SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT
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Oral Argument Requested
To be argued by:
Keri N. Powell (30 minutes)

CITIZENS' ENVIRONMENTAL COALITION, INC., SIERRA CLUB, INC., NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC., AND ENVIRONMENTAL ADVOCATES OF NEW YORK, INC.,

Petitioners,

-against-

Appellate Division
Docket No.

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules.

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BRIEF FOR PETITIONERS-APPELLANTS

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DATED: June 5, 2008

TABLE OF CONTENTS

CPLR 5531 STATEMENT

TABLE OF CASES

Federal Cases

State Cases

Statutes

Regulations

QUESTIONS PRESENTED

1. Environmental Conservation Law sections 27-1415(6)(b) and 27-1415(1) direct Respondents to establish soil cleanup objectives that are protective of, among other things, surface water, ecological resources (including fish) and indoor air. Was it unlawful and/or arbitrary and capricious for Respondents to establish soil cleanup objectives that:

   a) do not protect against toxic contamination of surface water?

   b) do not protect against toxic contamination of aquatic ecological resources?

   c) do not protect against toxic contamination of indoor air?

2. Environmental Conservation Law section 27-1415(6)(b) directs Respondents to "consider . . . the feasibility of achieving more stringent [soil cleanup] objectives, based on experience under the existing state remedial programs, particularly where toxicological, exposure, or other pertinent data are inadequate or non-existent." Was it unlawful and/or arbitrary and capricious for Respondents to:

   a) fail to identify actual cleanup levels achieved at properties cleaned up under pre-existing remedial programs and evaluate the feasibility of attaining those cleanup levels at future sites, despite its admission that more stringent cleanups likely had been achieved?

   b) decline to strengthen any of the soil cleanup objectives in light of more stringent historically achieved cleanup levels—regardless of whether data on a contaminant's health and environmental impacts is "inadequate or non-existent"— on the basis of an unsupportable assertion that no public health or environmental benefit would be gained?

3. Was it unlawful and/or arbitrary and capricious for Respondents to exclude from Brownfield Cleanup Program eligibility any property where contamination came from an off-site source, given that the eligibility criteria set forth at ECL section 27-1405(2) make no distinction regarding the contamination source?

The court below answered each of the above questions in the negative, holding that Respondent DEC's Brownfield Cleanup Program regulations are in accordance with law.

STATEMENT OF FACTS

I. Background

Across New York, thousands of boarded-up gas stations, decaying factories, and other abandoned and likely contaminated properties threaten the health and vitality of the communities in which they are located. *See* ECL 27-1403. Communities and developers are reluctant to redevelop or reuse these properties, which are known as "brownfields," because contamination can be costly to clean up and they fear legal liability. Left unremediated, these properties create community health risks, spoil the environment, perpetuate unemployment, erode tax bases, accelerate sprawl development and contribute to the loss of open space. *See* New York Environmental Conservation Law ("ECL") § 27-1403.

Public health risks posed by abandoned industrial and commercial sites can be serious. For example, several of New York's upstate communities have become well-known due to widespread residual contamination from former industrial sites that is seeping into homes and groundwater. In the Village of Endicott, regulatory and public health agencies discovered toxic tricholoroethene ("TCE") vapor seeping into 400 to 500 basements and groundwater. According to the DEC, the contamination is related to leaks and spills on a nearby industrial site formerly occupied by International Business Machines, Inc.[1] A health study conducted by the New York Department of Health and the federal Agency for Toxic Substances and Disease registry found

[1] *See In the Matter of the Development and Implementation of a Remedial Program for an Inactive Hazardous Waste Disposal Site, Under Article 27, Titles 13 and 9, and Article 71,Title 27, of the Environmental Conservation Law of the State of New York by International Business Machines Corporation*, Order On Consent Index # A7-0502-0104, IBM Endicott Site, Site # 704014. (September 2004). (Available online at http://www.dec.ny.gov/chemical/24886.html).

elevated incidences of testicular and kidney cancer and elevated incidences of birth defects.[2]

In Hopewell Junction, the DEC and U.S. Environmental Protection Agency ("EPA") determined in 2005 that a former industrial site previously thought to have been remediated was contaminating numerous residential drinking water wells with TCE.[3] EPA re-listed the site on its "national priorities list" for cleanup in 2005. 70 Fed. Reg. 21644 (Apr. 27, 2005). Groundwater contamination resulting from this site has potentially affected more than 150 individuals.[4]

New York City has been confronted with problems at several public schools built on contaminated sites. For example, Public School 141 in Harlem, located on the site of a former dry cleaning operation, was closed after one month because of percloroethylene vapors entering the school.[5] Likewise, Public School 65 in Ozone Park, Queens was temporarily closed after students experienced symptoms such as nausea, fatigue, and facial paralysis that their parents believed were linked to the school's location on a contaminated site.[6] And, in the Bronx, the New York City School Construction Authority is constructing four new schools on a

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[2] *See* New York State Department of Health, "Public Health Consultation, Health Statistics Review: Cancer and Birth Outcomes Analysis, Endicott Area, Town of Union, Broome County, New York. (May 30, 2006) (available online at http://www.health.state.ny.us/environmental/investigations/broome/fact_sheet.htm.).

[3] *See* New York State Department of Health, "Public Health Assessment: Hopewell Precision Area Contamination," (Nov. 17, 2006)(available online at http://www.health.state.ny.us/environmental/investigations/hopewell/docs/public_health_assessment.pdf).

[4] *See* http://www.epa.gov/superfund/sites/npl/nar1720.htm.

[5] Steinberg, Jacques, "School in Harlem Shut Indefinitely Because of Fumes," *New York Times*, A25 (Oct. 7, 1997).

[6] *See e.g.*, Press Release of Congressman Anthony D. Weiner, "Weiner Demands Toxic Cleanup at P.S. 65," (Sep. 17, 2002) (available online at http://www.house.gove/list/press/ny09_weiner/020917tox.html).

contaminated former rail yard.[7] As these examples illustrate, it is imperative that contaminated properties be properly cleaned up before being returned to use.

II. New York's Brownfield Cleanup Program

In 2003, after more than four years of negotiations, the New York state legislature passed landmark legislation establishing the Brownfield Cleanup Program ("BCP"). *See* ECL §§ 27-1401 to 27-1433 ("the Brownfield Cleanup Law"). The program is designed to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment by offering tax credits and liability relief, and by establishing clear-cut cleanup standards. *See, id.; see also,* 28 N.Y. Reg. 15 (Nov. 29, 2006).

The statute defines "brownfield site" as "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). Under the statute, "[a]ll remedial programs shall be protective of public health and the environment including but not limited to groundwater according to its classification pursuant to section 17-0301 of this chapter; drinking water, surface water and air (including indoor air); sensitive populations, including children; and ecological resources, including fish and wildlife." ECL § 27-1415(1). The statute further specifies that "[a] remedial program that achieves a complete and permanent cleanup of the site is to be preferred over a remedial program that does not do so." ECL § 27-1415(3)(d).

The statute allows for different levels of soil remediation depending on a property's "current, intended, and reasonably anticipated future land uses." ECL § 27-1415(3)(i). Central to the program are "soil cleanup objectives" ("SCOs"), which are general, contaminant-specific

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[7] *See* Arden, Patrick, "Toxic Schools Site Get Approval from Council," *Metro New York*. (Jan. 10, 2007), (available online at http://ny.metro.us/metro/local/article/Toxic_schools_site_gets_approval_from_Council/6476.html).

cleanup objectives developed by the DEC that are designed to be protective of specified uses, including unrestricted, commercial, and industrial. *See* ECL § 27-1415(6)(a). Different soil cleanup objectives apply depending upon a property's anticipated future use. *Id.* Specifically, the statute directs the DEC to include in its regulations "three generic tables of contaminant-specific remedial action objectives for soil based on current, intended, or reasonably anticipated future use, including: (i) unrestricted, (ii) commercial and (iii) industrial." *Id.* All soil cleanup objectives "shall be protective of public health and the environment pursuant to subdivision one of this section," ECL § 27-1415(6)(b), *i.e.*, they "shall be protective of public health and the environment including but not limited to groundwater according to its classification pursuant to section 17-0301 of this chapter; drinking water, surface water and air (including indoor air); sensitive populations, including children; and ecological resources, including fish and wildlife." ECL § 27-1415(1).

The statute establishes four different "tracks" that a developer can follow in remediating a property. Under Track 1, the developer must achieve the generic soil cleanup objectives designed to allow for unrestricted future use of the property without any institutional or engineering controls (*e.g.*, without soil barriers to prevent the migration of contaminants). ECL § 27-1415(4). Track 1 sites receive the most generous tax credits. *See* New York Tax Law § 21(a)(5). The other three tracks allow for site use restrictions as well as engineering and institutional controls as needed to protect pubic health and the environment. Under Track 2, the developer must achieve the generic soil cleanup objectives relevant to the site's designated use without the use of engineering or institutional controls, but can utilize such controls to protect public health and the environment from remaining contamination. ECL § 27-1415(4). Under Track 3, the developer does not need to achieve the generic soil cleanup objectives, but must

achieve site-specific soil remediation objectives calculated using "the criteria used to develop" the generic soil cleanup objectives. *Id.* Finally, Track 4 allows for the development of site-specific cleanup objectives using site-specific information. *Id.* The statute instructs, however, that "[f]or Track 4, exposed surface soils shall not exceed the generic contaminant-specific [soil cleanup objectives] developed for unrestricted, commercial, or industrial use pursuant to this subdivision which conforms with the site's current intended, or reasonably anticipated future use." ECL § 27-1415(6)(d).

III. The DEC's Brownfield Cleanup Program Regulations

The DEC first proposed draft regulations to implement the Brownfield Cleanup Program on November 16, 2005, providing a 120-day public comment period. 28 N.Y. Reg. at 16. The DEC revised the draft regulations in light of public comments and re-proposed them on July 12, 2006 with an additional public comment period. *Id.* The DEC announced its adoption of final regulations on November 29, 2006. *Id.* The regulations became effective on December 14, 2006. *Id.*[8]

Petitioners-Appellants identify the cleanup of New York's ubiquitous brownfield sites as one of their top priorities, and thus applauded the 2003 legislation. However, they were deeply disappointed with the DEC's proposed implementing regulations, concluding that they contravened a number of important Brownfield Cleanup Law requirements, including key statutory obligations designed to ensure that properties are cleaned up properly before being returned to productive use. *See, e.g.*, CEC, *et al.*, March 27 2006 Comments to DEC on Proposed Rules. (A-101-112). Though they informed the DEC of their concerns in public testimony and written comments during the two public comment periods, the DEC rejected most

[8] Certain portions of the challenged regulations also apply to the State Superfund Program (ECL Article 27, Title 13), created in 1979, and the Environmental Restoration Program (ECL Article 56, Title 5), created in 1996.

of their comments. *See, e.g.*, DEC June 2006 Response to Comments. (A-129-136). Several of Petitioners' unaddressed concerns are at issue in this lawsuit, and are described in detail below.

A. The DEC Did Not Set its Soil Cleanup Objectives at Levels Sufficient to Protect Against Toxic Contamination of Surface Water, Aquatic Ecological Resources, and Indoor Air.

The Brownfield Cleanup Law directs the DEC to set its soil cleanup objectives at levels that are sufficient to guard against toxic contamination of, among other things, surface water, aquatic ecological resources, and indoor air. Specifically, ECL section 27-1415(6)(b) declares that soil cleanup objectives shall be "protective of public health and the environment pursuant to subdivision one of [ECL § 27-1415]." Subdivision one, in turn, explains, "protective of public health and the environment" includes, but is not limited to, protecting "groundwater according to its classification pursuant to section 17-0301 of this chapter; drinking water, surface water and air (including indoor air); sensitive populations, including children; and ecological resources, including fish and wildlife." ECL § 27-1415(1) (emphasis added). Nonetheless, the DEC admits that none of the soil cleanup objectives set forth in its regulations at 6 NYCRR § 375-6 are designed to protect surface water, aquatic ecological resources, or indoor air. *See* Answer, ¶¶ 33, 41 (A-33). Petitioners repeatedly informed the DEC during the public comment period that its failure to set the soil cleanup objectives at levels needed to safeguard these valuable resources violated the statute, to no avail. *See, e.g.*, CEC et al. Comments, March 27, 2006 at 41-44 (A-106-109).

1. Surface Water

It is undisputed that the DEC's soil cleanup objectives are not designed to protect against surface water contamination. As the DEC's regulations plainly state, "[t]he soil cleanup objectives presented in this subpart do not account for the impact of concentrations of

contaminants in soil relative to surface water and surface water sediments attributable to a remedial site." 6 NYCRR § 375-6.7(b)(1). *See also* DEC June 2006 Response to Comments at D74 (A-136) (DEC admitting that it "did not factor the protection of surface water into the calculated SCOs.").

In lieu of developing soil cleanup objectives designed to protect surface water as the statute directs, the DEC contends that it will address threats to surface water "on a site specific basis" as part of the overall "remedial work plan" for the site. *See* DEC June 2006 Response to Comments at D74 (A-136). But the DEC admits that the "measures" taken to address surface water contamination under its approach need not entail removing the contamination as would be required if a developer had to comply with a soil cleanup objective designed to protect surface water. *See, id.* Rather, the DEC's approach allows a developer to leave soil contaminated above levels that pose a risk to surface water in place, and only requires the developer to prevent contamination from migrating into surface water "to the extent feasible." *See* 6 NYCRR § 375-6.7. Specifically, the DEC's regulations declare: "The remedy for a site . . . shall, to the extent feasible: (i) remove, contain or treat the source of a discharge of contaminants from the site to the surface water and sediments; and (ii) address through appropriate removal or engineering controls the migration of contaminants in soil and groundwater at levels which could impact the water quality or adversely impact the sediments of a surface water body on or adjacent to the site.") 6 NYCRR § 375-6.7 (emphasis added). For example, under the DEC's approach, a developer might attempt to keep contamination from migrating into surface water by utilizing "drains, landscaping and barriers." DEC June Response to Comments at D74 (A-1019).

2. Aquatic Ecological Resources

As with surface water, there is no dispute that the DEC failed to provide for protection of aquatic ecological resources when it designed its soil cleanup objectives. Though the DEC developed soil cleanup objectives to protect "ecological resources," the regulations expressly declare that those cleanup objectives only apply "where terrestrial flora and fauna and the habitats that support them are identified," and "do not and/or will not apply to . . . protection of the aquatic environment." 6 NYCRR § 375-6.6(a)(emphasis added). The DEC offered no explanation in the administrative record regarding what steps, if any, it would take to protect aquatic ecological resources. In litigation, however, the DEC asserts that it will address this concern on a site-specific basis in the same manner that it will address surface water. See Harrington Affidavit ¶¶ 45-46 (A-648-649). In other words, dangerous soil contamination need not be removed as would be required if soil cleanup objectives applied, but a developer can instead utilize measures such as barriers in an attempt to prevent contamination from harming aquatic ecological resources. *See supra* at 7.

The DEC made no attempt to explain how its decision to exclude aquatic ecological resources from consideration in developing the soil cleanup objectives comports with ECL § 27-1415(6)(b). The agency declared only that it "declines to extend the protection of ecological resources to aquatic environments." DEC October Response to Comments at F3 (A-140). Nonetheless, the DEC admitted that contaminated soil at brownfield sites can negatively impact aquatic ecological resources. *See* DEC September Technical Support Document ("TSD"), at 268 (A-163) (admitting that "[b]rownfield sites can contain or be situated adjacent to habitats such as ... wetlands, streams, and rivers."); *id.* at 141 (A-410)(admitting that "[s]oil contaminants can

enter the bodies of fish directly from the water, or through the food chain, from microorganisms and algae, to zooplankton, invertebrates, and smaller fish.").

3. Indoor Air

In its Technical Support Document, the DEC explains how a process known as "vapor intrusion" contaminates indoor air. DEC Sept. TSD at 335 (A-604). Specifically, the DEC states, "[v]olatile contaminants (e.g., solvents, gasoline, elemental mercury) in subsurface soil may migrate into soil vapor and subsequently contaminate indoor air. Some of these contaminants may leach from soil into groundwater, and then migrate from groundwater into soil vapor and indoor air. In areas where the water table is elevated and in contact with buildings, contaminants in groundwater may volatilize directly into indoor air." *Id.* (emphasis added). Likewise, in response to public comments on the proposed regulations, the DEC conceded, "vapor intrusion may be an important exposure pathway at some brownfields." DEC June Response to Comments, at D66 (A-1011). Nonetheless, despite the statutory language directing the DEC to develop soil cleanup objectives at levels sufficient to safeguard "indoor air," (*see* ECL §§ 27-1415(1), 27-1415(6)(b)), the DEC's regulations clearly state, "[t]he soil cleanup objectives presented in this subpart do not account for the impact of concentrations of contaminants in soil relative to soil vapor or vapor intrusion attributable to a remedial site." 6 NYCRR § 375-6.7(a)(1). *See also* DEC June Response to Comments, at D66 (A-1011)(admitting that "SCO values do not account for the vapor intrusion pathway."). Instead of requiring soil to be cleaned up to a level sufficient to protect against vapor intrusion, the DEC chose to leave the contaminated soil in place and instead utilize site-specific remedial measures such as "engineering controls" to limit "the migration of contaminants in soil and groundwater at levels which could impact the indoor air of buildings." *See* 6 NYCRR § 375-6.7(a).

According to the DEC, setting a generic soil cleanup objective to protect against vapor intrusion would be difficult because "[t]he vapor intrusion pathway is complex and depends on numerous factors that may vary considerably from site-to-site." DEC June Response to Comments at D65 (A-1010). But the DEC did not explain how its decision not to set cleanup objectives to protect against vapor intrusion could be squared with the statutory language requiring that it do so. Nor did the DEC contend that setting soil cleanup objectives to protect against vapor intrusion was infeasible.

In fact, setting objectives that address vapor intrusion is feasible. During the public comment process, Anthony Hay, Associate Professor of Soil Ecotoxicology at Cornell University, presented the DEC with a detailed methodology for establishing such cleanup objectives. *See* Hay Comments dated February 2006 (A-169-178)("EPA's vapor intrusion-based groundwater target numbers could be used as a basis for arriving at SCOs that take vapor intrusion into account."). Professor Hay further explained that based on his calculations, it is likely that cleanup objectives designed to protect against vapor intrusion would be "substantially lower (10-100 times) than the [adopted] SCOs which do not include vapor intrusion as a possible pathway of exposure." *Id.* The DEC not only failed to make use of the information provided by Professor Hay, but also failed to offer any response whatsoever to his comments.

As with surface water and aquatic ecological resources, the DEC's approach to vapor intrusion does not require that contamination at levels that threaten indoor air quality be removed from the soil, but instead allows a developer to leave the contamination in place and utilize remedial measures such as "engineering controls" to limit "the migration of contaminants in soil and groundwater at levels which could impact the indoor air of buildings." *See* 6 NYCRR § 375-6.7(a).

B. The DEC Did Not Consider the Feasibility of Strengthening the Soil Cleanup Objectives in Light of Historically Achieved Cleanup Levels.

The Brownfield Cleanup Law directs that in developing the soil cleanup objectives, the DEC "shall consider . . . the feasibility of achieving more stringent remedial action objectives, based on experience under the existing state remedial programs, particularly where toxicological, exposure, or other pertinent data are inadequate or non-existent for a specific contaminant." ECL § 27-1415(6)(b). However, despite admitting that historical cleanup data may show that it is "possible to achieve cleanup values which are more stringent than those set forth in the SCO tables," (DEC Sept TSD at 343) (A-612), the DEC made no effort to identify those historically achieved cleanup levels and evaluate the feasibility of achieving them at future sites. Instead, the DEC limited its investigation to comparing its soil cleanup objectives to the cleanup guidelines specified in a 14-year-old agency guidance document entitled "Technical and Administrative Guidance Memorandum 4046 ("TAGM 4046")(*see* Harrington Aff. ¶ 70 (A-658)).

The DEC admits that some past cleanups likely achieved more stringent cleanups than the guidance levels specified in TAGM 4046. *See* September 2006 DEC Technical Support Document at 343 (A-612)(explaining, "[f]or some sites, the cleanup number may have been lower [than TAGM 4046] to provide for protection of ecological resources."). *Accord* Affidavit by Joseph A. Gardella, Jr., Ph.D. ("Gardella Aff.") ¶ 21-23(A-933-944). The DEC also admits that nineteen of the contaminants for which it set soil cleanup objectives are not covered by TAGM 4046. *See* Harrington Aff. ¶83 (A-662-663). Among others, TAGM 4046 omits cleanup levels for trivalent and hexavalent chromium, cyanide, lead, manganese, silver, cresol, cis-1,2-Dicholoroethene, 1,4 Dioxane, Hexachlorobenzene, tert-Burylbenzene, 1,2,4 and 1,3,5 Trimethylbenzene, n-Butylbenzene, Methyl tert-butylether, n-Propylbenzene, and sec-

Butylbenzene. *Id.* For those chemicals, the DEC apparently made no attempt whatsoever to identify historically achieved cleanup levels.

C. Despite the Statute's Emphasis on Considering the Feasibility of Achieving More Stringent Historical Cleanup Levels Where Health and Environmental Data are Inadequate or Non-Existent, the DEC Refused to Strengthen Any of the Cleanup Objectives on the Basis That Existing Data Do Not Show That Stronger Standards Will Be Beneficial.

The DEC admits that there are "gaps, limitations and uncertainties in the data used to derive the human health-based SCOs." Affidavit of A. Kevin Gleason, ¶ 11 (A-254). Recognizing those substantial data gaps with respect to both the health and environmental impacts of most contaminants, the Legislature directed the DEC to consider the feasibility of attaining more stringent historically achieved cleanup levels "particularly where toxicological, exposure, or other pertinent data are inadequate or non-existent for a specific contaminant." ECL § 27-1415(6)(b)(emphasis added). In other words, recognizing that new information about the health and environmental effects of toxic contaminants become available every year, and that an exposure level that is considered safe today may be found to pose a threat in the future, the statute directs the DEC to take a precautionary approach to setting soil cleanup objectives, including considering the feasibility of achieving even more stringent cleanup levels than mandated by existing data. Such an approach helps guard against construction of a school or workplace on a property that later turns out to be contaminated at unsafe levels.

As discussed above, the DEC admitted that historical cleanup data may show that it is "possible to achieve cleanup values which are more stringent than those set forth in the SCO tables." DEC Sept TSD at 343 (A-612). Regardless of the feasibility of achieving such cleanup levels, however, the DEC asserted that it was unnecessary to strengthen the soil cleanup objectives because "both public health and the environment will be protected through the use of

the SCOs and more stringent levels will not significantly increase this level of protection." *Id.* In support of this assertion, the DEC referred generally to its Technical Support Document and "various reference source documents," without undertaking any specific assessment of historically achieved cleanup levels for particular contaminants. *See, id.*

Despite the DEC's apparent confidence in its sweeping claim that no benefit would be gained from strengthening any of the soil cleanup objectives, the administrative record is replete with examples of contaminants for which inadequate or non-existent data make it impossible for the DEC to reach such a conclusion. And indeed, it is under these very circumstances—"where toxicological, exposure, or other pertinent data are inadequate or non-existent for a specific contaminant"— that the statute emphasizes the DEC's obligation to look beyond the data on health and environmental effects and consider whether it is feasible to attain more stringent historically achieved cleanup levels. *See* ECL § 27-1415(6)(b).

For example, numerous commenters questioned the DEC's decision to set soil cleanup objectives based on 50% percentile values, *i.e.*, at a level considered protective of 50% of the population. The U.S. Environmental Protection Agency commented, "the SCOs were developed using average exposure assumptions and do not protect sensitive individuals within a population. EPA recommends consideration of exposure assumptions that represent the reasonable maximum exposure and are obtained from peer-reviewed literature. U.S. EPA Comments at 8 (A-989). *See, also*, Comments by Kathleen Burns, Ph.D. at 11 (A-198) ("In cases where standards are being set up to protect the population, it is highly advisable to select values on the upper end of a spectrum of measurements of exposure because it is inevitable that some portion of the population will be exposed at that level. The SCOs were developed using relatively low exposure assumptions leaving many people unprotected by their approach to exposure

estimation. When a 50th percentile value is chosen, it yields, by default, a value that is protective of only one half of the population."). The DEC responded that "there is considerable variability in the exposure scenarios used by others and no obvious consensus on scenarios. So, while the information was helpful [comments arguing that the DEC shouldn't use the 50th percentile values], the Department found that it was not sufficient to provide a definitive technical basis for exposure scenario development." DEC June Response to Comments at D22 (A-133). The DEC went on to reject the experts' arguments that a standard based on 95th percentile values would be more appropriate, asserting: "Choosing to use 'upper-end' values for all factors can be problematic in that the data from which an 'upper end' value is derived may be limited (*e.g.*, soil ingestion rate data), significantly reducing confidence in the value of the factor and the resulting SCO. . . . In calculating SCOs, the Department chose values that it considered to be generally representative of the majority of the potentially exposed population for a given scenario." *Id.* (emphasis added). In other words, the DEC chose to set the soil cleanup objectives based on the less protective 50th percentile values because it lacked sufficient data to set them at a level sufficient to protect a higher percentage of the exposed population.

Another example of inadequate or nonexistent data with respect to exposure impacts of a particular contaminant arises in the context of indoor ingestion of contaminated soil by young children. In comments to the DEC, Dr. Nathan Graber, M.D., a fellow in Pediatric Environmental Health at Mount Sinai Hospital, explained that DEC inappropriately estimated indoor soil ingestion levels based on an average two-year-old instead of on a younger child. *See* Graber Comments at 14 (A-207). Dr. Graber explained, "very young children, starting around 6 months of age, begin to use their mouths as additional means of exploring their worlds. This behavior peaks between 16 months and 2 years of age but there is very wide variability in this. . .

. Since children's mobility greatly increases around 9 months of age, . . . it would be more appropriate to apply the parameters for a 9 month old child." *Id.* Dr. Graber explained that "[a]pplication of this number would yield soil cleanup objectives which are one an [a] half times lower." *Id.* The DEC responded:

> For calculating cancer and non-cancer ingestion and dermal SCOs, the Department chose not to include children less than one year of age because data to estimate exposure for such children are either not available or highly uncertain. For example, data for estimating soil/dust ingestion rates among children were derived from studies that did not include subjects under one year in age (Calebrese et al., 1989; Davis et al., 1990). Only one of the studies (Calebrese et al.) included children under the age of two years. Additionally, there would be substantial uncertainties in any estimates of how frequently such children may have opportunities for ingestion/dermal exposure indoors (i.e., time spent on floors/carpeting; frequency of mouthing or teething hands or toys). ... Therefore, the Department has decided not to change the SCOs based on the suggestion in the comments.

DEC June 2006 RTC at D22-D23 (emphasis added)(A-630-631); *see also id.* at D23 (A-631)("[T]he degree of uncertainty associated with incidental ingestion rates would be relatively high for very young children compared with other children and adults. The Department's confidence in ingestion rate estimates is greater for older (i.e., two year-old) children than for the very young."). In sum, the DEC refused to set its soil cleanup objectives based upon the risk to children younger than one (or two, depending on the contaminant) because it lacked sufficient information about exposure rates of these younger children.

In addition to the above examples, expert commenters reported a dramatic lack of data pertaining to the impact of toxic contaminants on young children, generally. *See, e.g.*, Graber Comments at 8 (A-205)("For most of the substances on the priority list, the toxicological potential for adverse health effects in children has never been studied."). The DEC did not dispute this lack of data.

Furthermore, throughout its Technical Support Document, the DEC acknowledges additional circumstances in which it was confronted with inadequate data regarding safe exposure levels for particular contaminants. Examples include:

- "For almost all contaminants, however, the quantitative data on environmental and dietary levels are likely to be inadequate to determine accurately the relative contribution of each exposure source to the aggregate exposure for populations of concern (adults and children)," (DEC Sept. TSD at 169) (A-438);

- "The human data on lead are inadequate for use in developing cancer toxicity values (i.e., cancer potency factor or inhalation unit risk) for lead . . . Thus, lead SCOs based on cancer effects are not derived." (DEC Sept. TSD at 213) (A-482);

- "In most cases, human data are inadequate for use in dose-response assessment and most cancer potency factors and air unit risks are based on results from animal studies." (DEC Sept. TSD at 28) (A-297);

- "There are very few studies of the bioaccumulation of soil-borne contaminants by amphibians and reptiles, so the food chain bioaccumulation model described herein only addresses impacts to birds and mammals." (DEC Sept. TSD at 272, fn.3) (A-541);

- "Few articles have evaluated the potential risk of acute effects from a large single dose of a soil contaminant." (DEC Sept. TSD at 57) (A-326);

- "[T]he acute toxicity data on children was not used to develop a provisional acute reference dose for lead because estimates of an acute does associated with acute effects are unavailable as are US EPA models to accurately convert an acute lead blood level into an acute dose." (DEC Sept. TSD at 60) (A-329);

- "Although incidental soil ingestion by children has been widely acknowledged, relatively few investigators have conducted studies to yield quantitative estimates of soil ingestion rates." (DEC Sept. TSD at 103) (A-372);

- "Limited information is available from which to derive soil ingestion rates for adults." (DEC Sept. TSD at 106) (A-375);

- "Because estimates of concentrations of chemicals in animal products that originated from soil are highly uncertain, likely even more so than those of contaminants in vegetables, the calculation of SCOs does not quantitatively account for this exposure pathway." (DEC Sept. TSD at 155) (A-424);

- "A metal's solubility or its potential to become soluble if conditions change depends on many factors associated with the metal form, particle size, weathering, and soil chemistry (NRC, 2003; Ruby et al., 1999). Another important factor is the likelihood of

disturbances that would alter the soil conditions that determine solubility and bioavailability (Ruby et al., 1999). There are limited data on how these factors vary with metals and soils and how these changes affect solubility and bioavailability. The missing data preclude accurate estimates of bioavailability of metals ingested with soils." (DEC Sept. TSD at 62) (A-331);

- "The potential for organic chemicals to bioaccumulate can be crudely predicted using values for chemical parameters found in the literature such as octanol-water partition coefficients. However, the accuracy of these methods is limited, as they do not take into account a number of factors, including the persistence of the chemical in the environment or in biota. Empirically derived estimates of potential for bioaccumulation can be found in the literature for some chemicals. However, these empirically derived estimates are often based on aquatic bioconcentration, [and] are not directly applicable to terrestrial bioaccumulation. They are also not available for all contaminants." (DEC Sept. TSD at 149) (A-418);

- "While there are some empirical data available to estimate the levels of contaminants in food that result from levels in local soils, these data are generally limited to a few highly bioaccumulative compounds. Even for these compounds, the exact contribution of the soil intake to animal body burden tends to be difficult to differentiate from contributions from other sources like atmospheric deposition to pasture grass or consumption of contaminated feed brought in from offsite. Furthermore, results reported in various studies suggest a range of possible food-to-soil ratios that spans several orders of magnitude." (DEC Sept. TSD at 151) (A-420);

- "Although the use of human data on acute toxicity eliminates the uncertainties associated with extrapolating the results of animal studies to humans, there are substantial limitations and uncertainties associated with the use of available human data on barium, cadmium, and nickel ... All the studies involved small numbers of people, and many of the reports provide little quantitative information on the extent and nature of the signs/symptoms of exposure. Confidence in the estimates of the doses from these studies is low because they contained very little data on intake." (DEC Sept. TSD at 61) (A-330);

- "Because of the wide range of organisms that must be protected, the impossibility of characterizing toxicity thresholds for all exposure scenarios, and the necessity of using general models for deriving [ecological resource SCOs], there is uncertainty associated with the calculated risk thresholds . . . The use of median (or near median) values reduces the likelihood that the risk thresholds would be overprotective, but increases the chance that some level of toxicity might occur when soil concentrations are very close to the [ecological resource SCO] values." (DEC Sept. TSD at 285-286) (A-554-555).

The DEC offered no explanation for how it could be sure that no benefit would be gained from strengthening cleanup objectives for the many contaminants for which data pertaining to health and environmental effects are inadequate or non-existent.

D. The DEC's Regulations Automatically Exclude All Properties Contaminated Solely by Off-Site Sources From Program Participation.

The statute broadly defines a "brownfield site" as "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) (emphasis added). The DEC's regulations build in an additional restriction that appears nowhere in the statute: that a property will only be considered for program admission based on contamination originating from an on-site source. *See* 6 NYCRR § 375-3.3(a)(2) (declaring, "[i]n determining eligibility, the Department shall consider only contamination from on-site sources."). Thus, a property contaminated solely by toxic pollution generated by an off-site source is automatically ineligible for the program, regardless of whether that contamination is complicating the property's redevelopment or reuse. The exclusion does not block program admission for properties contaminated by both on-site and off-site sources.

A broad cross-section of public commenters criticized the DEC's off-site source exclusion, explaining that it is illegal, unfair, and bad public policy. The New York State Bar Association commented that "[l]imiting eligibility to a site that is the source of contamination has no basis in the statute and is inconsistent with [DEC's] goal of reducing sprawl and loss of open space, improving and protecting natural resources and the environment, and enhancing the health, safety and welfare of the people of the state as set forth in the declaration of policy of the enacting statute. The source of the contamination impacting a site is important; however it does not alleviate the complications associated with redeveloping such a site." *See* Comments by Walter A, Mugdan dated August 25, 2006 (A-1000). *See also* Comments by City of New York

(A-1005)("DEC should not exclude sites or portions of sites that are contaminated with urban fill or from off-site sources from the BCP."). Likewise, the Consolidated Edison Company commented that "nothing in the language or legislative history of the Brownfield Cleanup Law suggests that the contamination on a development project site must be attributable to an on-site source for the property to be eligible for participation in the BCP. If a development project site's soil or groundwater is contaminated with petroleum or hazardous substances that complicate the site's development or re-use, it is irrelevant under the Brownfield Cleanup Law's definition of the term 'brownfield site' whether the contamination is attributable to operations that were formerly conducted on the site or to the migration of contaminants from neighboring properites." Comments by Randolph S. Price dated Mar. 27, 2006, at 3 (A-995).

Consolidated Edison went on to explain that the off-site source exemption is unfair because it perversely benefits those who have contaminated their own properties. Specifically, Consolidated Edison explained:

> Under this section, the owners of development project sites who have contaminated their properties would be eligible to participate in the BCP but would be required by the Department's proposed Part 375 rules and regulations to remediate any additional contamination that off-site sources may have caused on their properties and to include in the remedial action plans for their properties measures to prevent them from being re-contaminated by off-site sources.
>
> On the other hand, the owners of development project sites that have been contaminated only by off-site sources would be barred from participating in the BCP no matter how much the contamination complicates redevelopment of their sites. However, to ensure that their proposed development projects can proceed in a manner that adequately protects human health and the environment from the risks posed by the contamination that off-site sources have caused on their properties, they would for all practical purposes be forced to remediate the contamination and take steps to ensure that the continued migration of contamination from off-site sources does not undercut the effectiveness of the remedial actions that they have completed for their properties, but would have to do so outside the BCP.

Id. (A-996). Consolidated Edison concluded that while the DEC's approach would foreclose program participation by responsible site owners who have operated their properties in an environmentally sound manner, "landowners who contaminate their properties would be eligible to participate in the BCP and to reap the benefits of that program, including a broad release from liability from the State of New York and substantial tax benefits. Quite clearly, this result is not what the Legislature intended." *Id.* (A-996).

Echoing Consolidated Edison's comments, a group of New York manufacturing businesses known as the "Superfund Coalition" commented, "[t]here is no statutory basis for disqualifying a site from eligibility merely because the contamination present on this site is from an off-site source. There also is no public policy purpose for reading such a qualification into the BCP program requirements. ... If the reuse or redevelopment of a site is complicated by the presence or potential presence of a contaminant, it does not matter whether the source of the contaminant is from on-or off-site. If the Legislature had intended to make such a distinction, it could have so stated in the BCP Act." Superfund Coalition Comments at 43 (A-983). The Coalition went on to explain that "rather than disqualifying sites subject to contamination that has originated off-site, there is a sound public policy justification for addressing the victim site in the BCP program and addressing the off-site source of contamination by other means." *Id.* For example, the Coalition pointed to a statutory provision instructing the DEC "to bring an enforcement action against any parties known or suspected to be responsible for contamination at a site" if the DEC determines that a volunteer Brownfield Cleanup Program site poses a significant threat. *Id* at 44 (A-984). The Coalition explained that "[s]uch a responsible party could include a party responsible for the origination of off-site contamination that is reaching the volunteer BCP site." *Id.*

Dismissing the many comments opposing the off-site source exclusion, the DEC asserted that the exclusion "is consistent with the remedial programs' long history of addressing contamination at the source and working out from the source." DEC June 2006 RTC at D6 (A-131); *see also, id.* (stating that the intent of this rule is to "determine whether it is likely that the contamination on-site is the result of an off-site source, which would be more appropriately addressed at such source."). The DEC did not explain why it is appropriate to accommodate the cleanup of off-site source contamination where a property is also contaminated by an on-site source, but not where an off-site source is the sole contamination source.

Indeed, elsewhere in its response to public comments, the DEC confirms that there is no practical impediment to admitting properties contaminated solely by off-site sources into the cleanup program. Acknowledging that many properties admitted into the program may be impacted by off-site contamination sources, the DEC explains that "the site remedial program shall ... remediate or mitigate the impact of the off-site source to allow the proposed use of the site." June Response to Comments at B9 (A-1008)(emphasis added). The DEC further explains, "[t]he Department will, consistent with past practice, pursue responsible parties relative to off-site sources for which the remedial part is not responsible for addressing." *Id.* at D73 (A-1018). Thus, it is clear that the mere fact that a property's contamination originates from an off-site source does not make it inappropriate or ineffective to admit that property to the cleanup program. Rather, even where a property's contamination originates off-site, a developer could clean up the property and then either clean up the off-site source or mitigate its impact. Likewise, the DEC acknowledges that admitting such a property into the cleanup program would in no way impede the DEC's ability to commence legal proceedings to force a responsible party to clean up the off-site contamination source.

IV. Proceedings Below

On March 28, 2007, Citizens' Environmental Coalition, *et al.* initiated this proceeding by filing a Verified Petition under CPLR Article 78, in the Supreme Court, Albany County, alleging that Respondents acted unlawfully and arbitrarily by (1) setting the soil cleanup objectives without taking into account the contaminant exposure levels that would protect surface water, aquatic ecological resources, and indoor air, (2) failing to consider whether to strengthen the soil cleanup objectives in light of more stringent historically achieved cleanup levels, (3) excluding any property contaminated solely by an off-site source from cleanup program eligibility, and (4) authorizing cleanups in pervasively contaminated communities to be cleaned up only to "site background" levels rather than to the levels specified in the soil cleanup objectives. *See* Verified Petition (A-19-56). In response to the Verified Petition, Respondents conceded issue (4), but contested issues (1) – (3). *See* Verified Answer (A-241-248). Oral argument was presented on December 21, 2007. On February 22, 2008, Justice Christopher E. Cahill, JSC, issued a decision on behalf of the court denying the petition with respect to issues (1)-(3) and granting the petition with respect to issue (4). *See* Decision (A-5-14). Following the entry of judgment, Respondents filed this appeal of the Supreme Court's decision and order with respect to the first three issues. *See* Notice of Appeal (A-1-2).

SUMMARY OF ARGUMENT

The DEC's failure to set its soil cleanup objectives at levels designed to protect surface water, aquatic ecological resources, or indoor air violates the statute's plain language and structure. *See* ECL § 27-1415(6)(b), 27-1415(1). The DEC cannot ignore the statute's directive that contamination in excess of safe levels be removed from a site in favor of its own policy preference to allow such contamination to remain in place and instead be addressed by

site-specific containment measures such as barrier walls. The DEC's *post-hoc* argument that establishing generic soil cleanup objectives with respect to these resources is infeasible appears nowhere in the administrative record and is thus inadmissible. Moreover, expert affidavits filed by Petitioners-Appellants demonstrate that it is feasible to establish such objectives. The lower court's decision was based on an incorrect factual determination that the DEC's regulations require the establishment of site-specific soil cleanup objectives; in reality, the regulations eschew reliance on soil cleanup objectives with respect to these resources altogether. The lower court also improperly deferred to the DEC on the purely legal question of whether the statute requires the DEC to set soil cleanup objectives to protect these resources.

The DEC unlawfully and arbitrarily failed to consider the feasibility of achieving more stringent cleanup levels accomplished at past sites as directed by ECL § 27-1415(6)(b). Despite the DEC's acknowledgement that more stringent cleanup levels than specified in its cleanup objectives likely were achieved in the past, the DEC made no attempt to identify those cleanup levels or assess the feasibility of achieving them at future sites. The DEC's comparison of its cleanup levels to cleanup guidelines set forth in a 14-year-old agency guidance document cannot substitute for an analysis of historically achieved cleanup levels. The DEC knows that more stringent cleanup levels than specified in the guidance document likely have been achieved. The guidance also fails to cover 14 of the contaminants for which the DEC set cleanup objectives. The DEC's *post-hoc* claim that it is impossible to identify the extent to which sites have been cleaned up in the past appears nowhere in the record and is inadmissible. Moreover, an expert affidavit filed by Petitioners-Appellants demonstrates that it is possible to identify actually achieved cleanup levels.

The DEC's across-the-board refusal to strengthen any of the soil cleanup objectives on the basis that no benefit would be gained must be rejected as arbitrary. The statute emphasizes that it is "particularly" important for the DEC to assess the feasibility of attaining more stringent historically achieved cleanup levels where data on a contaminant's health and environmental impacts are "inadequate or non-existent;" thus, the Legislature plainly did not intend for the DEC to decide whether to strengthen cleanup standards for such contaminants based on whether the data show that stronger cleanup standards will be beneficial. Moreover, where such data are inadequate or non-existent, there is no rational basis for the DEC to conclude that no benefit would be gained from stronger cleanup standards.

The DEC's blanket regulatory exclusion from cleanup program participation by any property contaminated solely be an off-site source contravenes the plain language of ECL § 27-1405 which defines "brownfield site" in terms of whether contamination impedes redevelopment of a property, regardless of the contamination source. The exclusion is also arbitrary because the contamination source is irrelevant to whether a property satisfies the statutory eligibility criteria.

ARGUMENT

I. The DEC's Failure to Set the Soil Cleanup Objectives at Levels Sufficient to Safeguard Surface Water, Aquatic Ecological Resources, and Indoor Air was Unlawful and Arbitrary.

A. The DEC Violated the Unambiguous Statutory Command That Soil Cleanup Objectives be Set at Levels Sufficient to Protect Surface Water, Aquatic Ecological Resources, and Indoor Air.

It is undisputed that the DEC's part 375 soil cleanup objectives were not set at levels designed to protect surface water, aquatic ecological resources, or indoor air. *See supra* at 6-10. Thus, the issue before the Court is one of law: whether the statute requires the DEC to set soil cleanup objectives designed to protect these resources. As explained below, both the

unambiguous language of the statutory provisions at issue and the overall statutory structure demonstrate that the answer must be "yes." The Court's resolution of this pure question of statutory interpretation requires no deference to the DEC. *See, e.g., Teachers Ins. and Annuity Ass'n of America v. City of New York*, 82 N.Y.2d 35, 42, 623 N.E.2d 526, 529, 603 N.Y.S.2d 399, 402 (N.Y. 1993) (deference to an agency "is not required where the question is one of pure legal interpretation."); *Schenectady Police Benev. Ass'n v. New York State Public Employment Relations Bd.*, 85 N.Y. 2d 480, 485, 650 N.E. 2d 373, 375 (N.Y. 1995)("[C]oncerning the standard of review, we recognize that an administrative agency's determination requires deference in the area of its expertise ... Where, however, the matters at issue involve statutory interpretation, such deference is inapplicable.")

Plain language: In describing the minimum requirements for establishing generic soil cleanup objectives, ECL § 27-1415(6)(b) plainly states, "[s]uch objectives shall be protective of public health and the environment pursuant to subdivision one of this section." Subdivison one then provides, "[a]ll remedial programs shall be protective of public health and the environment including but not limited to groundwater according to its classification ...drinking water, surface water and air (including indoor air; sensitive populations, including children; and ecological resources, including fish and wildlife." ECL § 27-1415(1)(emphasis added). Thus, for the DEC's "objectives" to be "protective of public health and the environment" in compliance with ECL § 27-1415(6)(b), they must be set at levels designed to protect, *inter alia*, "surface water," "ecological resources, including fish," and "indoor air." *Id.* The DEC's failure to take these resources into account when establishing its soil cleanup objectives violates this unambiguous statutory command.

Pointing to ECL § 27-1415(1), the DEC suggests that the statute is satisfied so long as surface water, aquatic ecological resources, and indoor air are protected as part of the overall "remedial program" applicable to a particular site, even if the soil cleanup objectives themselves are not protective of those resources. *See, e.g.*, DEC June 2006 Response to Comments at D74 (A-136)(stating that ECL § 27-1415(1) "requires ... all remedies to be protective of public health and the environment," and asserting that "measures undertaken to protect surface water on a particular site will be memorialized in the remedial work plan and site management plan."). What the DEC overlooks is that ECL § 27-1415(6)(b) specifically requires that the DEC's "objectives" (*i.e.*, soil cleanup objectives) be "protective of public health and the environment." (emphasis added). While ECL §§ 27-1415(1) and 27-1403 state the broader command that overall "remedies" shall be protective of public health and the environment, those provisions say nothing to obviate ECL § 27-1415(6)(b)'s more specific directive that the "objectives" be set at a level that is protective of "public health and the environment," which ECL § 27-1415(1) expressly defines to include, among other things, surface water, aquatic ecological resources, and indoor air.

The DEC's attempt to ignore ECL § 27-1415(6)(b)'s specific command that soil cleanup "objectives" be set at levels that are protective of public health and the environment runs afoul of the longstanding rule of statutory construction that a court should give "effect and meaning ... to the entire statute and every part and word thereof." McKinney's Cons. Laws of New York, Book 1, Statutes § 98 (emphasis added); *Friedman v. Connecticut General Life Ins. Co.*, 9 N.Y.3d 105, 2007 NY Slip. Op. 7771, at 8 (N.Y. 2007); *People v. Mobil Oil Corp.*, 48 N.Y. 2d 192, 199, 397

N.E. 2d 724, 728, 422 N.Y.S.2d 33, 38 (N.Y. 1979).[9] By specifically instructing that the DEC's soil cleanup "objectives" be "protective of public health and the environment," the Legislature plainly intended something different from its separate, more general command in ECL sections 27-1415(1) and 27-1403 that overall "remedies" be protective of public health and the environment. The DEC's proffered interpretation fails to ascribe any meaning whatsoever to ECL § 27-1415(6)(b)'s use of the term "objectives," and thus, must be rejected.

Statutory structure: Not only do ECL sections 27-1415(6)(b) and 27-1415(1) make clear that the soil cleanup objectives must be set at levels sufficient to protect public health and the environment, including surface water, aquatic ecological resources, and indoor air, but this interpretation is essential to the overall functioning of the statute. *See, e.g., Notre Dame Leasing, LLC v. Rosario*, 2 N.Y.3d 459, 464, 812 N.E.2d 291, 292, 779 N.Y.S.2d 801, 802 (N.Y., 2004) ("It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other.").

First, the statute unambiguously demonstrates the Legislature's intent for soil contamination to be addressed through application of the soil cleanup objectives, and the statute broadly declares that these objectives must be set at levels necessary to protect "public health and the environment." *See, e.g.*, ECL § 27-1415(6). Attainment of these soil cleanup objectives is of central importance to each of the different cleanup "tracks" specified in the statute. ECL § 27-1415(4). Moreover, the statute unambiguously demonstrates that the Legislature considered the "use" of a property as a waterway that supports ecological resources to be a protected use under the statute. *See* ECL § 27-1415(3)(i)(xii)(stating that in determining the "reasonably

[9] *See also* McKinney's Statutes § 231 ("In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning.").

anticipated future use of [a] site," an applicant should consider "[n]atural resources, including proximity of the site to important federal, state or local natural resources, including waterways, wildlife refuges, wetlands, or critical habitats of endangered or threatened species."). In light of the central role of soil cleanup objectives in the overall statutory scheme for ensuring that properties are cleaned up to levels that will be protective of future uses, the Legislature plainly did not intend for the DEC to exclude surface water, aquatic ecological resources, and indoor air from protection.

Second, in the section describing the DEC's obligation to establish soil cleanup objectives, the statute explains that the DEC must establish "contaminant-specific remedial action objectives for soil based on current, intended or reasonably anticipated future use, including (i) unrestricted, (ii) commercial, and (iii) industrial." ECL § 27-1415(6)(a) (emphasis added). It would make no sense for the statute to require the DEC to establish soil cleanup objectives suitable for "unrestricted" use, but then, in the very same statutory section, authorize the DEC to pick and choose which uses the soil cleanup objectives should protect. A soil cleanup objective that fails to account for threats posed by contaminated soil to surface water, aquatic ecological resources, and indoor air cannot possibly be viewed as suitable for "unrestricted" use in accordance with ECL § 27-1415(6)(a).

Similarly, interpreting the statute to allow soil cleanup objectives to be set at contamination levels that pose a threat to certain aspects of public health and the environment also conflicts with ECL § 27-1415(4), which defines what constitutes a "Track 1" cleanup. Specifically, ECL § 27-1415(4) states that a "Track 1" cleanup "shall achieve a cleanup level that will allow the site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls, and shall achieve [soil cleanup

objectives] which conform with those contained in the generic table of [soil cleanup objectives] for unrestricted use." *Id.* In light of the Legislature's command that a Track 1 site "will allow the site to be used for any purpose" it would be an odd outcome if the DEC were allowed to nonetheless apply soil cleanup objectives at such sites that are insufficient to protect uses requiring clean surface water, uncontaminated aquatic ecological resources, or healthy indoor air quality. This is especially so given that a Track 1 site must allow for such uses "without reliance on long-term employment of institutional or engineering controls." *Id.* In the absence of such controls, it is difficult to see how a Track 1 remediation could enable a site to be "used for any purpose" unless the soil cleanup objectives are set at a level sufficient to protect "public health and the environment," including all resources identified in 27-1415(1) as falling within that phrase.

In sum, to give effect to both the plain language of ECL § 27-1415(6)(b) and the statute as a whole, soil cleanup objectives must be set at a level designed to be "protective of public health and the environment," including all resources identified in § 27-1415(1). Because the DEC failed to set the soil cleanup objectives in 6 NYCRR § 375-6 at a level sufficient to protect aquatic surface water, aquatic ecological resources, and indoor air, the Court should declare the process by which the DEC established the cleanup objectives to be unlawful and remand them back to the agency for appropriate revisions. *See McNulty v. New York State Tax Com'n,* 70 N.Y.2d 788, 791, 516 N.E.2d 1217, 1218, 522 N.Y.S.2d 103, 104 (N.Y., 1987).

B. The DEC Cannot Ignore Statutory Requirements in Favor of its Own Policy Preference.

DEC does not have discretion to ignore the plain statutory language requiring it to set soil cleanup objectives designed to guard against contamination of surface water, aquatic ecological resources, and indoor air in favor of its preferred approach. *See Beer Garden, Inc. v. New York*

State Liquor Authority, 79 N.Y.2d 266, 276, 590 N.E.2d 1193, 1197, 582 N.Y.S.2d 65, 69 (N.Y., 1992) ("an agency cannot 'promulgate rules in contravention of the will of the Legislature.'") (internal citation omitted); *Bender v. Jamaica Hospital*, 40 N.Y. 2d 560, 561, 356 N.E. 2d 1228, 1229 (N.Y. 1976) ("Where the statute is clear and unambiguous on its face the legislation must be interpreted as it exists.... The courts [and likewise, administrative agencies] are not free to legislate."). Here, the statute plainly requires that the soil cleanup objectives themselves be set at a level sufficient to safeguard surface water, aquatic ecological resources, and indoor air. *See* ECL §§ 27-1415(6)(b), 27-1415(1). The DEC's decision to issue soil cleanup objectives that do not account for protection of these resources violates that unambiguous statutory command and must be rejected.

C. The DEC's *Post-Hoc* Argument that Implementation of the Statute's Requirement Would be Impossible Lacks Any Basis in the Administrative Record and is Inadmissible.

In an affidavit submitted by the DEC's lawyers in response to the Verified Petition filed in this proceeding, a DEC employee argues for the first time that site variability makes it impossible to calculate generic soil cleanup objectives designed to protect surface water and aquatic ecological resources. *See* Affidavit of James B. Harrington, P.E., ¶31, ¶ 36 (A-643, 644-645). The same affidavit attempts to refute, again for the first time, Professor Anthony Hay's comments on the proposed rules (*see supra* at 10) describing a methodology by which the DEC could have calculated vapor intrusion soil cleanup objectives (though the DEC does not expressly contend that setting a vapor intrusion soil cleanup objectives would be impossible). *See* Harrington Aff. ¶ 52 (A-651-652). These *post-hoc* arguments, made after the close of the administrative record and the commencement of litigation, cannot be relied on by the Court to uphold the DEC's action. *See, e.g., Aronsky v. Board of Educ., Community School Dist. No. 22*

of City of New York, 75 N.Y.2d 997, 1000-1001, 556 N.E.2d 1074, 1076, 557 N.Y.S.2d 267, 269 (N.Y.,1990)("Judicial review of an administrative determination is limited to the grounds invoked by the agency ... We may not sustain the determination by substituting a more appropriate basis now asserted by the Board."); *Malchow v. Board of Educ. for North Tonawanda Cent. School Dist*., 254 A.D.2d 608, 609-610, 679 N.Y.S.2d 172, 173 (N.Y.A.D. 3rd Dept.,1998) ("It is a fundamental principle of administrative law that judicial review of an agency's determination is limited, first, to a consideration of evidence that was before the agency and, second, to the actual grounds that were relied upon by the agency in reaching its determination."); *Law Enforcement Officers Union, Dist. Counsil 82, AFSCME, AFL-CIO v. State*, 229 A.D. 2d 286, 292, 655 N.Y.S.2d 770, 775 (N.Y.A.D. 3rd Dept., 1997)(same).

If the DEC had complied with procedural requirements and provided public notice of these new arguments, Petitioners-Appellants would have filed comments refuting that claim. Indeed, in response to the DEC's filing of the Harrington affidavit in the Supreme Court proceeding, Petitioners-Appellants filed an expert affidavit by Peter L. deFur, Ph.D. confirming that the DEC can develop soil cleanup objectives designed to protect surface water, aquatic ecological resources, and indoor air. (A-899-924).

In light of the plain statutory language directing the DEC to establish soil cleanup objectives designed to protect surface water, aquatic ecological resources, and indoor air, the proper remedy is to remand the part 375 soil cleanup objectives back to the DEC for further action consistent with the correct legal standard. *See, e.g., PPG Industries v. US,* 52 F.3d 363, 365 (D.C. Cir. 1995) ("Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal

standards."). Insofar as the DEC concludes after remand that it cannot abide by the statutory command, the DEC bears the heavy burden of making that demonstration in the administrative record.

D. The Court Below Incorrectly Concluded That the DEC's Regulations Require *Site-Specific* Soil Cleanup Objectives to be Developed for the Purpose of Protecting Surface Water, Aquatic Ecological Resources, and Indoor Air.

In finding that the DEC's failure to account for protection of surface water, aquatic ecological resources, and indoor air in developing its soil cleanup objectives complied with the statute, the court below incorrectly concluded that the DEC's regulations merely require that soil cleanup objectives be developed "on a site specific basis" rather than on a generic basis. *See* Decision at 5 (A-9) (the Court describing its understanding that under the challenged DEC regulations, "cleanup levels for soils would be evaluated by a remedial investigation and SCOs would, thereafter, be developed on a site specific basis."). That factual conclusion is wrong. The DEC's regulations plainly give developers the option of allowing contamination in excess of levels that pose a threat to remain in the soil, and to instead utilize various measures designed to "contain" that contamination. *See supra* at 7. Allowing developers to leave contamination in the soil is fundamentally different from requiring developers to comply with soil cleanup objectives, which—regardless of whether they are generic or site-specific—require that soil contamination be reduced to safe levels. *See* ECL § 27-1415(4) (providing that a Track 1 site "shall achieve" the soil cleanup objectives designed for unrestricted use, a Track 2 site "shall achieve" the generic soil cleanup objectives appropriate for the future use of the property, a Track 3 site "shall achieve" site-specific soil cleanup objectives that "conform with the criteria used to develop" the generic soil cleanup objectives, and "exposed surface soils" at Track 4 sites "shall not exceed" the generic soil cleanup objectives appropriate for the future use of the property.).

Given the substantial difference under the statute between an approach requiring the establishment of site-specific soil cleanup objectives and an approach that altogether eschews reliance on soil cleanup objectives, the Supreme Court's erroneous finding that the DEC's regulations require the development of site-specific soil cleanup objectives to protect the resources in question fundamentally undermines the basis of the court's decision. Thus, this Court should document a factual finding pursuant to CPLR § 5712 that the DEC's regulations do not, in fact, require the development of any kind of soil cleanup objective to protect surface water, aquatic ecological resources, and indoor air, and should vacate the Supreme Court's decision with respect to this issue. *See, e.g., Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498, 382 N.E.2d 1145, 1147, 410 N.Y.S.2d 282, 285 (N.Y.,1978)("In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts.").

D. The Court Below Improperly Deferred to the DEC's Expertise in Interpreting the Statute, Even Though Interpretation of the Statutory Provision at Issue Requires No Special Expertise and the DEC Did Not Actually Offer an Interpretation.

In addition to misapprehending the facts of what the DEC's regulations require, the court below improperly deferred to the DEC's "expertise" in interpreting the Brownfield Cleanup Law on the basis that interpretation of what the statute requires "involve[s] a mixture of law and science." *See* Decision at 5 (A-9) (internal quotation omitted). *See also* Decision at 4 (A-8). But deciding whether the statute requires soil cleanup objectives to be set at levels necessary to protect surface water, aquatic ecological resources, and indoor air in no way "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom." *Id.* (quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y. 2d 451, 459 (1980). Rather, resolution of this question involves "pure statutory

reading and analysis, dependent only on accurate apprehension of legislative intent." *Kurcsics*, 49 N.Y. 2d at 459. Under such circumstances, "there is little basis to rely on any special competence or expertise of the administrative agency." *Id.* Instead, "the courts use their own competence to decide issues of law raised, since those questions are of ordinary statutory reading and analysis." *Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 144, 527 N.E. 2d 274, 277 (N.Y., 1988). *See also Seittelman v. Sabol*, 91 N.Y.2d 618, 625, 697 N.E.2d 154, 157, 674 N.Y.S.2d 253, 256 (N.Y.,1998)(where special agency expertise is not implicated, the court is "free to ascertain the proper interpretation from the statutory language and legislative intent.")(internal citation omitted).

Environmental Conservation Law § 27-1415(6)(b) plainly requires soil cleanup objectives to be "protective of public health and the environment pursuant to subdivision one of this section." Thus, the only legal analysis needed to resolve this issue is whether the Legislature's use of the phrase "pursuant to subdivision one of this section" in ECL § 27-1415(6)(b) serves to define "public health and the environment" as including all of the resources specified in ECL § 27-1415(1). If it does, then the statute must be read to require soil cleanup objectives to be set at levels sufficient to protect all such resources, including surface water, aquatic ecological resources, and indoor air. Petitioners-Appellants are unable to see any other way to interpret this statutory provision. Moreover, interpreting the quintessentially legalistic phrase "pursuant to" does not call upon the DEC to "utilize[] its expertise," *see* Decision at 5 (A-9). Thus, it was improper for the court below to defer to the DEC's supposed expertise in interpreting this statutory provision.

In any event, even if some deference were owed to the DEC's interpretation if an interpretation were offered, no such interpretation appears in the administrative record. Insofar

as deference is owed, there must be an agency interpretation to which the Court can defer. Here, despite many calls by public commenters for the DEC to explain the legal basis for excluding consideration of surface water, aquatic ecological resources, and indoor air when setting the soil cleanup objectives (*see, e.g*., CEC *et al.* Comments, Mar. 27, 2006, at 42 (A-107)), the DEC never provided such an explanation. *See* DEC Response to Comments at D74, D65-D68 (A-1020, 1010-1013), DEC October Response to Comments at F2-F3 (A139-140). And, though the court below declared that the DEC's "reasoning ... was fully explained in the affidavit of James B. Harrington," *see* Decision at 5 (A-9), that affidavit (by a DEC engineer) makes no attempt to explain how the statute should be interpreted. *See* Harrington Affidavit (A-633-674).[10] Finally, though the court below stated that its decision was based in part on "[t]his Court's review of the statutory language," (Decision at 5)(A-9), the court's decision is itself devoid of any explanation as to how the statute can be read to authorize the DEC to set its soil cleanup objectives without considering impacts on surface water, aquatic ecological resources, or indoor air.

In sum, it was improper for the court below to defer to the DEC's expertise in upholding the DEC's statutory interpretation where no special agency expertise was required, where the administrative record is devoid of any agency interpretation of the relevant statutory provisions, and where the court failed to specify what the interpretation was that it was upholding. In light of the plain statutory language requiring the DEC to set its cleanup objectives at levels needed to safeguard surface water, aquatic ecological resources, and indoor air, this Court should vacate

[10] Even if Mr. Harrington's affidavit had offered an interpretation of the statute, that affidavit exists outside the record and could not be relied upon to establish the basis for the DEC's action. *See, e.g., Malchow v. Board of Educ. for North Tonawanda Cent. School Dist.*, 254 A.D.2d 608, 609-610, 679 N.Y.S.2d 172, 173 (N.Y.A.D. 3 Dept.,1998)(" It is a fundamental principle of administrative law that judicial review of an agency's determination is limited, first, to a consideration of evidence that was before the agency and, second, to the actual grounds that were relied upon by the agency in reaching its determination.").

the lower court's decision and direct the DEC to revise its cleanup objectives as needed to protect these resources.

II. The DEC Unlawfully and Arbitrarily Failed to Consider the Feasibility of Strengthening the Soil Cleanup Objectives in Light of Historically Achieved Cleanup Levels.

The Brownfield Cleanup Law declares that in developing the soil cleanup objectives, the DEC "shall consider . . . the feasibility of achieving more stringent remedial action objectives, based on experience under the existing state remedial programs, particularly where toxicological, exposure, or other pertinent data are inadequate or non-existent for a specific contaminant." ECL § 27-1415(6)(b). As explained below, the DEC failed to comply with this important statutory directive.

A. Despite Acknowledging That More Extensive Cleanups May Have Been Achieved, the DEC Unlawfully and Arbitrarily Made no Attempt to Identify Those Cleanup Levels or to Determine Whether it is Feasible to Achieve Those Levels at Other Sites.

By the DEC's own admission, the term "consider" means "to think carefully especially with regard to taking some action." *See* DEC June Response to Comments at D69 (A-1014). That the DEC did not actually "think carefully" about whether it is feasible to attain historically achieved cleanup levels is confirmed by the DEC's own explanation of what it did to comply with ECL § 27-1415(6)(b). Specifically, though the DEC explains in its Technical Support Document that some historical cleanups "may" have achieved a greater reduction in contaminants than specified in its soil cleanup objectives, there is no indication that the DEC made any effort to identify exactly what those more stringent historical cleanup levels were, or whether it would be feasible to achieve those levels at other sites. *See* DEC TSD at 343 (A-612). Rather, the DEC explained that regardless of whether it is feasible to attain more stringent cleanup levels, the DEC would not strengthen the soil cleanup objectives because "both public

health and the environment will be protected though the use of the SCOs and more stringent levels will not significantly increase this level of protection." *Id.*. But regardless of whether the DEC ultimately decided to strengthen the cleanup objectives, the DEC was obligated to "consider . . . the feasibility of achieving more stringent remedial action objectives, based on experience under the existing state remedial programs." ECL § 27-1415(6)(b). Given the DEC's failure even to establish what those historically achieved cleanup levels are, the agency did not, and could not, fulfill its statutory obligation to consider the feasibility of achieving those levels. At a minimum, the DEC's failure to identify and account for the more stringent cleanup levels that it admits may have been achieved at past cleanups requires that its feasibility assessment under ECL § 27-1415(6)(b) be rejected as arbitrary. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision that "runs counter to the evidence before the agency" is arbitrary)**.**

The DEC's claim that instead of examining actually achieved historical cleanup levels it was sufficient to compare the new soil cleanup objectives to the cleanup guidelines set forth in a 14-year-old DEC guidance document entitled "Technical and Administrative Guidance Memorandum 4046 ("TAGM 4046")(*see* Harrington Aff. ¶ 70 (A-658)) is without merit.

First, the DEC knew that more stringent cleanup levels than had been achieved for some contaminants but failed to identify and consider those levels. *See supra* at 11. Thus, the cleanup levels specified in TAGM 4046 plainly do not amount to "the best" indicator of whether it is feasible to achieve more stringent cleanups than specified in the soil cleanup objectives (*see* Harrington Aff. ¶ 80)(A-662). The DEC's disregard for evidence indicating that more stringent cleanup levels were in fact attained was quintessentially arbitrary and capricious. *See Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck,*

Westchester County, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (N.Y. 1974) ("Arbitrary action is ... generally taken without regard to the facts.").

Second, the DEC's sole reliance on TAGM 4046 to establish historically achieved cleanup levels for purposes of ECL § 27-1415(6)(b) was unlawful and arbitrary because 19 of the contaminants for which the DEC set cleanup standards are not covered by TAGM 4046. *See supra* at 11. This significant gap in the DEC's analysis plainly contravenes ECL § 27-1415(6)(b)'s directive that the DEC evaluate the feasibility of achieving more stringent cleanup levels with respect to each "specific contaminant." Moreover, the DEC's failure to make any attempt to identify actually achieved cleanup levels for these 19 contaminants is especially significant because the DEC's own data sheets reveal that the data on health risks posed by many of these contaminants is inadequate or non-existent. In other words, these contaminants fall squarely within the category of contaminants for which the Legislature declared that it was "particularly" important for the DEC to assess the feasibility of attaining more stringent cleanup levels. *See* ECL § 27-1415(6)(b)(the DEC "shall consider . . . the feasibility of achieving more stringent remedial action objectives ... <u>particularly where toxicological, exposure, or other pertinent data are inadequate or non-existent for a specific contaminant.</u>.")(emphasis added). For example, the DEC's information sheets offer the following information about chemicals that were not covered by TAGM 4046:

> *Trivalent Chromium:* Regarding the cancer risk from inhalation, "[t]he data from inhalation exposures of animals to trivalent chromium do not support determination of the carcinogenicity of trivalent chromium." (A-1036)
>
> *Cyanide*: Regarding cancer risks from oral exposure, "[n]o values or reviews were found in any of the listed sources." (A-1038). For cancer risks from inhalation, "[c]ancer potency values for inhalation were not available." (A-1042)
>
> *Manganese*: Regarding oral cancer potency, "[h]uman data are not available, but there is suggestive evidence of carcinogenicity in several studies in rats and mice" (A-1062). For

cancer risk from inhalation, "[n]o data on humans and chronic inhalation studies in animals are available." (A-1064).

Silver: Regarding cancer and non-cancer risks from inhalation, "[d]ata suitable for derivation of a chemical-specific reference concentration are not available." (A-1074)

1,4 Dioxane: All risks assessed based on studies of rats and mice. (A-1044, 1046, 1048, 1050).

Hexachlorobenzene: Nearly all the data for cancer and non-cancer threats due to oral exposure are based on studies of rats and hamsters. (A-1052-A-1058) Regarding cancer and non-cancer threats posed by inhalation, "Data suitable for derivation of a chemical-specific reference concentration are not available." (A-1059, A-1061)

1,2,4 Trimethylbenzene: For non-cancer risks posed by oral exposure, the only studies have been on rats. (A-725). For cancer risks from oral exposure, the information sheet notes that "[o]ne available animal study is inadequate for evaluating potential carcinogenicity." (A-727). For cancer risks from inhalation, "[d]ata suitable for derivation of a chemical-specific inhalation unit risk are not available." (A-1082)

1,3,5 Trimethylbenzene: For non-cancer risks posed by oral exposure, only tests are on rats. (A-733). For cancer risks from oral exposure, "[n]o data available" (A-1086). For cancer risks from inhalation, "[d]ata suitable for derivation of a chemical-specific inhalation unit risk are not available." (A-1090)

n-Propylbenzene: For cancer and non-cancer risks posed by oral exposure, "[n]o information available." (A-1066, 1068). For cancer and non-cancer risks from inhalation, "[d]ata suitable for derivation of a chemical-specific reference concentration are not available." (A-1070, 1072).

sec-Butylbenzene: For cancer and non-cancer risks posed by oral exposure, "[n]o information available." (A-1028, 1030). For cancer and non-cancer risks from inhalation, "Data suitable for derivation of a chemical-specific reference concentration are not available." (A-1032, 1034).

Especially in light of the Legislature's emphasis on the need to assess the feasibility of achieving more stringent cleanups for contaminants for which health data are minimal or non-existent, the DEC's blithe dismissal of any obligation to assess historically achieved cleanup levels for these contaminants plainly contravenes the Legislature's unambiguous intent.

In light of the above deficiencies in the DEC's analysis, the Court should reject the DEC's claim that it was appropriate to rely on TAGM 4046 in lieu of investigating historically

achieved cleanup levels, and remand the soil cleanup objectives back to the DEC for reconsideration as to whether actual historical cleanup data indicate that it is feasible to achieve more extensive cleanups.

B. The DEC's *Post-Hoc* Assertion That it is Impossible to Compile Information Regarding Actually Achieved Cleanup Levels Lacks Any Basis in the Record and is Inadmissible.

In response to Petitioners-Appellants Article 78 Petition, the DEC asserted for the first time that it relied on TAGM 4046 as evidence of historically achieved cleanup levels because "[a]ccurate information on actual cleanup levels is not available in any form and would be impossible to compile." Harrington Aff. ¶ 80(A-662). This *post-hoc* claim cannot be found anywhere in the administrative record, and thus, cannot serve as a basis for upholding the DEC's decision. *See cases cited supra* at 30-31. Moreover, the DEC's surprising claim that it has no way of determining the degree to which contaminated sites have been cleaned up under its pre-existing remedial programs is refuted by the affidavit by Dr. Joseph A. Gardella, an expert with many years of experience in site remediation. *See* Gardella Aff. (A-925-979). As Dr. Gardella explains, "[t]here are a number of obvious methods widely and regularly used to characterize actual cleanup levels" following remediation of a site. *Id.* ¶ 9 (A-929). Dr. Gardella explains further that this cleanup data is available in a "useful form" and is possible to compile. *See id.* ¶ 10-15 (A-929-931). Indeed, the DEC admits that extensive testing is performed to confirm remaining contamination levels at a site following completion of remediation. *See* Harrington Aff. ¶ 80(A-662). If the DEC had made its new claim about the impossibility of accessing cleanup data during the rulemaking process, that claim most certainly would have been soundly refuted by numerous public commenters. The DEC cannot now justify its failure to examine

data showing actually achieved cleanup levels based on a factual assertion that appears nowhere in the administrative record and was withheld from public scrutiny.

III. The DEC's Across-the-Board Refusal to Strengthen Any of the Soil Cleanup Objectives to Historically Achieved Levels on the Basis That No Environmental or Public Health Benefit Would Accrue Was Arbitrary and Capricious.

Apart from the flaws in the DEC's assessment of historically achieved cleanup levels, the Court should reject as arbitrary and capricious the DEC's across-the-board refusal to strengthen any of the soil cleanup objectives on the basis that no health or environmental benefit would be gained from such action (*see* September Technical Support Document at 343) (A-612).

First, the DEC's generic claim that there is no benefit to be gained from strengthening any of the soil cleanup objectives arbitrarily ignores the DEC's own acknowledgments that in setting the objectives, it was repeatedly faced with inadequate or non-existent data with respect to the public health and/or environmental impacts of various contaminants. *See supra* at 13-18, 38-39. In light of the uncertainty created by this lack of data—particularly with respect to vulnerable subsets of the population such as young children and infants—the DEC's generic claim that no benefit would be gained from strengthening any of the soil cleanup objectives lacks a rational basis and cannot withstand judicial scrutiny.

Second, the DEC's across-the-board refusal to strengthen any of the soil cleanup objectives in light of historical cleanup data should be rejected as arbitrary and capricious because it was based on a factor that the Legislature plainly did not intend for the DEC to consider. *See State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which [the Legislature] has not intended it to consider**.").** Specifically, in directing the DEC to "consider . . . the feasibility" of strengthening the soil cleanup objectives, "particularly where toxicological, exposure, or other pertinent data

are inadequate or non-existent for a specific contaminant," the Legislature could not have intended for the DEC then to refuse to strengthen any of the standards on the basis that the data do not show that more stringent standards would be beneficial. *See* ECL § 27-1415(6)(b)(emphasis added). Obviously, if data on public health and environmental risks are inadequate or non-existent, the DEC cannot know whether requiring more stringent cleanups will benefit public health or the environment. Rather, in accordance with the statute's plain language, the Legislature clearly intended the DEC's determination as to whether to strengthen the standards in light of historically achieved cleanup levels to turn on the "feasibility" of achieving those levels. *See* ECL § 27-1415(6)(b).

IV. The DEC Unlawfully and Arbitrarily Excluded All Sites Contaminated Solely by Off-Site Sources From the Brownfield Cleanup Program.

A. The Off-Site Source Exclusion Violates the Statute.

The DEC's blanket regulatory exclusion from program participation by any property contaminated solely by an off-site source (*see* 6 NYCRR § 375-3.3(a)(2)) contravenes the plain language of the statute broadly defining "brownfield site" as "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) (emphasis added). Nothing in this definition suggests program eligibility should turn on the origins of a property's contamination. To the contrary, the definition unambiguously declares the Legislature's intent to facilitate the cleanup of "any property" where redevelopment or reuse is complicated by contamination. *Id.*

While ECL § 27-1405(2) provides certain limited exceptions from the statute's broad definition of "brownfield site," none of these exceptions serve to exclude sites based on the contamination source. That the Legislature provided a list of exceptions that did not include the DEC's off-site source exclusion provides further evidence that the exclusion is contrary to the

Legislature's intent. *See* McKinney's Consolidated Laws of N.Y., Statutes, § 240; *see also Pajak v. Pajak,* 56 N.Y.2d 394, 397, 437 N.E.2d 1138, 1139, 452 N.Y.S.2d 381, 382 (N.Y.,1982)(where statute provided for certain defenses but not the one offered by the litigant, concluding that the Legislature's failure to offer that defense "was not a matter of mere legislative oversight. The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended.); *Deth v. Castimore*, 281 N.Y.S. 114, 120 (N.Y.A.D. 4 Dept.1935)("As a general rule, an express exclusion eliminates all others. That which is not clearly embraced within the named exception remains within the scope of the principal provision.").

Further indication that the DEC's blanket off-site source exclusion contravenes legislative intent is found in the Legislature's "Declaration of policy and findings of fact," published in the Brownfield Cleanup Law at ECL § 27-1403. The declaration explains:

> The legislature hereby finds that there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden, and that these sites, known as brownfields, are also contributing to sprawl development and loss of open space. It is therefore declared that, to advance the policy of the state of New York to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution in order to enhance the health, safety, and welfare of the people of this state and their overall economic and social well being, it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment by establishing within the department a statutory program to encourage cleanup and redevelopment of brownfield sites.

The above-quoted declaration says nothing whatsoever to indicate that the Legislature was concerned only about properties contaminated by on-site sources. Rather, the clear statutory language demonstrates that the Legislature intended for the DEC to implement a program that would remediate "contaminated properties that threaten the health and vitality of the

communities they burden." ECL § 27-1403. The source of that contamination is irrelevant to whether a property falls within the category intended for remediation under the program.

B. The Off-Site Source Exclusion is Arbitrary.

Insofar as the DEC seeks to rely on the source of a property's contamination as a proxy for a site-specific analysis of whether a property satisfies the statute's eligibility criteria, the DEC's approach should be rejected as arbitrary because the source of a property's contamination has nothing to do with the statute's eligibility criteria.

Certainly, the DEC possesses authority to reject a particular application for program participation based on a site-specific determination that the site does not satisfy statutory criteria. Indeed, one such determination was recently upheld by the New York County Supreme Court in *377 Greenwich LLC v. New York State Dept. of Environmental Conservation*, 14 Misc. 3d 417, 2006 N.Y. Slip Op. 26453 (N.Y. Sup., N.Y. County, 2006). As that court explained, however, the DEC's decision as to whether a particular site should be admitted to the cleanup program "requires analysis and determination of whether the limiting criteria in the statute are met." *Id.* at 5. The DEC's blanket off-site source exclusion contravenes that command, entirely disregarding whether the facts of a particular case would satisfy the statutory criteria: that "the redevelopment or reuse" of a site is "complicated by the presence or potential presence of a contaminant." ECL § 27-1405(2).

As the New York Court of Appeals held in *Matter of Swalbach v. State Liquor Authority of the State of New York*, a general rule treating a particular type of case in a particular way without regard to the facts of an individual case constitutes a capricious exercise of discretion where the legislature intends the agency to deal with situations case-by-case. 7 N.Y.2d 518, 523-524, 166 N.E.2d 811 (N.Y. 1960). In *Swalbach*, the Court addressed a Liquor Authority policy

"that the licensing of package stores in modern 'shopping centers' would be contrary to public convenience and advantage; and therefore, the Authority will continue to disapprove petitions to remove package stores to modern 'shopping centers.'" *Id.* at 521. The Court concluded, "there is no warrant for a policy which excludes liquor stores from all such centers without regard to, indeed in entire disregard of, the facts of any particular case. The Authority's reliance upon the policy as basis for denying every [such] license transfer application . . . constitutes a capricious exercise of discretion, one made 'by administrative officers acting solely on their own ideas of sound public policy.'" *Id.* at 523-524 (quoting *Matter of Picone v. Commissioner of Licenses*, 241 N.Y. 157, 162 (N.Y. 1925)). The Court went on to explain, "No one questions the Authority's discretionary power to refuse the permit removal of a store to a particular shopping center, if there is a basis therefor[e] in the record, on the ground that public convenience and advantage would not thereby be promoted. But this does not permit formulation of a general 'policy' to cover every petition for transfer to any shopping center in the State." *Id.* at 524.

In a manner strikingly similar to the agency policy struck down in *Swalbach*, the DEC's off-site source exclusion bars from the Brownfield Cleanup Program any site where contamination originates solely from an off-site source, without any consideration of the facts of a specific case. Moreover, like the statute at issue in *Swalbach*, the Brownfield Cleanup Law clearly demonstrates the Legislature's intent that the DEC take case-by-case factors into account when deciding whether a site should be approved for program participation.

Specifically, the Brownfield Cleanup Law directs that "[a] person who seeks to participate in this program shall submit a request to the department on a form provided by the department. Such form shall include information to be determined by the department sufficient to allow the department to determine eligibility." ECL § 27-1407(1). The statute further

requires the DEC to consider a list of site-specific considerations requiring exclusion from the program of properties that would otherwise fall within the statutory definition of "brownfield site," (*see* ECL § 27-1407(8)), but none of these exceptions exclude properties based on the contamination's origin. Likewise, the statute provides a limited list of reasons for which the DEC is authorized to reject a property from the cleanup program even if it meets the definition of "brownfield site," *see* ECL § 27-1407(9), but again, that list omits any reference to the source of a property's contamination.

The court below, in concluding that the DEC's off-site source exclusion was lawful, stated that the exclusion "is based on the DEC's rational interpretation of its broad responsibility to have remediation directed to addressing contamination at its source." Decision at 7-8 (A-11-12). The court went on to state that the program's goal of protecting public health and the environment "cannot be effectively served by addressing contamination at a property impacted by an upgradient site unless that upgradient source is first remedied." Decision at 8 (A-12). But as the DEC itself concedes, even where a property's contamination originates off-site, a developer participating in the Brownfield Cleanup Program can clean up the property and then either clean up the off-site contamination source or mitigate its impact. *See supra* at 21. Likewise, the DEC confirms that admitting a property into the Brownfield Cleanup Program in no way impedes the DEC's ability to commence legal proceedings to force a responsible party to clean up an off-site contamination source. *Id.* And, indeed, the DEC anticipates that some properties admitted into the Brownfield Cleanup Program will be contaminated by a combination of on-site and off-site sources. *Id.* Given that the DEC's regulations expressly allow a property to be cleaned up under the program even if some of the property's contamination originates from an off-site source—and even if that off-site source has not yet been remediated—there is no basis

for the lower court's conclusion that a property contaminated solely by an off-site source could not also be remediated effectively under the program.

Ultimately, the DEC may well conclude on a case-by-case basis that certain properties should be rejected from the cleanup program because it is impossible to mitigate ongoing contamination from off-site sources. But the DEC has not offered a legally cognizable reason for making all properties contaminated solely by off-site sources ineligible for the program. Regardless of where contamination originates, if it is presently on a site, it may be "complicat[ing] ... the redevelopment or reuse of" the site, and if so, the property falls within the category of sites that the Legislature intended for the statute to address. Thus, the Court should annul the DEC's unlawful and arbitrary off-site source exclusion and direct the DEC to evaluate program applications pertaining to properties contaminated solely by off-site sources on a case-by-case basis.

REQUESTED RELIEF

Petitioners-Appellants request that certain provisions of the challenged regulations be vacated, while others be declared unlawful but left in place pending revision by the DEC. Such an approach is consistent with Court of Appeals caselaw indicating that the test for determining whether an unlawful regulatory provision can be severed turns on whether the remainder of the regulation can survive—and whether the Legislature would want the remainder to survive—independent of the unlawful provision. *See, e.g., New York State Superfund Coalition, Inc. v. New York State Department of Environmental Conservation*, 550 N.E.2d 155, 75 N.Y.2d 88, 94 (N.Y. 1989); *see also People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 202, 207, 230 N.Y. 48, 60 (N.Y. 1920)(stating that the test for severability has been whether the

Legislature "would have wished the statute to be enforced with the invalid part rescinded, or rejected altogether.").

The soil cleanup objectives set forth in 6 NYCRR § 375-6, though flawed, are central to the Brownfield Cleanup Program's operation. Thus, Petitioners-Appellants request that these cleanup objectives be left in place, but that the Court declare them to be unlawful and direct the DEC to take final action within six months of the Court's decision revising them (1) as needed to protect surface water, indoor air quality, and aquatic ecological resources, and (2) as warranted in light of historically achieved cleanup levels.

In contrast, the regulatory provision establishing the off-site source exclusion (6 NYCRR § 375-3.3(a)(2)) is not integral to the operation of the Brownfield Cleanup Program regulations and should be vacated.

Petitioners further request that the Court award Petitioners attorneys' fees and the costs of this action, and grant such other relief as the Court deems just and proper.

CONCLUSION

For the foregoing reasons, Petitioners-Appellants respectfully request that the Court vacate the portions of the decision by the Supreme Court, Albany County that pertain to the issues on appeal, and enter a judgment in favor of Petitioner-Appellants granting the relief requested in their Verified Petition.

Dated: June 5, 2008

EARTHJUSTICE, INC.

By: _____

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