that it acknowledges that "it is not necessary to evaluate cost effectiveness or community acceptance in this evaluation." The factors which are required to be evaluated and addressed are: protection of human health and the environment; standards, criteria, & guidance (SCG); short-term effectiveness & impacts; long-term effectiveness & permanence; reduction of toxicity, mobility, or volume; and implementability.

Comments: These are the same factors (with the two indicated exceptions) that are required to be evaluated for State Superfund sites. They also closely resemble the evaluation criteria under federal CERCLA that are used for federal Superfund sites.

- (a) The VCP really needs its own remedy evaluation factors, as DEC seems itself to recognize by eliminating as irrelevant two of the original Part 375 factors. (Even more irrelevant would seem to be the use of Superfund-specified SCGs in the context of low-hazard VCP sites.)
- (b) If the Part 375 factors are to be retained in whole or in part, they should at least be supplemented by two factors that have some relevance to the VCP: i) protectiveness of the remedy in light of the current or anticipated land use; and ii) compatibility of the remedy with opportunities for productive reuse of the site and associated community benefits. (The first of these is also one of Governor Pataki's reform proposals - but does not require legislative authorization for non-Superfund, non-oil spill VCP sites.)

11. Standards, Criteria & Guidance (SCG):

All of the major SCGs for the site must be listed (§ 7.4.2) and whether the proposed remedy complies with them must be discussed.

Comment: The Program Guide requires this to be done as part of an “engineering evaluation.” Few engineers are likely to have the biological, chemical, toxicological, and hydrogeological expertise to provide a persuasive rationale for departing from particular SCGs. This argues for relaxing or eliminating (a) the SCG requirement, and/or (b) the P.E. certification requirement.

12. DEC (and DOH) responses to Volunteer submittals:

One of the major benefits of the VCP process, as compared to State Superfund, is the possibility of accelerated review and approval by DEC. To the extent that many or most VCP sites are “brownfields” with redevelopment potential, these sites present both environmental and real estate issues. Since these sites are generally of low to moderate significance from an environmental and public health standpoint, environmental cleanup considerations do not usually present an urgent need for expeditious site remediation. On the other hand, from a real estate standpoint, if a brownfield site is to compete effectively with an uncontaminated “greenfield,” time is generally of the essence. Few developers or sellers are likely to enter into multi-year option agreements, or do real estate deals on speculation, while a diffuse VCP process runs its course through a lengthy sequence of regulatory twists and turns.

Although not given much attention in the Program Guide, a key positive element of the VCP is the elimination of some of the time-consuming procedural steps involved in Superfund. However, unlike the VCPs of many other states, there is little reference in the Program Guide to deadlines or timetables for completing various stages of the VCP process. Thus, Section 3.5, in talking about DEC’s response to an application to participate in the VCP, merely indicates that “The Department uses best efforts to send an application response letter within 45 days of receipt of a complete application stating if the applicant is eligible to participate in the program.”

The fact that DEC needs a month-and-a-half (and won’t even commit itself to that timeframe) to make the most straightforward and clearcut determination in the whole VCP process, suggests that expeditious completion of the process is not high enough on DEC’s priority list.

Other states have made rapid review of voluntary cleanups a major hallmark of their programs. For example, in Pennsylvania, if state decisions are not made within specified deadlines, the application or submittal involved is “deemed” automatically approved (in practice, the state ensures that its reviews are completed within the time limits). In Michigan, once a new owner has prepared a “Baseline Environmental Assessment,” the owner receives a liability release for any past contamination “by operation of law” as long as certain “due care” measures are taken. And, in Massachusetts, the whole process has been “privatized,” to allow private consultants (subject to various controls and safeguards) to develop and implement voluntary cleanup work plans—so that state DEP staff don’t create a bottleneck in the review and approval process (this has reportedly allowed the number of sites cleaned up to increase by 14-fold).

Comment: The Program Guide should seek to be more responsive to the time-sensitivity of many VCP projects. Where possible, realistic deadlines should be specified (for both DEC and DOH) for responding to applicant or Volunteer submittals. If a submittal is deemed deficient, that deficiency should be communicated as quickly as possible to the Volunteer, so that it can be corrected expeditiously.