

# S.3008-A/A.3008-A, Part RR

STAFF CONTACT : Ken Pokalsky | Vice President | 5186944460

<b>BILL</b> S.3008-A/A.3008-A, Part RR
<b>SUBJECT</b> Amendments to the Inactive Hazardous Waste Sites Remediation Program (State “Superfund”)
<b>DATE</b> March 03, 2025
<b>OPPOSE</b>

Governor Hochul’s FY2026 Executive Budget (S.3008/A.3008, Part RR) proposes dramatic changes to the state’s inactive hazardous waste site program (aka, Title 13 or state “superfund”), in addition to providing an additional \$1.3 billion in bonding authority to support state-funded cleanups at inactive sites.

While we can support the proposed additional funding, **The Business Council is strongly opposed to Part RR’s major restructuring of the inactive sites program, including provisions related to liability, remediation orders and cost recovery.**

These amendments would take a program that has worked relatively well for decades and make it increasingly difficult and costly for business, raise significant legal questions that will likely result in additional litigation and program delays, raise significant uncertainty and risks for site redevelopment programs (including those done under the state’s brownfield program), and allow the reopening of liability claims against private sector and municipal entities alike.

One of the goals of this proposal is to increase the recovery of state funds spent addressing inactive sites where there is one or more financially viable “responsible party” that has refused to take action. Typically, New York and other states pursue cost recovery under the federal superfund law (the “Comprehensive Environmental Response, Compensation and Liability Act,” or CERCLA.) Since CERCLA establishes an explicit “strict, joint and several” liability standard, which has been successfully applied against responsible parties (or RPs) for four decades, it is unclear why the state would be having cost recovery issues. It is also unclear what share of state superfund resources are spent on sites with viable PRs, versus “orphan” sites with no viable responsible party and municipal sites where significant cost-recovery is not expected. Together, these factors call into question the need for dramatic amendments to Title 13.

In general, Part RR proposes to adopt a number of provisions of CERCLA into the Environmental Conservation Law, including the creation of two new state-level causes of action, one for cost-recovery and one for natural resource damage claims. However, the Executive Budget unfairly ignores and fails to incorporate key CERCLA’s defenses, exemptions, statutes of limitation and other provisions that would govern state action at inactive sites.

Several of the Executive Budget provisions would also impact (intentionally or not) the brownfield cleanup program. Instead of making the brownfield program even more costly and complex to navigate, the legislature, with significant remediation program financing and policy issues already on the table, should be assessing how recent DEC proposals would negatively impact the BCP and consider statutory countermeasures for adoption as part of any superfund refinancing legislation.

Key issues of concern regarding Part RR are summarized below. We also have provided the Hochul Administration with a set of detailed amendments to address our concerns, with commentary describing the most significant changes we are supporting, which we can share with members of the legislature upon request.

Key issues of concern include:

- Part RR creates new and unnecessary state-level response cost recovery authority for the Department of Environmental Conservation, including statutory imposition of strict, joint and several liability on responsible parties, without adopting key CERCLA requirement to follow the National Contingency Plan or imposing any other cost-effectiveness requirements, and without fully incorporating CERCLA defenses and exemptions. This new cause of action would also be divorced from more than forty years of case law under CERCLA, leading to uncertainty on key provisions and likely litigation, and resulting in significant program delays.
- Part RR creates new (and duplicative) abatement order authority that, along with an additional change included in the Administration's 30-day amendments, would allow the DEC to dispense with the long-standing statutory requirement to show imminent threat, or threat of irreversible or irreparable damage, be applied to any site requiring remediation as a "class two" site, and disregard the notice and hearing provisions of ECL 27-1313. Among other concerns, if this abatement order is applied to an entity with valid exemptions or defenses from liability, its relief may only come through a petition for reimbursement that can only be submitted after its full compliance with the order (and under Part RR, non-compliance of such order is subject to a civil penalty of up to \$37,500 per day.)
- Part RR creates new state-level authority for the recovery of natural resource damage claims for DEC at any inactive hazardous waste disposal site (including brownfield sites) but fails to include any statute of limitations and fails to exclude BCP "volunteers" or include related CERCLA limitations (e.g., where resource damage was accepted in a SEQRA process or is the result of a permitted discharge, emission or disposal.) While Part RR cites federal NRD rules adopted pursuant to CERCLA, it does not contain the federal statute of limitations under 42 U.S. Code §9613, which require damages claims to be commenced within 3 years after the date of the discovery of the loss and its connection with the release in question, or for sites on the federal "National Priorities List" or on which remedial action has already commenced, within 3 years after the completion of the remedial action (excluding operation and maintenance activities). Without any statute of limitations in Part RR, it seems

that this NRD liability could be applied to sites regardless of when they were identified, and regardless of whether or when remedial work was completed.

- Part RR authorizes DEC to impose a lien on real property where hazardous wastes are disposed that are owned by a responsible party relative to response costs and natural resource damage claims, and against certain entities at sites whose property value was increased as the result of a state response action. This lien authority provides no clear exemption for entities such as “innocent landowners” who did not cause on-site contamination, and participants and volunteers under the state’s brownfield cleanup program. Again, these claims and liens are not subject to any statute of limitations under Part RR.
- Part RR provides broad liability exemptions to municipalities (in addition to public corporations) even if certain cases where the municipality caused or contributed to the significant threat at the site (leaving full liability to any private responsible parties.) If municipalities have some past involvement with sites subject to Part RR’s new cost recovery and NRD liability provisions, its municipal exemption is unlikely to provide protection against municipal liability under CERCLA or common law contribution claims.
- Part RR authorizes DEC to adopt regulations requiring financial assurance for completion of remediation projects by responsible parties without substantial limitations on the amount of required financial security.

As a final issue, with the Executive Budget placing significant remedial program financial and policy issues before the legislature, the SF 2026 budget process would be an opportune time for the Senate and Assembly to also consider addressing recent state regulatory actions that (once finalized) will make the brownfield program more difficult and costly for volunteers to navigate, with a negative impact on the program’s ability to bring previously developed contaminated sites back into safe and productive use. These pending regulatory changes (the DEC’s Part 375 amendments are in the “revised rulemaking” process) include but are not limited to requiring BCP volunteers to: address on-site exposures from off-site sources, conduct off-site field investigation to identify and sample potential areas of contamination, prepare a feasibility study for any site determined to be a “significant threat,” and conduct a responsible party search for a site on the DEC’s registry. In effect, these pending program changes impose activities and costs on brownfield program participants that have been historically, and correctly, obligations of the DEC, and which will significantly increase compliance and cost burdens on BCP participants.

We support the continued implementation of effective, cost-effective and sufficiently funded environmental remedial programs, and can support the refunding of the state superfund program to provide needed state resources to address sites without viable or willing responsible parties.

However, we are very concerned that the proposed amendments in Part RR would result in one-sided, unwarranted impacts on private sector entities, and we oppose its adoption without significant amendments.

As always, we welcome the opportunity to discuss our concerns and recommendations