

# SUMMARY OF PRINCIPAL NEW YORK REMEDIAL PROGRAMS

By Larry Schnapf

## I. NEW YORK STATE RESPONSE PROGRAMS

The New York Department of Environmental Conservation ("NYSDEC") is responsible for administering the following four remedial programs: the State Superfund Program for hazardous wastes, the Spill Response Program for petroleum contamination, the Environmental Restoration Program for municipal brownfields and the Brownfield Cleanup Program ("BCP"). The New York State Department of Health ("NYSDOH") and State Attorney General also have a role for ensuring the cleanup of inactive hazardous waste disposal sites across the state.<sup>1</sup>

Traditionally, the NYSDEC staff for the various programs have adopted their own procedures and standards for investigating and remediating sites under their jurisdiction. To establish better uniformity across its remedial programs, the NYSDEC's Division of Environmental Remediation ("DER") developed a draft *Technical Guidance for Site Investigation and Remediation* ("DER 10") in December 2002. The DER-10 helps to promote better consistency across the NYSDEC remedial programs and among the regional offices.<sup>2</sup> DER-10 establishes the minimum steps that must be followed in each remedial program. These steps include Site Characterization, Remedial Investigation, Remedy Selection, Remedial Design/Remedial Action, and Operation, Maintenance and Monitoring ("OM&M").

Because the remedial programs have different statutory goals, individual cleanup projects may not be required to complete each of the investigative and remedial steps. For example, when there is a known spill event or the contamination is associated with an underground storage tank, a responsible party may skip certain portions of the Site Characterization process (i.e., records review). In addition, the individual remedial programs continue to use different types of oversight documents used to implement response actions.

In 2006, NYSDEC promulgated its Soil Cleanup Objectives (SCOs) as part of a complete overhaul of the Part 375 regulations.<sup>3</sup> The SCOs create four cleanup tracks with track 1 being the

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<sup>1</sup> NYSDOH provides input to NYSDEC on proposed remedial investigation and cleanup plans. NYSDOH also has played a leading role in the implementation of the state's vapor intrusion initiative.

<sup>2</sup> The guidance does not change the cleanup criteria but clarifies the process for characterizing sites. Some environmental consultants maintain that 50% of the costs of site characterization can be associated with negotiating the procedures to be used to investigate and remediate a site. By establishing a roadmap for site characterization, DER hopes that this process can be streamlined and become less time-consuming.

<sup>3</sup> 6 NYCRR 375-6

unrestricted residential standard and track 4 allowing for site-specific standards.<sup>4</sup> The SCOs became effective in December 2006 but a group of environmental organizations filed a lawsuit at the end of March seeking to invalidate the cleanup standards.<sup>5</sup>

### **A. Hazardous Waste Remediation Program-**

The New York Inactive Hazardous Waste Disposal Site Law is the New York Superfund law (SSF).<sup>6</sup> DEC has promulgated regulations implementing the state superfund program at 6 NYCRR 375.

**1. DEC Site Listing Authority-** Under §27-1305 of the New York Inactive Hazardous Waste Disposal Site law, the DEC is required to identify and establish a registry of sites that are contaminated with hazardous wastes. The sites are to be classified as follows:

- \* Class 1- Poses an imminent danger of causing irreversible or irreparable damage to the public health and the environment. Immediate actions is required.
- \* Class 2- poses significant threat to public health or the environment. Action is required.
- \* Class 3- Does not present a significant threat to public health or the environment. Action may be deferred.
- \* Class 4-Site properly closes but continued management is required;
- \* Class 5- Site is properly closed and there is no evidence of present or adverse impact so no further action is required.

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<sup>4</sup> Developers using a track 1 cleanup for sites being remediated under the BCP are will be entitled to claim an additional 2% of tax credits. The track 2 cleanup standard requires excavation of 15 feet and the source of soil contamination. In some cases, developers may excavate to bedrock to try to achieve the additional 2% tax credit under the BCP. In most cases though, developers have been using track 4 since there are no additional tax credits for implementing a track 2 cleanup.

<sup>5</sup> Previous to the promulgation of the SCOs, the NYSDEC relied on a series of guidance documents to establish cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for VOCs, SVOCs, heavy metals, pesticides and PCBs is the Technical and Administrative Memorandum ("TAGM") 4046. The recommended soil cleanup objectives apply to in-situ (non-excavated) soil and excavated soil that will be placed back into the original excavation or consolidated elsewhere on a site. Since December 2000, TAGM 4046 is also used to develop soil cleanup objectives for gasoline and fuel oil contaminated soils that will be remediated in-situ.

The Spill Technology and Remediation Series (STARS) Memo #1 provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil. STARS Memo #1 also provides guidance on sampling soil from tank pits and stockpiles. Excavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site. The principal guidance document for establishing groundwater cleanup goals is the Technical and Operational Guidance Series ("TOGS") # 1.1.1

<sup>6</sup> ECL §27-1301 et seq.

§27-1305(4)(d) requires the DEC to notify owners of sites that are proposed to be placed on the registry. Owners or operators of sites that are listed on the registry may petition the DEC to have the site de-listed or to have the classification changed. The DEC is required to convene an adjudicatory hearing within 90 days of receiving a de-listing petition and provide at least 30 days notice of a scheduled hearing. The DEC is required to issue a ruling within 30 days after the hearing.

NYSDEC will de-list a site if no “consequential” quantity of hazardous wastes are present. This can occur when one of two conditions exist:

- A consequential quantity of hazardous waste was never present at the site. Upon investigation, it is often found that no hazardous waste was ever disposed of at a site. If other environmental problems exist at the site, DER refers the site to the appropriate agency division for further tracking - Division of Solid and Hazardous Materials, Division of Water; or;
- An inconsequential amount of hazardous waste is all that remains at the site as a result of remediation.

Most municipal landfills are not formally listed as hazardous waste sites because the definition of hazardous waste law excludes household hazardous waste.<sup>7</sup> For a municipal waste landfill to be considered a hazardous waste site, it must be determined that hazardous waste present at the site was commercial or industrial in origin. As a result, municipal landfills are usually handled by the Division of Solid and Hazardous Materials under the closure provisions of 6 NYCRR Part 360. Co-disposal municipal landfills that are also hazardous waste sites are also usually closed under Part 360.

**2. DEC Information Gathering Authority-** Under §27-1309, DEC is allowed access to and has the right to copy all books, papers, documents and records related to current and past generation, transportation and disposal of hazardous waste. The DEC may issue subpoenas requiring the production of such records as well as to take testimony by of persons regarding current and past hazardous waste activities.

In addition, DEC is authorized to enter any inactive hazardous waste site and areas near such sites to inspect and take samples of wastes, soil, air, surface water and groundwater. Under §27-1309(4), DEC shall not take any samples that involve substantial disturbance of the ground unless it has first made a reasonable effort to identify the owner of the property and provide the notify the owner with at least ten days notice of the intent to collect the samples. Any such inspection shall be conducted at reasonable times and be completed with reasonable promptness. The owner may request split samples. The costs of the sampling may be recovered by the DEC pursuant to the statute or common law.

**3. DEC Remedial Authority-** When the NYSDEC determines that a site poses a “*significant threat*” to the environment, it may order the owner of the site and/or any other person

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<sup>7</sup> 6 NYCRR Part 371

responsible for the disposal of the hazardous wastes to develop a remedial program acceptable to the NYSDEC and to implement the remedial program<sup>8</sup>.

Significant threat is not defined by the statute. However, 6 NYCRR 375-1.4 sets forth conditions that would satisfy a significant threat. It is important to note that the mere presence of hazardous waste at a site is not sufficient to constitute a “significant threat.”

The NYSDEC may develop and implement the remedial plan if the agency determines that:

- \* the hazardous wastes constitute a “*significant threat*”;
- \* the “*significant threat*” is causing or presents an imminent danger of causing irreversible or irreparable damage to the environment, and;
- \* Delaying responding to the threat to allow a hearing on the order would be prejudicial to the public interest.

In developing a remedial plan, the NYSDEC is required to develop a cost-effective plan whose goal will be the complete cleanup of the contamination by the elimination of the “*significant threat*” or the imminent danger of irreversible and irreparable harm.<sup>9</sup> Factors that the NYSDEC is to consider include:

- \* the ability to determine through scientific means that the imminent danger of irreversible or irreparable harm may be achieved through limited actions;
- \* the ability of the NYSDEC to identify responsible parties with sufficient financial resources to develop and implement the plan;
- \* the nature of the danger, and;
- \* the extent to which the actions shall reduce the danger. (ECL §27.1313.5.a)

Unlike under section 106 of CERCLA, the NYSDEC cannot issue a cleanup order until after the alleged responsible party is provided with a hearing. Moreover, a party who has been issued an order after an administrative hearing may seek judicial review of that decision.<sup>10</sup> The inability to order a PRP to cleanup a site without first conducting an administrative hearing has substantially limited the usefulness of the state superfund program.<sup>11</sup>

The NYSDEC may also develop and implement a remedial plan if a person who has been ordered to eliminate the threat fails to do so within the time period set forth in the order. The reasonable expenses of developing and implementing the remedial program are recoverable from the responsible persons. If a site constitutes a “*significant threat*” and the NYSDEC cannot either identify or locate the responsible person after a reasonable attempt, the NYSDEC shall also develop and implement a remedial program. However, the NYSDEC is required to secure

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<sup>8</sup> ECL §27-1313.3.a

<sup>9</sup> ECL §27-1313.5.d

<sup>10</sup> ECL §27-1313.4

<sup>11</sup> The DOH may also order a responsible party to cleanup a significant threat under the Public Health Law which will supercede any order issued by DEC.(ECL §27-1313.3.a)

appropriate relief from any responsible persons who are subsequently identified or located, including the recovery of reasonable expenses.<sup>12</sup>

**4. Responsible Parties-**The categories of PRPs under this law are potentially broader than CERCLA since PRPs include anyone who might be liable under statutory or common law liability scheme. The law does not expressly provide for strict and joint liability but this kind of liability may be imposed under common law.

Under §27-1321, persons who voluntarily provide assistance or advice to help mitigate the effects of an accidental or threatened discharge without expectation of compensation shall not be liable for penalties or civil liability for damages or injuries alleged to have been sustained by any person as a result of an act or omission in the course of providing such advice or assistance.

In addition, persons who by training or experience are qualified to analyze and interpret matters pertaining to the transportation, treatment, disposal and storage of hazardous materials are also not liable.

None of the foregoing are relieved from liability for gross negligence, reckless, wanton or intentional misconduct, are under a duty to respond to the incident or receive compensation other than for out-of-pocket expenses.

## **5. Defenses to Liability**

The Brownfield/Superfund Amendments of 2003 added an Act of God, act of war, third party and innocent purchaser defenses to the SSF<sup>13</sup> that are modeled after those in CERCLA. The innocent purchaser defense is only available to owners who had no reason to know that their property was contaminated.<sup>14</sup>

### **a). Innocent Landowner Defense-**

Persons seeking to assert the Innocent Landowner defense must comply with the EPA All Appropriate Inquiry (“AAI”) rule and comply with the post-acquisition continuing obligations.<sup>15</sup> Many in the private bar believe that NYSDEC should not simply adopt the AAI rule but instead review it for consistency with the SSF. For example, will the “appropriate care” requirements set forth in the AAI be consistent with the obligations contained in Title 14? Will the requirements for investigating adjacent properties be consistent with the public participation requirements of Title 14? In addition, NYSDEC may want to adopt a different definition of Environmental Professional or different procedures for filling data gaps.

### **b). No BFPP Defense**

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<sup>12</sup> ECL §27-1313.5.b

<sup>13</sup> *Id.* at § 27-1323(4).

<sup>14</sup> *See* 42 U.S.C. § 9601(35).

<sup>15</sup> N.Y. ENVTL. CONSERV. LAW § 27-1323(4)(c).

Since sites are brownfields because there is at least the perception of contamination, the innocent purchaser defense will not be available to most brownfield developers. Because of this limitation, the United States Congress added a bona fide prospective purchaser (“BFPP”) defense to CERCLA as part of the Small Business Liability Relief and Brownfield Revitalization Act of 2002 (the “2002 CERCLA Amendments”) to allow purchasers to knowingly acquire contaminated property without incurring CERCLA liability.<sup>16</sup>

Unfortunately, the New York legislature did not include a BFPP defense in the Brownfield/Superfund Act, presumably because the legislature preferred to have BFPPs remediate sites rather than receive immunity from liability.<sup>17</sup> The absence of a BFPP defense is somewhat mitigated by the fact that COCs may be relied upon by subsequent purchasers but the legislative decision to not include a BFPP defense was disappointing to the environmental practitioners and their clients.

### **c). No CPO Defense**

The legislature also failed to enact a contiguous property owner’s defense that protects landowners whose property has been impacted by releases of hazardous substances migrating onto their property from an off-site source. This omission was not as important because of the differences between CERCLA and the SSF. Under CERCLA, a “facility” is a site where hazardous substances have come to be located while NYSDEC has historically interpreted a hazardous waste site under the SSF to be the source of the contamination. Nevertheless, it would be comforting to purchasers and lenders if NYSDEC could develop guidance similar to that recently developed by the United States Environmental Protection Agency for contiguous property owners.

### **d). Lender and Fiduciary Liability**

The Brownfield/Superfund Act also adds statutory liability exemptions for lenders and fiduciaries for claims filed under state law. These provisions are identical to the CERCLA exemptions.<sup>18</sup> A lender will not be liable as owner or operator of contaminated property if it holds indicia of ownership primarily to protect its security interest and does not otherwise participate in the management of the property. Lenders may also foreclose on property without forfeiting their immunity from liability provided they attempt to sell the property in a commercially reasonable manner.

Title 13 also now provides limited liability protection to fiduciaries.<sup>19</sup> The liability of fiduciaries is limited to the assets being held in its fiduciary capacity unless there is an independent basis for

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<sup>16</sup> *Id.* at § 9607(r).

<sup>17</sup> *Id.* at § 9607(q).

<sup>18</sup> N.Y. ENVTL. CONSERV. LAW § 27-1323(1).

<sup>19</sup> N.Y. ENVTL. CONSERV. LAW § 27-1323(3).

holding the fiduciary liable, including, but not limited to, the fiduciary negligently causing or contributing to the release or threatened release of hazardous waste at the site. Because these exemptions use the same terminology as CERCLA, EPA guidance and CERCLA case law can presumably be relied up to provide direction to lenders and their counsel.

#### **e). Municipal and IDA Liability Exemptions**

The Brownfield/Superfund Act also creates a liability defense for municipalities that involuntarily acquire ownership or control of a contaminated site and do not “participate in development” of the site provided they did not cause or contribute to the release. Municipalities must provide notice to DEC within 10 days of learning of a release or lose their exemption.<sup>20</sup>

This defense can be particularly useful to local governments to help them assemble parcels of smaller brownfield sites into a larger site that has greater development potential. However, it is unclear what “participation in development” means. NYSDEC should clarify the scope of this term in its implementing regulations.

**5. Use Restrictions-** §27-1317 provides that no person may substantially change the use of a site that has been placed on the registry without first notifying the DEC at least 60 days before the physical alteration or change in use is to commence. Substantial changes includes but is not limited to the following:

- \* constructing a building or other structure;
- \* the paving of the site for use as a roadway or parking lot;
- \* the creation of a park or other private or public recreational facility

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<sup>20</sup> *Id.* at § 27-1323(2).

## **B. Brownfield Cleanup Program (see following article)**

### **C. Oil Spill Response Program-**

The oil spills response program in New York is authorized by the Oil Spill Prevention, Control and Compensation Law<sup>21</sup> (Navigation Law) and the Control of the Bulk Storage of Petroleum Act.<sup>22</sup>

#### **1. Liability Framework of Navigation Law-**

The Navigation Law was enacted in the mid-1970s to respond to the possibility of oil spills from off-shore oil drilling that was being considered in response to the energy crisis. The Navigation Law is now the primary mechanism to deal with liability and cleanup for oil spills on land and water in New York State.

The Navigation law prohibits the unpermitted discharge of petroleum into the “waters” of the state or onto land from which the petroleum might drain into state waters.<sup>23</sup> The Navigation law prohibits the unpermitted discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into state waters.<sup>24</sup> Dischargers of petroleum are strictly liable without regard to fault for all cleanup and removal costs as well as direct and indirect damages.<sup>25</sup> Cleanup liability extends to discharges that occurred prior to the 1977 enactment date of the statute.

The NYSDEC is authorized to use the Oil Spill Fund to pay for cleanups of discharges from underground storage tanks as well as vessels, vehicles, pipelines and aboveground tanks that impair or threaten surface and ground waters when a responsible person refuses to perform the cleanup, where the responsible party is unknown or the responsible party is unable to pay for a cleanup that NYSDEC considers necessary to prevent risking public health or the environment. Cleanups should be performed in accordance with the NCP.

#### **a) Who is a "Discharger"?**

The statute does not expressly define who qualifies as a discharger. The term has been construed to include operators of a facility where a release has occurred, the owner of tanks that leaked, suppliers of heating oil, installers of oil tanks and even oil brokers. Until 2001, it was unclear if landowners who did not actively operate the source of contamination may be liable. In *State v. Green*, the New York Court of Appeals ruled that while the Navigation Law does not impose liability based solely on ownership of contaminated land, a landowner that can control activities

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<sup>21</sup> Navigation Law §12-170 et seq.

<sup>22</sup> ECL §17-0101

<sup>23</sup> *Id.* at § 173.

<sup>24</sup> Navigation Law §173

<sup>25</sup> Navigation Law § 181



occurring on its property and has reason to believe that petroleum products will be stored there, could be liable as a discharger for the cleanup costs.<sup>26</sup> The New York Court of Appeals recently ruled that an owner with knowledge of a spill who fails to take remediate the contamination may be a "discharger" under the Navigation Law.<sup>27</sup>

Dischargers are required to report any unauthorized spills of petroleum within two hours of discovery to the NYS Spill Hotline (1-800-457-7362). The reporting requirement does not apply to spills that meet all of the following criteria:

- The quantity is known to be less than 5 gallons;
- The spill is contained and under the control of the spiller;
- The spill has not and will not reach the State's water or any land; and
- The spill is cleaned up within 2 hours of discovery.<sup>28</sup>

A spill is considered to have not impacted land if it occurs on a paved surface such as asphalt or concrete. A spill in a dirt or gravel parking lot is considered to have impacted land and is reportable.

The NYSDEC spill reporting regulations also impose reporting obligations on the owner or operator of the facility where the spill occurred as well as the person who was in actual or constructive control of the petroleum.<sup>29</sup>

## **b). Defenses to Liability**

Owner or operators of a "major facility" may assert defenses to liability based on act or omissions solely caused by an act of war, sabotage, or government negligence.<sup>30</sup> However, it appears that these defenses may not be asserted by owners or operators of smaller facilities. There are also limited defenses for certain kinds of persons such as responders<sup>31</sup> good Samaritans and contractors unless the injury is a result of negligence or gross negligence.<sup>32</sup> The Brownfield Amendments added a new defense to the Navigation Law for discharges caused by third parties<sup>33</sup> that is modeled after the third party of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>34</sup> The Brownfield Amendments also added a secured creditor exemption that is based on the CERCLA secured creditor exemption.<sup>35</sup>

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<sup>26</sup> 96 N.Y.2d 403; 754 N.E.2d 179;729 N.Y.S.2d 420 (July 2, 2001)

<sup>27</sup> State of New York v. Speonk Fuel Inc, 2004 N.Y. LEXIS 2438 (N.Y. Oct.19, 2004); Reargument denied by State v. Speonk Fuel, Inc., 2004 N.Y. LEXIS 3893 (N.Y. Dec. 21, 2004).

<sup>28</sup> Navigation Law §175

<sup>29</sup> 17 NYCRR Part 32.3

<sup>30</sup> Navigation Law §181

<sup>31</sup> Navigation Law §178-a

<sup>32</sup> Navigation Law §176(7)

<sup>33</sup> Navigation Law §181(4)(a)

<sup>34</sup> 42 U.S.C. 9607(b)(3). The third party defense provides that a party will not be liable if it can show by a preponderance of the evidence that: (1) the release was solely caused by a third party (2) the third party was not in a

### **c). Contribution Actions Under the Navigation Law**

In 1991, the Navigation Law was amended to expressly include a right of contribution. Under section Navigation Law § 181(5) private parties who have been injured by oil spills to recover their costs and damages may recover directly from the discharger. However, a "faultless landowner" who is liable as a discharger simply because of its status as the owner of the property impacted by the discharge may seek contribution under the Navigation Law.<sup>36</sup> Section 181(5) has also been construed to apply retroactively so that faultless property owners who were considered dischargers may seek recovery against prior owners/dischargers.<sup>37</sup>

Some courts have also ruled that dischargers may bring contribution claims under Navigation Law § 176(8).<sup>38</sup> Under this line of cases, parties who perform a cleanup or reimburse the Oil Spill Fund in exchange for a release from liability will not lose any common law right of contribution.<sup>39</sup> To bring an action under this section, a plaintiff must show that it has incurred some cleanup costs.<sup>40</sup> One case has held that a plaintiff has to obtain approval from the NYSDEC for its cleanup to be able to bring a contribution claim under §176(8).<sup>41</sup> Navigation Law § 190 authorizes the NYSDEC and injured parties to file claims directly against the insurance carriers of the discharger.

### **d). Oil Spill Fund**

The Navigation Law also authorized the creation of the Environmental Protection and Spill Compensation Fund ("Oil Spill Fund") which is administered by the Office of the State

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direct or indirect contractual relationship with the defendant, (3) the defendant exercised reasonable care with respect to the contamination and (4) took precautions with respect to foreseeable acts or omissions of third parties. Since conditions (3) and (4) require the defendant to exercise some control over the property, it is unclear how this defense will impact the "faultless landowner" analysis which requires an owner to show it did not have the capacity to control the activities at the site.

<sup>35</sup> Navigation Law §181(4)(b)

<sup>36</sup> *State v. Green*, 96 N.Y.2d 403,408, 729 N.Y.S.2d 420, 424(2001); *White v Long*, 85 NY 2d 564, 626 NY S 2d 989 (1995)

<sup>37</sup> *Snyder v. Newcomb*, 194 A.D. 2d 53, 603 N.Y.S.2d 1010(4<sup>th</sup> Dept. 1993); *Wheeler v. National School Bus Service*, 193 A.D.2d 998, 598 N.Y.S.2d 109 (3d Dep't 1993).

<sup>38</sup> This section provides that "Notwithstanding any other provision of law to the contrary, including but not limited to section 15-108 of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party."

<sup>39</sup> *Dora Homes, Inc. v. Epperson*, 344 F. Supp. 2d 875 (E.D.N.Y. 2004); In the matter of the Application of the City of New York, 2002 N.Y. Misc. LEXIS 1978 (Sup. Ct. Kings Cty. Oct. 8, 2002), affirmed by, in part, Remitted by City of New York v. Mobil Oil Corp., 2004 N.Y. App. Div. LEXIS (2<sup>nd</sup> Dept Oct. 25, 2004); *Volunteers of America v. Heinrich*, 90 F.Supp.2d. 252 (W.D.N.Y. 2000)

<sup>40</sup> *FCA Associates v. Texaco, Inc.*, 2005 U.S. Dist. LEXIS 6348 (W.D.N.Y. March 31, 2005)

<sup>41</sup> *Atlantic Richfield Company v. Current Controls, Inc.*, 1996 U.S. Dist. LEXIS 13828 (W.D.N.Y. September 6, 1996)

Comptroller. The Oil Spill Fund is strictly liable for all "cleanup and removal costs" as well as direct and indirect damages.<sup>42</sup> The Oil Spill Fund is authorized to pay for NYSDEC cleanups of petroleum discharges where the responsible party is unknown or the responsible party is unable to pay for a cleanup<sup>43</sup>, pays damage claims to persons injured by a petroleum discharge,<sup>44</sup> works with the Office of the Attorney General to recover money disbursed from the Oil Spill Fund,<sup>45</sup> may record liens against on contaminated property when the owner is a discharger and fails to pay for the cleanup,<sup>46</sup> and facilitate settlements among dischargers and persons who suffer damages as a result of a discharge.<sup>47</sup> The Oil Spill Fund also reviews BCP applications to determine if there has been a petroleum discharge at the site. If the Oil Spill Fund does compensate a claimant, the Oil Spill Fund will acquire the claimant's claims against the discharger by subrogation.<sup>48</sup>

The Oil Spill Fund is strictly liable for "*Cleanup and Removal Costs*"<sup>49</sup>. The term is defined to include the following:

- the cost to restore, repair or replace real or personal property damaged or destroyed by discharge<sup>50</sup>;
- Loss of Income or impairment of earning capacity because of damage to real or personal property, including damage or destruction to natural resources;
- Reduction in Property Value;
- Loss of Tax Revenue by a state or local government for up to 1 year;
- Interest on a loan to offset economic harm from discharge.<sup>51</sup>

While parties damaged by oil spills may seek reimbursement from the Oil Spill Fund, dischargers may not obtain reimbursement from the Oil Spill Fund even if they paid more than their fair share of the cleanup costs. Claims for reimbursement must be made within three years after discovery of the damage and no later than ten years after the incident.<sup>52</sup>

### **e.) Cleanup Liens**

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<sup>42</sup> Navigation Law § 181(2)

<sup>43</sup> Navigation Law § 186

<sup>44</sup> Navigation Law § 181(2)

<sup>45</sup> Navigation Law § 187 [1]; § 188

<sup>46</sup> Navigation Law §181-a.

<sup>47</sup> Navigation Law §185

<sup>48</sup> Navigation Law § 188

<sup>49</sup> Navigation Law §172(5).

<sup>50</sup> The injured person must have title, right or interest in the real or personal property. 2 NYCRR 402.1

<sup>51</sup> Navigation Law § 186;

<sup>52</sup> Navigation Law §182

The state comptroller is the administrator of the Oil Spill Fund. The state attorney general is authorized to seek reimbursement of any dispersed funds from dischargers.<sup>53</sup> The Navigation Law also authorizes the state to file a lien against the land where the discharge took place when the Oil Spill Fund incurs costs to cleanup or remove a discharge or makes payment to satisfy claims asserted by injured parties and a landowner fails to make payment within 90 days of a demand. The lien is a non-priority lien that does not subordinate previously perfected security interests.<sup>54</sup>

The notice of lien is indexed in the same manner as a lien under Lien Law § 10.<sup>55</sup> An action to vacate an environmental lien is governed by Lien Law §59, and should not be brought as an Article 78 proceeding.<sup>56</sup>

Prior to the promulgation of the federal All Appropriate Inquires ("AAI") rule,<sup>57</sup> cleanup liens were not routinely reviewed during the customary phase I environmental site assessment but should be identified in the title search. If a cleanup lien has been filed against the Property, purchasers and developers should contact the Oil Spill Fund to resolve the lien. In some situations such as where the redevelopment will result in a cleanup of the site, the Oil Spill Fund may be willing to reduce the amount of the lien

## **2. Liability Framework of Petroleum Bulk Storage Act ("PBSA")-**

The PBSA applies to Underground Storage Tanks (USTs) and Aboveground Storage Tanks (ASTs), or groupings of such tanks with a combined storage capacity of between 1100 and 400,000 gallons of petroleum.<sup>58</sup> Facilities that store more than 400,000 gallons of petroleum are considered "major facilities" and regulated by the Navigation Law. The definition of facility does not include heating oil tanks used for on-site consumption that are less than 1100 gallons. Other tanks that are exempted from the PBSA program include oil production facilities; facilities licensed under the Navigation Law; and facilities regulated under the Natural Gas Act.

Nassau, Suffolk, Rockland, Westchester and Cortland Counties have been authorized by the NYSDEC to administer the program for tanks located in those areas. Because these counties may have more stringent requirements than the State, owners and operators should contact the county to learn of specific local requirements.

### **a. Registration Requirements**

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<sup>53</sup> Navigation Law §187

<sup>54</sup> Navigation Law §181-a

<sup>55</sup> Navigation Law § 181-c.

<sup>56</sup> *Art-Tex Petroleum, Inc. v. New York State Department of Audit and Control*, 93 N.Y.2d 830, 1999 WL 72981 (1999).

<sup>57</sup> 40 CFR 312

<sup>58</sup> ECL §17-0101

Under the regulations promulgated in 1985, owners were required to register storage facilities with DEC by December 27, 1986.<sup>59</sup> Facilities must be re-registered every five years. New facilities must be registered before being placed into service. NYSDEC must be notified within 30 days prior to substantial modifications.

### **b. Operating and Design Standards**

Like the federal UST program, owners and operators of petroleum bulk storage facilities must comply with design and construction standards as well as closure requirements.<sup>60</sup> Owners are defined as anyone who has legal title and operators. For example, operators of USTs must keep daily inventory records, reconcile them on a 10 day basis (and maintain them for five years) and notify DEC and the tank owner within 48 hours of unexplained inventory losses. They must also test tanks and pipes every five years or monitor the interstitial space of double-walled equipment.

New or modified USTs must either be made of fiberglass reinforced plastic; cathodic protected steel (to protect against the corrosion caused by contact between steel and soil); or steel clad with fiberglass reinforced plastic.<sup>61</sup> Secondary containment such as a double-walled tank, or a vault, must be provided. If tank is double walled, monitoring of the interstitial space is required, otherwise use of an in-tank monitoring system or one or more observation wells is required. New underground piping systems must be designed with a 30-year life expectancy. If made of steel, they must be cathodic protected. Pipes may be constructed of fiberglass-reinforced plastic or other equivalent non-corrodible materials.

New ASTs must be constructed of steel. If their bottom rests on the ground, the tank must have cathodic protection. An impermeable barrier must be installed under the tank bottom, with monitoring between the barrier and the bottom. Operators of ASTs must conduct monthly visual inspections. Every 10 years they must clean out the tanks that are resting on grade, remove the sludge from the bottom, inspect for structural integrity and test for tightness. ASTs must also be equipped with secondary containment (i.e., berms or other devices to contain spills).

It is important to note that a tank in a building basement or below-grade floor that is encased in a vault that does not have any "weep holes" or a manway so that the tank cannot be observed will be considered a UST. Owners and operators of such tanks would be subject to the full panoply of UST requirements under the PBSA regulatory program.

### **c. Reporting Obligations**

The PBSA imposes reporting obligations on "any person with knowledge of a spill leak or discharge" of petroleum that exceeds 25 gallons or creates sheen on nearby surface water.<sup>62</sup> While this reporting obligation was traditionally viewed as applying only parties who own or

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<sup>59</sup> 6 NYCRR 612

<sup>60</sup> 6 NYCRR Parts 613 and 614

<sup>61</sup> 6 NYCRR Part 614

<sup>62</sup> 6 NYCRR Part 613.8

operate facilities that store more than 1100 gallons of petroleum, an administrative law decision extended the reporting obligation to environmental consultants.<sup>63</sup> Reporting obligations for smaller facilities are governed by the Navigation Law.

If the NYSDEC suspects or believes that a UST is leaking, it may order the owner to perform a tightness test. If the owner fails to conduct the test within ten days, the NYSDEC may conduct the test and seek reimbursement of its reasonable expenses.<sup>64</sup>

#### **d. Closure**

Tanks that are temporarily out of service (30 days or more) must be drained of product to the lowest draw off point. Fill lines and gauge openings must be capped or plugged. Inspection and registration must continue. Those tanks that are permanently out of service must be emptied of liquid, sludge and vapors. The tanks that are permanently out of service must then either be removed or if left in place USTs must be filled with solid inert material such as sand or concrete slurry. DEC must be notified 30 days prior to filling or removal.

**e. Financial Assurance-** Owners or operators are required to maintain adequate financial assurances.<sup>65</sup>

### **3. Oil Spill Cleanup Procedures**

Cleanups of oil spills that are expected to be completed over an extended period of time will usually be accomplished pursuant to a Stipulation Agreement ("STIP"). The STIP is designed as a fast track procedure with predetermined non-negotiable discharge limits. The terms of the STIP are non-negotiable except for the corrective action plan and schedule.

For complex remediation, the NYSDEC may require the responsible party to enter into a long-form consent order. The long-form order is drafted to address site-specific issues, and its terms are subject to negotiation. While the STIP will address only the cleanup portion of a spill site, the long-form order may address other aspects of the situation, including possible fines and/or penalties.

Anyone willing to accept responsibility for cleaning up a petroleum release may enter into a STIP. This includes the responsible party or a volunteer not responsible for the discharge. A responsible party can also request to negotiate a long-form order.

Within a short time after a spill has occurred, a responsible party will receive a STIP Guidance Package, including a "Letter of Responsibility," a Stipulation Agreement, and discharge limits, from the NYSDEC Regional Director.

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<sup>63</sup> *In re Middletown Kontokosta Associates, Ltd*, NYSDEC Case No. R1-6039

<sup>64</sup> ECL §17-1007(2)

<sup>65</sup> 6 NYCRR Part 613.9(e)

The letter informs the recipient that the NYSDEC believes that the party is responsible for a spill. The recipient will be asked to sign the STIP. Work can and usually will begin prior to the STIP being signed. Any milestone already completed will be identified in the schedule. The responsible PRP can discuss a proposed schedule and include the schedule with the signed STIP.

The schedule may identify any or all of the following milestone activities: initiation of the investigation, completion/submittal of the investigation report, submission of the remediation plan, and project start date. For more complex sites, the remediation schedule may be adjusted to reflect site conditions subject to approval of the Regional Spill Engineer. If a recipient refuses to sign a STIP, the NYSDEC will hire its own contractor, conduct the spill cleanup, and bill the responsible party.

#### **4. Reimbursements For Remediation of Petroleum-Contaminated Sites**

When property owners or developers think of the Oil Spill Fund, it is probably because they are concerned about becoming potential targets of a cost recovery action seeking reimbursement for the costs of a cleanup performed by the NYSDEC. However, funding NYSDEC cleanups is only one of the missions of the Oil Spill Fund. The other lesser known but just as important role of the Oil Spill Fund is to compensate parties who have suffered economic damages in connection with a discharge of petroleum. In this role, the Oil Spill may be a tool to help facilitate the redevelopment of petroleum-contaminated sites. This article discusses who may be eligible to file claims for reimbursements from the Oil Spill Fund, reviews procedures for processing claims and provides practical insights on filing claims.

Since the passage of the Brownfield /Superfund Law of 2003 many prospective purchasers and developers have been exploring using the New York State Brownfield Cleanup Program ("BCP") to help defray the costs of their development projects. These parties are willing to endure the extensive and time-consuming remedial procedures and public participation requirements of the BCP because of the very generous tax credits that are available under the BCP<sup>66</sup>

The BCP may make sense for complex developments or heavily contaminated sites. However the added costs and time delays associated with the BCP may not make economic sense for purchasers or developers of smaller sites that are contaminated with petroleum. Instead, under certain circumstances, the Environmental Protection and Spill Compensation Fund ("Oil Spill Fund") may be a viable alternative to the BCP. While the Oil Spill Fund will not rival the BCP tax credits in the amount of financial assistance, it can be used pay purchasers and developers with their out of pocket costs of remediating petroleum contamination in a timely manner. On the

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<sup>66</sup> The Brownfield Amendments created three types of tax credits for developers or owners of sites admitted into the BCP. The most significant tax credit is the Brownfield Redevelopment Tax Credit ("BRTC"). Similar to the state Investment Tax Credit ("ITC"), the BRTC applies to three types of costs: site preparation costs, qualified tangible property ("QTP") costs, and on-site groundwater remediation. Under the QTP credit, a taxpayers admitted into the BCP may be eligible to claim up to 22% of the value of the improvements of the property. See "New Brownfield Law Changes Remediation Process", Vol. 76, No. 8, New York Bar Journal (October 2004).

other hand, the Oil Spill Fund claim procedures and eligibility are well established<sup>67</sup> and not subject to the kind of changing eligibility criteria that has recently been witnessed in the BCP.<sup>68</sup>

While the Oil Spill Fund is strictly liable for all cleanup and removal costs and all direct and indirect damages, the definition of "claim" only applies to claim by an injured person who is not responsible for the discharge."<sup>69</sup> Thus, a discharger is not eligible for reimbursement from the Oil Spill Fund even if the discharger paid more than its fair share of the cleanup costs.<sup>70</sup> Accordingly, one of the first critical questions that a developer, owner or purchaser must ask is whether it may be considered a "discharger" under the Navigation Law.

One of the more vexing issues for developers or owners of property is whether they may be liable as discharges because of the presence of current or former USTs at a site that they do not or have not operated in the past. Until 2001, it was unclear if landowners who did not actively operate the source of contamination such as a storage tank used by a tenant or who did not otherwise cause the contamination ("non-discharging landowner) could be strictly liable for dischargers.<sup>71</sup> In *State v. Green*<sup>72</sup>, the New York Court of Appeals ruled that while the Navigation Law does not impose liability based solely on ownership of contaminated land, a landowner that can control activities occurring on its property and has reason to believe that petroleum products will be stored there, could be liable as a discharger for the cleanup costs. The Court said that liability was predicated on a party's capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill. To not be liable under the Navigation Law, the property owner has to show that it is "faultless". The Court of Appeals recently extended its ruling in *Green* and held that an owner with knowledge of a spill who fails to take remediate the contamination may be liable as a "discharger" under the Navigation Law.<sup>73</sup>

In most cases, a property owner with a tenant who operated USTs will usually be found to be a discharger because the will generally find that the owner as landlord could have exercised

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<sup>67</sup> 2 NYCRR Parts 401-404.

<sup>68</sup> Because of the potential size of the BCP tax credits, the New York State Department of Environmental Conservation ("NYSDEC") recently published new BCP eligibility criteria that have the effect of narrowing the definition of what constitutes an eligible brownfield site. See "Brownfield Cleanup Program's Final Site Eligibility Criteria", Freedman, David J. and Schnapf, Lawrence P., New York Law Journal, April 2, 2005; "Brownfield Cleanup Program's Draft Eligibility Criteria", Freedman, David J. and Schnapf, Lawrence P., New York Law Journal, Nov. 15, 2004, p.4

<sup>69</sup> Navigation Law § 172(3).

<sup>70</sup>Navigation Law §182. See also *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den 'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991), *app. denied* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992)

<sup>71</sup> Compare *Busy Bee Food Services v. WCC Tank Lining Technology, Inc.*, 202 A.D.2d. 8989, 609 N.Y.S.2d 118 (3<sup>rd</sup> Dept. 1994) with *White v. Long*, 85 N.Y.2d. 564, 626 N.Y.S.2d 989 (1995) and *Popolizio v. City of Schenectady*, 269 A.D.2d. 670, 701 N.Y.S.2d. 755 (3<sup>rd</sup> Dept. 2000).

<sup>72</sup> 96 N.Y.2d 403; 754 N.E.2d 179;729 N.Y.S.2d 420 (July 2, 2001)

<sup>73</sup> *State of New York v. Speonk Fuel Inc*, 2004 N.Y. LEXIS 2438 (N.Y. Oct.19, 2004); *Reargument denied by State v. Speonk Fuel, Inc.*, 2004 N.Y. LEXIS 3893 (N.Y. Dec. 21, 2004).



control over the tenant's operations through lease covenants. A more difficult question is what happens if a tenant abandons tanks when it vacates the premises. Purchasers and developers have argued that the tanks remain the property of the tenant and are not part of the real estate. However, there have been a number of cases that have held that the USTs are trade fixtures that become the a part of the real estate, thereby making the purchaser or developer the owner of the tanks who would be responsible for contamination emanating from those inactive tanks.<sup>74</sup> Indeed, the Oil Spill Fund did deny a claim where tanks had been installed by prior operators or owners, and where the claimant's current lease provided that all improvements and equipment installed on the property would be deemed to become part of the property and that the claimant would considered the sole and absolute owner of the improvements.<sup>75</sup>

Less clear is what happens if tanks were properly closed in place in the past under the requirements in effect at the time and a purchaser discovers contamination. Some cases have held owners or buyers liable as dischargers where they could have known about the existence of contamination through the exercise of reasonable diligence or should have known about the presence of USTs from the use of the property.<sup>76</sup>

#### **a). Filing Claims For Reimbursement With Oil Spill Fund**

Non-dischargers who incur Cleanup and Removal costs or suffer damage to real or personal property as a result of a petroleum discharge may submit a claim to the Oil Spill Fund using the “Application for Damage Compensation”. In addition to completing the application, the claimant must include all appropriate and relevant documentation including any environmental. The claim package should be sent by certified mail or hand delivery to the New York State Department of Audit and Control, Administrator, New York State Environmental Protection and Spill Compensation Fund in Albany.<sup>77</sup>

One of the key issues that claimants will need to address is when the discharge causing the damage occurred. Claimants should be aware that claims for reimbursement must be filed within three years after the “date of discovery of damage,” and no later that ten years after the discharge causing the damage, regardless of date of discovery<sup>78</sup> The date of discovery will be judged from the time when the claimant should have known about the discharge. For example, the statute of limitations may be deemed to have begun to run when a phase II investigation detects the presence of contamination or a Phase I environmental site assessment uncovers evidence of a spill, when a UST system fails a tank test or when a spill report is filed with the NYSDEC. Thus, while the federal UST regulations do not trigger

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<sup>74</sup> Golovach v. Belomont, 4 A.D.3d 730, 773 N.Y.S.2d 139 (3<sup>rd</sup> Dept. 2004); Drouin v. Ridge Lumber, 209 A.D.2d 957, 619 N.Y.S.2d 433 (1994)

<sup>75</sup> In the Matter of 310 South Broadway Corporation v. H. Carl McCall, 275 A.D.2<sup>d</sup> 549, 712 N.Y.S.2d 206 (3d Dept 2000).

<sup>76</sup> New York v. Robin Operating Corp., 3 A.D. 767, 773 N.Y.S.2d 135 (3d Dept 2004); Oliver Chevrolet, Inc. v. Mobil Oil Corp., 249 A.D.2d 793, 671 N.Y.S.2d 850 (3<sup>rd</sup> Dept. 1998)

<sup>77</sup> 2 NYCRR Part 402.3(b)

<sup>78</sup> ; Z & H Realty, Inc. v. Office of State Comptroller, 259 A.D.2d 928, 686 N.Y.S.2d 900 (3d Dep’t 1999).

reporting obligations until a suspected release is confirmed, the mere suspicion of a spill could trigger the running of the statute of limitations for purposes of filing a claim with the Oil Spill Fund. If the claimant cannot estimate the date of the discharge, it should indicate that the discharge date is “unknown” in question 7 of the Application for Damage Compensation.

The Oil Spill Fund regulations provide that only one claim application may be required for each discharge causing damages. However, the claim may be amended if further damages are incurred prior to any award of damages.<sup>79</sup> Since the filing of a claim will toll the statute of limitations, it is advisable for a claimant to file a protective application as soon as it learns of a discharge causing damage. When the claimant has completed the cleanup or when the total damages become known, the claimant could then file an amended claim.

One of the advantages of the Oil Spill Fund is that potential claimants do not necessarily have to endure the delays commonly associated with the BCP in obtaining approval of a remedial action. Instead, the claimant can commence the cleanup and submit the claim to the Oil Spill Fund. However, claimants should be aware that the Oil Spill Fund will submit the claim package to the NYSDEC to determine if the work was necessary and that the costs were reasonable. Thus, it is advisable that the claimant have its environmental consultant confer with the appropriate NYSDEC regional office to verify that the proposed remedial plan will be acceptable to the NYSDEC.

When the Oil Spill Fund receives a claim, it is required to provide notice to the known or suspected discharger of the claim. If the discharger fails to respond within seven days, the Oil Spill Fund may then make a determination on the claim.<sup>80</sup> If the discharger does respond, the Oil Spill Fund may attempt to negotiate a settlement between the discharger and the claimant.<sup>81</sup> If the claimant fails to participate in a settlement without good cause, the claim may be denied.<sup>82</sup> If the claimant elects to present the claim to the Oil Spill Fund after unsuccessful negotiations, the Oil Spill Fund provide notice to the discharger who will have 20 days to challenge the validity or amount of the claim.<sup>83</sup> Any person challenging claims for Cleanup and Removal costs must provide written notice to the Oil Spill Fund within seven days after the Oil Spill Fund receives the claim for payment.<sup>84</sup>

#### **b). Filing Claims For Reimbursement With Oil Spill Fund**

Non-dischargers who incur Cleanup and Removal costs or suffer damage to real or personal property as a result of a petroleum discharge may submit a claim to the Oil Spill Fund using

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<sup>79</sup> 2 NYCRR Part 402.3(d)

<sup>80</sup> 2 NYCRR Part 402.5(a)

<sup>81</sup> 2 NYCRR Part 402.6(a)

<sup>82</sup> 2 NYCRR Part 402.6(a)(1)

<sup>83</sup> 2 NYCRR Part 402.6(b)

<sup>84</sup> 2 NYCRR Part 403.1

the “Application for Damage Compensation”. In addition to completing the application, the claimant must include all appropriate and relevant documentation including any environmental. The claim package should be sent by certified mail or hand delivery to the New York State Department of Audit and Control, Administrator, New York State Environmental Protection and Spill Compensation Fund in Albany.<sup>85</sup>

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The Oil Spill Fund regulations provide that only one claim application may be required for each discharge causing damages. However, the claim may be amended if further damages are incurred prior to any award of damages.<sup>87</sup> Since the filing of a claim will toll the statute of limitations, it is advisable for an claimant to file a protective application as soon as it learns of a discharge causing damage. When the claimant has completed the cleanup or when the total damages become known, the claimant could then file an amended claim.

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<sup>85</sup> 2 NYCRR Part 402.3(b)

<sup>86</sup> ; *Z & H Realty, Inc. v. Office of State Comptroller*, 259 A.D.2d 928, 686 N.Y.S.2d 900 (3d Dep’t 1999).

<sup>87</sup> 2 NYCRR Part 402.3(d)

<sup>88</sup> 2 NYCRR Part 402.5(a)

Oil Spill Fund may attempt to negotiate a settlement between the discharger and the claimant.<sup>89</sup> If the claimant fails to participate in a settlement without good cause, the claim may be denied.<sup>90</sup> If the claimant elects to present the claim to the Oil Spill Fund after unsuccessful negotiations, the Oil Spill Fund provide notice to the discharger who will have 20 days to challenge the validity or amount of the claim.<sup>91</sup> Any person challenging claims for Cleanup and Removal costs must provide written notice to the Oil Spill Fund within seven days after the Oil Spill Fund receives the claim for payment.<sup>92</sup>

### **c). Options for Owners or Developers Who Are Ineligible for Oil Spill Fund Compensation**

If the claim of owner or developer is denied or only a portion of the damages are reimbursable from the Oil Spill Fund, there are some other options for seeking recovering of cleanup costs.

Perhaps the most common option is filing an action under the Navigation Law for contribution or indemnity<sup>93</sup> Thus, landowners whose property is contaminated, and innocent persons who suffer damages or incur response cost may file a private statutory action for indemnification against the discharger.

While an "as is" clause in the contract should not prevent an injured party from bring a private cost recovery action under section 181(5),<sup>94</sup> there is some authority to suggest that a plaintiff who contractually assumed liability may not be able to recover in a contribution action.<sup>95</sup> One area fraught with peril can be leases where a landlord may inadvertently take title to abandoned USTs and therefore could be considered liable for discharges from those tanks.<sup>96</sup>

If a developer or property owner is barred from pursuing a statutory claim for contribution or indemnity, they may still be able to pursue common law remedies such as nuisance, trespass,

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<sup>89</sup> 2 NYCRR Part 402.6(a)

<sup>90</sup> 2 NYCRR Part 402.6(a)(1)

<sup>91</sup> 2 NYCRR Part 402.6(b)

<sup>92</sup> 2 NYCRR Part 403.1

<sup>93</sup> Navigation Law § 181(5). Courts have held that the relief authorized by §181(5) is in the nature of a claim for indemnification and is therefore governed by a six-year statute of limitations. *Dominick Bologna v. Kerr-McGee Corporation*, 95 F.Supp.2d 197 (S.D.N.Y. 2000); *145 Kisco Ave. Corp. v. Dufner Enterprises*, 198 A.D.2d 482, 604 N.Y.S.2d 963 (2<sup>nd</sup> Dept. 1993). The statute of limitations begins to run when the plaintiff should have discovered the contamination through the use of reasonable diligence. *Patel v. Exxon Corp.*, 284 A.D.2d 1007, 726 N.Y.S.2d 527 (4<sup>th</sup> Dept. 2001); *Kozemko v. Griffith Oil Company, Inc.*, 256 A.D.2d 1199, 628 N.Y.S.2d 503 (4<sup>th</sup> Dept. 1998)

<sup>94</sup> *State of New York v Tartan Oil Corp.*, 219 AD2d 111, 114-115

<sup>95</sup> *101 Fleet Place Associates v. New York Telephone Co.*, 197 A.D.2d 27, 609 N.Y.S.2d 896 (Pt Dep't 1994); *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002).

<sup>96</sup> *In the Matter of 310 South Broadway Corporation v. H. Carl McCall*, 275 A.D.2d 549, 712 N.Y.S.2d 206 (3<sup>rd</sup> Dept. 2000).

negligence as well as common law contribution or indemnity.<sup>97</sup> The Navigation specifically provides that the statutory private right of action does not preempt other available common law and equitable remedies.<sup>98</sup> Navigation Law § 190 authorizes the NYSDEC and injured parties to file claims directly against the insurance carriers of the discharger.

Another litigation option could be to file an action under §7002 of the federal Resource Conservation and Recovery Act ("RCRA")<sup>99</sup> citizen suit provision. While plaintiffs are not entitled to money damages under this section, they may seek order compelling a responsible party to remediate contamination. Some developers and purchasers have literally used RCRA §7002 actions as a business plan where they purchase discounted mortgage notes, file a RCRA §7002 action to order a cleanup and then sell the note for a profit when the property has been remediated.

To prevail under a RCRA §7002 action, the plaintiff must show that the defendant "contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste that ... may pose an imminent and substantial endangerment to health and the environment."<sup>100</sup> The key issue in these cases is usually if there is an "imminent and substantial endangerment". While a full discussion of this cause of action is beyond the scope of this article, it should be noted that this term does not require an immediate risk but simply that actual harm may occur. Some courts have held that contaminants above groundwater levels are sufficient to constitute an "imminent and substantial endangerment" while others require that there be completed pathways of exposure.<sup>101</sup> If an approved remedy has been installed and is operating, some courts in New York have found that there is no relief that can be awarded even if the remedy allow residual contaminant to remain in place and does not restore the property to its pre-spill condition.<sup>102</sup>

Of course, developers or purchasers who are not interested in pursuing litigation may still apply to the BCP. If the site is not eligible for the BCP, New York State does have a variety of other sources of financial resources that may be available to private parties directly or through local governments.<sup>103</sup>

### **C. Environmental Restoration Program (ERP)**

The Clean Water/Clean Air Bond Act of 1996 authorized the \$200 million Environmental Restoration Project Fund program to cleanup contaminated properties are owned by municipal

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<sup>97</sup> *Dora Homes, Inc. v. Epperson*, 344 F.Supp.2d 875 (E.D.N.Y. 2004)

<sup>98</sup> Navigation Law §193; *New York v. Lunking*, 2003 N.Y. Misc. LEXIS 1378 (Sup. Ct. Albany Co. Oct. 27, 2003); *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3d Dep't 2000).

<sup>99</sup> 42 U.S.C. 6972(a)(1)(B)

<sup>100</sup> *Id.*

<sup>101</sup> See *Interfaith Community Organization v. Honeywell Int'l*, 263 F.Supp.2d 796 (D.N.J. 2003), *aff'd*. 2005 U.S. App. LEXIS 2911 (3<sup>rd</sup> Cir. February 18, 2005)

<sup>102</sup> *Kara Holding Corp. v. Getty Petroleum*, 2004 U.S. Dist. LEXIS 15864 (S.D.N.Y. 2004); *87<sup>th</sup> Street Owners Corp. v. Carnegie Hill-87<sup>th</sup> Street Corp.*, 251 F.Supp.2d 1215 (S.D.N.Y. 2000)

<sup>103</sup> See *Brownfields Self Help/Financial Resources Manual* July 2001.

governments.<sup>104</sup> The program may be used to remediate sites contaminated with hazardous substances and petroleum.<sup>105</sup> This program not only provides funding to local governments but also liability protection. The NYSDEC regulations are codified at 6 Part NYCRR 375-4 et seq.

## 1. Eligibility Requirements

The Brownfield/Superfund Amendments of 2003 modified the eligibility requirements for the ERP and established financial incentives for certain qualifying community-based organizations (“CBOs”) to undertake studies to facilitate redevelopment of qualifying areas and sites.

It is important to note that ERP remains a distinct program from the Title 14 Brownfield Cleanup Program (BCP). However, some of the new requirements of the ERP flow from the BCP. For example, ERP now provides that engineering and institutional controls must be developed and maintained in accordance with the requirements of the BCP.<sup>106</sup> ERP remediation projects are supposed to use the same remediation goals of the SSF.<sup>107</sup>

The legislation expands the definition of municipality to include qualifying CBOs that partner with the local government. A CBO will be eligible for the SAG provided it is acting in partnership with the municipality where the brownfield is located and has not caused or contributed to a release of hazardous waste or petroleum, or generate, dispose, transport same at the brownfield site. The CBO will not be eligible for ERP funds if more than 25% of members, board or officers are or were employed by a person responsible for contamination under the state superfund law or the Navigation Law. A municipality that generated, transported or disposed of wastes at the site to receive funds is not eligible for such assistance. Private parties are also not eligible for funding.<sup>108</sup>

A municipality is eligible for a brownfield grant if it is the owner of a property that may be contaminated with hazardous substances or petroleum.<sup>109</sup> The municipality does not have to own the property at the time of the application but must hold title before funds can be disbursed. Thus, private developers who would not ordinarily be able to obtain financing for remediating the site could enter into an agreement with a local government where the local government performs the cleanup and then sells the property to the developer who would reimburse the local government for its share of the cleanup costs. Moreover, while a property can be subdivided prior to the completion of remediation, contaminated parcels may not be used either by the municipality or a successor until the NYSDEC approved cleanup as be completed for that parcel.

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<sup>104</sup> ECL § 56.0101 et seq.

<sup>105</sup> (ECL § 56-0101.11

<sup>106</sup> ECL §56-0503(2)(h)

<sup>107</sup> ECL §56-0505(3). This has caused some confusion because the SSF does not address petroleum while the ERP does include petroleum-contaminated sites. Some have asked how can a municipality remediate a site with petroleum contamination to the SSF standards when the SSF does not address petroleum? Senior NYSDEC officials have indicated that the reference is simply to the pre-disposal remediation goal of the SSF.

<sup>108</sup> N.Y. ENVTL. CONSERV. LAW § 56-0101(7).

<sup>109</sup> "Municipality" includes counties, cities, towns and villages as well as local public authorities, public benefit corporations, school and supervisory districts and improvement districts.

A municipality may not be eligible for funding if it indemnifies other PRPs for remediation of the site. Indeed, the local government is required to assist the state in seeking reimbursement of response costs.

There are two important eligibility limitations. First, a municipality is not eligible if it was responsible for the hazardous substance or petroleum contamination. Thus, if a municipality applies for a grant and during the investigation finds that the petroleum contamination was from city-owned vehicles or tanks, the municipality would lose its grant and its liability limitation in this situation. However, if hazardous substances disposed of by a municipality are distinct from and not intermixed with other hazardous substances found at a property, the municipality could be eligible for funding if it completely removes its hazardous substances from the site before applying for State assistance. This exclusion may not apply when the government's liability is based solely on its status as an owner of the property but it did not operate the site.

Second, a municipality is not eligible if the property is listed as Class 1 or 2 on Registry. If the site is listed as a Class 2 site after the investigation is carried out under the grant but before a grant for remediation is made, the municipality would not be eligible for the grant. However, the municipality would still receive the liability limitation by virtue of completing the investigation and would not be obligated to remediate the property as long as the property was not used for any new purpose until the remediation is implemented to the satisfaction of the NYSDEC.

If the municipality takes title, then applies for an investigation grant, and NYSDEC subsequently determines that the site should be listed as a Class 2 site, the NYSDEC will ensure that the grant is awarded before the property becomes a Class 2 site. However, if a municipality takes title and the property becomes a Class 2 before the municipality applies for a grant, the municipality will not be eligible for this program.

An important feature is the provision allowing taxing districts that are not foreclosing on a tax lien to be considered titleholders for purposes of receiving ERP investigations SAGs. The taxing authority may petition on 20 days notice for an order granting the taxing district temporary incidents of ownership to conduct an ERP and receive an ERP Investigation SAG. Relief shall be granted unless a party having the right of redemption has redeemed the parcel. The order will stay the foreclosure proceeding until the ERP investigation is completed. The report is to be delivered to the court, which shall then lift its stay of the foreclosure.<sup>110</sup>

## **2. Liability Limitation**

A municipality receiving funds pursuant to an SAC, its successor, lender, and lessee not liable under statutory or common law arising out of presence of hazardous substance existing at time of the SAC, shall each be indemnified by the state provided that they did not generate, transport or dispose of hazardous substances at site.<sup>111</sup> The liability exemption has the following reopeners: (a) failing to implement the approved workplan including land use controls, (b) fraudulently

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<sup>110</sup> *Id.* at § 56-0508.

<sup>111</sup> *Id.* at § 56-0509.

show cleanup levels were achieved, (c) causing a release, (d) changing the property's use, or (e) use the property in violation of 56-0511.<sup>112</sup>

The rights of this indemnification are assignable to a subsequent landowner, lessees, and lenders of the municipality. The State will indemnify these same persons for any liability associated with the hazardous substances that were on the property prior to the grant.<sup>113</sup> The liability relief will take effect when the application is approved.

However, if the municipality fails to complete the work to the satisfaction of the NYSDEC, liability relief will be suspended until the work is completed. In addition, the property cannot be used for any new purpose until the remediation of the property is completed to the satisfaction of the NYSDEC.

### **3. Funding and Eligible Costs**

As amended by the Brownfield/Superfund Amendments of 2003, municipalities may receive reimbursements of 90% of their on-site remediation costs and 100% for off-site contamination.<sup>114</sup> The local government will also be allowed to use other federal or state assistance to satisfy its 10% cost-share obligation. For example, a municipality may use low-interest loans from the Clean Water State Revolving Fund (CWSRF) to satisfy the cost share as well as pre-finance design and construction costs incurred prior to reimbursement of the State share, and costs that are ineligible for the Brownfields Program.<sup>115</sup>

In addition, proceeds from the sale of property that exceed the municipality's costs of property including taxes no longer have to be shared with state.<sup>116</sup> Instead, the municipality will first recover its costs, the State will then be entitled to its costs (i.e. the amount of the SAG) and then the local government will be able to keep any remaining proceeds from the sale. The state is required to use reasonable efforts to pursue responsible parties, but not those parties who are responsible parties solely because of ownership, for the full amount of the SAC.<sup>117</sup>

After completing the cleanup, the municipality may use the property for a public purpose or dispose of it. The SAG cost-share will be re-calculated if municipality receives any payments from PRPs.<sup>118</sup> If sold to a PRP, the PRP must pay the amount of the SAC plus interest in addition to any consideration received by municipality.<sup>119</sup>

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<sup>112</sup> *Id.* at § 56-0509(2).

<sup>113</sup> ECL § 56-0509

<sup>114</sup> *Id.* at § 56-0503.

<sup>115</sup> The CWSRF is jointly administered by the Environmental Facilities Corporation ("EFC") and NYSDEC.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at § 56-0507.

<sup>118</sup> *Id.* at § 56-0503(2)(c).

<sup>119</sup> N.Y. ENVTL. CONSERV. LAW § 56-0505.



If the property is leased, the benefits to the municipality will be calculated using the higher of the present worth of the stream of rent over a thirty year period or the present worth of the fair market value of the property. Once those SAC expenses have been paid, the municipality's expenses may be paid. Any additional revenue must be equally shared by the state and municipality.<sup>120</sup>

There are two types of grants available under the Brownfield Program: Investigation grants and remediation grants. A municipality may apply for as many grants as it has brownfield sites. Investigation grants are used to determine the nature and extent of contamination and then determine the appropriate remedy using the same process followed in the superfund program (e.g., RI/FS and ROD). Complete applications for investigations which satisfy the four eligibility criteria will be approved on a first-come, first-served basis.

Remediation grants may be used to fund the Design and Construction of the cleanup remedy selected in the ROD. Generally, completed applications for remediation will be evaluated in groups based on when they are received. The NYSDEC will score each application according to the Environmental Restoration Project prioritization criteria. If the project's score meets or exceeds the minimum score required for eligibility, and there are sufficient funds, then the project will be approved. If available funds are insufficient, the NYSDEC will approve the complete applications in accordance with their rank. Once funds become available, complete applications will be reconsidered for funding.

Local governments may also leverage SAG grants by applying for an SAG investigation grant and then have a private developer apply to the BCP to remediate the site and obtain tax credits for the redevelopment. The local government would have to retain title to the property to be eligible for the SAG investigation grant but could lease or convey title to the property after the SAG-funded investigation is completed to maximize tax credits to the private developer. However, the developer would not have to hold title or even lease the property to claim the brownfield redevelopment tax credit

Eligible costs include the costs of appraisal, surveying, engineering and architectural services, plans and specifications, consultant, and legal services which are necessary for conducting the approved project, and which are reasonable and properly documented, as determined by NYSDEC. Generally, costs to acquire or redevelop the property are not eligible costs. Thus, all costs associated with the approval, preparation, issuance and sale of bonds issued by the municipality in support of the project, together with the interest on such bonds or other form of indebtedness are not eligible for State assistance. However, it is possible that a municipality could recover its redevelopment costs upon recovery of money from federal payments, responsible or private party payments, or the sale or lease of the property if the total recoveries exceed the environmental restoration project cost.

Costs incurred prior to NYSDEC approval of an investigation application are also not eligible. However, pre-application costs associated with storage tank registration, closure, and disposal activities are eligible for reimbursement if those costs are incurred on or after June 6, 1996.

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<sup>120</sup> ECL §56.0503

Costs of indoor asbestos abatement and demolition of structures will usually be reimbursed at 50%. However, if the costs are almost exclusively for demolition, indoor asbestos abatement or lead-paint abatement, those costs will not be eligible for reimbursement. In addition, costs incurred prior to the approval of the SAC are also not reimbursable. Legal services that are necessary to implement the project are reimbursable for up to 5% of the investigation costs.<sup>121</sup>

#### 4. ERP Remediation Procedures

The ERP basically follows the SSF cleanup procedures with some limited exceptions. Cleanups under the ERP must meet the same standard for protection of public health and the environment that applies to remedial actions performed under the state superfund program.<sup>122</sup> The ERP does not differentiate between petroleum and hazardous substances for purposes of cleanup. As a result, a petroleum cleanup funded under the ERP must follow the requirements of the superfund program. If it is not feasible to cleanup to that level, then deed restrictions could be required and a higher cleanup level may be allowed based on feasibility.<sup>123</sup> Any land use controls that are required as part of the remedy selected by NYSDEC must be recorded in the local land records along with a copy of the SAC within 45 days of receipt of an executed SAC. (TAGM 4058)

The oversight document for the Brownfield Program is the State Assistance Contract (“SAC”). As part of the application, the municipality must identify the environmental benefit to be derived from the project and either the economic benefit also to be derived or the public recreational use to which the property will be placed once it is remediated. The municipality must complete the application form and include a Site Investigation (“SI”) workplan if applying for an investigation grant. If the municipality is applying for a remediation grant, it must include workplans for the SI and the Remedial Alternatives Report (“RAR”).

Projects will be prioritized based on the benefit to the environment, the economic benefit to the State, the opportunity for the property to be used for public or recreational purposes, and the opportunity for other funding sources to remediate such property.<sup>124</sup>

A municipality is required to submit a site investigation (“SI”) workplan as part of the application process. The SI workplan may be submitted independently or combined with the Remedial Alternatives Report. The NYSDEC must approve any workplan prior to the start of any work for the costs to be eligible for reimbursement. If the SI workplan is unacceptable, the application will be rejected and the municipality will notified of the SI workplan deficiencies.<sup>125</sup>

The SI will provide sufficient information to:

- Fulfill the work plan objectives;

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<sup>121</sup> 6 NYCRR Part 375-4.7

<sup>122</sup> ECL § 56-0505.3

<sup>123</sup> 6 NYCRR Part 375-1.10

<sup>124</sup> ECL § 56-0505

<sup>125</sup> 6 NYCRR Part 375-4.5

- Make a preliminary identification of potential remedial alternatives;
- Further define the study area of the SI/RAR;
- Identify probable Standards, Criteria, and Guidance ("SCG") and determine the extent to which they have been exceeded or contravened;
- Perform a Health and Environmental Risk Assessment as necessary.

A municipality must prepare a Remedial Alternatives Report ("RAR") or a combined SI/RAR instead of a FS. The RAR phase may begin concurrently with or shortly after commencement of the SI. For example, SI data will be used to develop and screen alternatives, and the alternatives under consideration may serve as a guide for additional characterization work.

The RAR does not provides the same detailed analysis as a FS but simply provides sufficient information to develop potential remedial action alternatives that may be used to clean up the property and to mitigate any off-site impacts from the property. The minimum information may be:

- Identifying potential general response actions;
- Evaluating general response actions for effectiveness, reliability; implementability and cost, and;
- Assembling suitable general response actions into alternative remedial actions.<sup>126</sup>

NYSDEC will prepare a PRAP which summarizes the proposed remedy for the property based on the findings of the SI/RAR Report. A summary of Remedial Goals and whether they will be attained by a specific alternative will be presented in the SI/RAR and PRAP. Once the SI/RAR and PRAP are ready for public release, the municipality must notify the public and allow a 45-day comment period to receive written comments.

After the 45 day comment period, public comments must be addressed through a Responsiveness Summary (RS). The municipality will assist the NYSDEC with the preparation of the RS. The NYSDEC will determine if the PRAP needs to be modified or if a public hearing is necessary because substantive issues were raised by the affected community.

Once the NYSDEC issues a final ROD, the municipality will be notified in writing that it may proceed with the implementation of the remedy and that it has satisfactorily completed the project.

The municipality is responsible for designing and implementing the remedy selected by NYSDEC. Workplans for the RD and RA must be prepared and submitted to NYSDEC for approval.<sup>127</sup> The end product of the detailed Remedial Design is a set of plans, specifications, and detailed construction cost estimates which are suitable for bidding and construction. The

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<sup>126</sup> The Procedures Handbook for Municipal Assistance Environmental Restoration Projects contains suggested formats for the SI/RAR.

<sup>127</sup> 6 NYCRR Part 375-4.9(b)

municipality must submit a final OM&M plan to the NYSDEC just before the completion of construction of the RD.<sup>128</sup>

## **5. Application of the State Environmental Quality Review Act (SEQRA)**

If a municipality is applying for a grant to undertake an investigation, SEQRA will not apply since data collection and research of properties are Type II actions that are not subject SEQRA.<sup>129</sup> However, NYSDEC must comply with SEQRA prior to approving any remediation grants. Since the issues involving brownfield cleanup and redevelopment are primarily local in nature, it is strongly recommended that the municipality assume lead agency status on an action and coordinate review of the action with all involved agencies (including NYSDEC). It is also strongly recommended that coordinated review of an action be conducted and a determination of significance made prior to submitting an application for a grant.

Before the NYSDEC can issue a grant for remediation, the SEQRA process must be completed. This means that an environmental assessment must be conducted of the "whole action" (i.e., the remediation and redevelopment) by the lead agency. If the environmental assessment results in a negative declaration, SEQRA will be satisfied. However, if a positive declaration is issued by the lead agency, then a Final Environmental Impact Statement and Findings Statements must be prepared before the action can go forward and before NYSDEC can issue the grant. SEQRA determinations must be submitted as part of a complete application.

## **D. Chemical Bulk Storage**

The Hazardous Substances Bulk Storage Act (CBS) regulates the sale, storage and handling of hazardous substances. The CBS was one of the first laws in the country that was designed to prevent chemical spills and leaks. The CBS prohibits the transfer of hazardous substances to or from an unregistered facility or for products that the manufacturer/distributor fails to provide buyers with recommended practices and guidance on proper methods for storage and handling of such substances.

The CBS Regulations appear at 6NYCRR Parts 595-599 and impose a variety of obligations on owner and operators of regulated facilities including:

- Requirements for release reporting, response and corrective action are outlined;
- Storage equipment (tanks, pipes, transfer stations and associated equipment) must meet State standards by December 22, 1998. USTs and their piping systems were required to be replaced with double-walled walled systems. By December 22, 1999 aboveground tanks and transfer stations were required to have secondary containment and be upgraded to meet State standards. Non-stationary tanks were required to be stored in dedicated areas with spill containment.
- Tanks and pipes must be tested and inspected for soundness;

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<sup>128</sup> 6 NYCRR Part 375-4.9(c)

<sup>129</sup> 6 NYCRR Part 617.5(c)(18)

- Owners were required to develop and maintain a current spill prevention plan.

## II. New York State Vapor Intrusion Policies

In November 2004, NYSDEC and New York State Department of Health (NYSDOH) issued draft vapor intrusion guidance.<sup>130</sup> The agencies issued revised guidance in October 2006 incorporate and respond to comments that the agencies received during public comment periods. It should be noted that while these guidance documents do not focus on petroleum contamination, the Oil Spill Fund is evaluating the VI pathway when it funds cleanups at petroleum-contaminated sites.

The NYSDEC policy applies to all sites that are currently under investigation and currently being reviewed by NYSDEC as well as sites that will be reviewed in the future. However, the primary policy is to establish a process for investigate potential VI pathway at sites where remedial decisions were made prior to January 1, 2003.

In its background statement, the NYSDEC defined VI as the migration of volatile chemicals (VOCs) from the subsurface into overlying or adjacent buildings. In extreme cases, the vapors may accumulate in buildings to levels that may pose near-term safety hazards (e.g., explosion), acute health effects, or aesthetic problems (e.g., odors). Typically, however, if vapors do migrate into buildings, the levels are considerably lower in comparison and health concerns, if any, relate to chronic effects based on long term exposure to low chemical concentrations.

The policy also explained VI was historically considered to be a potential issue only when a VOCs contamination was located adjacent to or directly beneath the foundation of an occupied building. If the dissolved contaminant plume was more than 15 feet deep, there was an assumption that any vapors entering buildings would not represent an indoor air concern.

NYSDEC estimates that 750 sites in New York may be impacted from VOCs. For ongoing sites where final remedial decisions have not been made, the agency policy will be to evaluate the VI pathway during the site investigation process like any other media. NYSDEC will be issuing guidance document for evaluating the soil vapor intrusion pathway that will describe the appropriate investigation methodology and how to evaluate the investigation data.

Many of the 750 sites have already been remediated and are either in the long-term monitoring phase or were closed once remedial objectives established for the cleanup were met. However, the agency said that recent evidence and a better understanding of vapor intrusion as led it to conclude that the VI pathway may need to be re-evaluated at these sites.

For the pre-2003 sites where remedial actions have been completed, NYSDEC has developed screening criteria and prioritization score sheets to help identify if there may be a potential for

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<sup>130</sup> See NYSDEC “Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites in New York” (DER-13 October 18, 2006) and NYSDOH “Guidance for Evaluating Soil Vapor Intrusion in the State of New York”

subsurface vapor intrusion at a site. The screening document is a series of questions that address the nature of VOCs known or reasonably suspected to be present in the subsurface.

To expedite the screening process, NYSDEC generated a list of sites where chlorinated volatile organic compounds (CVOCs) were disposed or detected in soil or groundwater. NYSDEC decided to target CVOC sites first because CVOCs are found at the vast majority of contaminated sites, do not readily biodegrade and they may accumulate indoors without being noticed by the occupant because of their high odor threshold.

While the NYSDEC recognized that non-chlorinated VOCs (such as benzene and toluene) also have some potential for vapor intrusion, they represent less of a concern for several reasons. In addition, the agency said that non-chlorinated volatile compounds generally have an odor or taste when they are present in drinking water or breathing space and that sites below the odor threshold are generally below levels of concern and do not represent a threat to public health. Moreover, non-chlorinated VOCs also readily biodegrade in the presence of oxygen, which is readily available in the vadose zone (zone above the groundwater table) that contaminants must pass before entering a basement or crawl space. For these reasons, the agency decided to defer taking action on sites with non-chlorinated VOCs until further monitoring is evaluated and used to verify these assumptions.

Based on this effort, NYSDEC has developed a list approximately 400 so-called "Legacy Sites" that were closed prior to January 2003 that may be subject to further remediation for VI. Evaluation of legacy sites (defined as sites where remedial decisions were completed prior to January 1, 2003) will occur along three tracks. For current or former NPL sites in New York, EPA will take the lead or provide oversight. For non-NPL sites, NYSDEC will provide responsible parties with the opportunity to conduct soil vapor evaluation evaluations. For sites where the responsible parties decline, are unable or no viable responsible parties can be identified, the NYSDEC will conduct the evaluation and seek to recover its costs.

Sites meeting the screening criteria will be ranked and prioritized using a score for soil and a groundwater score sheet. The score sheets will evaluate sites based on site-specific information such as chemical concentration, depth to contaminated groundwater and soil, soil type, land use above impacted areas at or near the site, presence of NAPL, preferential vapor flow paths, and proximity to sensitive receptors (e.g., daycare facilities, schools, and hospitals).

NYSDEC will apply weighting factors for the four ranking criteria to prioritize legacy sites that are to be evaluated by the agency. For instance, example if the depth to contaminated groundwater is between 15 and 50 ft below grade, then that condition will be given a weight factor of 4. Sites with soil contamination and sites with groundwater contamination will be prioritized separately. Additional scoring points will be added for sensitive receptors such as day care centers, elder care facilities and hospitals. Points will also be added to a site's score if there are preferential pathways such as pipes and pipe bedding, joints and fractures, sumps and other penetrations into the buildings.

The NYSDEC indicated that its goal is to have each of the nine regional offices evaluate at least five legacy sites per year. However, we understand that the agency is ahead of this goal and has

completed initial evaluations on just over 200 sites. It is unclear at this time how many of these legacy sites will actually be required to implement additional remedial actions to address the vapor intrusion pathway.

After the initial list has been reviewed by DER staff as a check on the validity of the screening process and to find out about other potential sites which for one reason or another did not rank highly, a manageable number of pre-2003 sites will be targeted initially for further study to determine whether indoor air impacts associated with site contaminants actually exist. This determination will require a certain amount of field sampling and characterization to supplement any existing information. The scope of the sampling will be determined on a site-specific basis but will generally involve soil gas sampling between any remaining on-site sources of VOCs and the nearest occupied buildings to estimate the extent of any vapor plumes associated with the site that could impact these structures.

In its draft guidance, the NYSDEC established a 100-foot screening distance for prioritizing sites for potential vapor intrusion. Under this approach, if soil gas contamination is not found within 100 feet of an existing occupied structure or one that is planned, then the site will be given a low priority and further investigation of vapor impacts would be deferred. If soil gas sampling indicates that vapors have migrated beneath an occupied building, then sub-slab and indoor air sampling will be necessary to further evaluate potential impacts.

If groundwater within 100 feet of or beneath an occupied building is contaminated with VOCs, the draft policy provided that sub-slab and indoor air sampling will be initiated. If recent groundwater quality data is not available, a limited groundwater investigation may be required to evaluate current groundwater conditions (i.e., nature and extent) downgradient of any remaining on-site sources of VOCs and make this determination. If groundwater contaminated with VOCs is not found within 100 feet of an occupied building, then the site will be given a low priority and further investigation of vapor impacts will be deferred.

In its final guidance, the NYSDEC eliminated the 100 foot vertical and horizontal threshold for screening out sites. Instead, the agency will use site-specific factors. For sites where remedial activities are currently on-going, the soil vapor intrusion pathway will be evaluated as part of the remedial process.

The most significant change in the NYSDOH final guidance was that the agency tightened the criteria for TCE based on the July 2006 report of the National Academy of Sciences. As a result, the decision matrix TCE requires mitigation at lower levels

### **III. New York City Laws Impacting Contaminated Sites**

#### **A. New York City "Superfund" Law**

The New York City Hazardous Substance Emergency Response Law<sup>131</sup>, the New York City Department of Environmental Protection (NYCDEP) is authorized to respond to actual or

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<sup>131</sup> New York City Administrative Code §24-600 et seq.

threatened releases of hazardous substances and to impose a lien on the property subject to the cleanup.

**1. Responsible Parties-** Each responsible party is jointly and severally liable without regard to fault for all response costs incurred by the NYCDEP. Includes any owner, operator, lessee, occupant or tenant other than a residential lessee, occupant or tenant of property at the time there is a release, or a substantial threat of a release, of a hazardous substance from such property into the environment.

An owner of an owner-occupied residential property consisting of six or fewer dwelling units used exclusively for residential purposes will not be deemed to be a responsible person unless that person committed a willful, knowing, reckless or negligent act or omission which caused or substantially contributed to the threat or threatened release of hazardous substances. The invitee or licensee of a person using the property as a residence will not be liable as a responsible person unless that person willfully, knowingly, recklessly or negligently caused or substantially contributed to the release or threatened release.

Regulated financial institutions chartered under state or federal law which received title to the contaminated property through abandonment, foreclosure, a deed in lieu of foreclosure or through a judicial or bankruptcy order will not be deemed to be a responsible party unless (i) the institution willfully, knowingly, recklessly, or negligently caused or substantially contributed to the release or threatened release of hazardous substances, or (ii) the financial institution received title in order to secure the underlying credit extension for the purpose of allowing the responsible party from avoiding the provisions of the law.

**2. Defenses-** The New York City Superfund law contains the same statutory affirmative defenses as provided in CERCLA but there is no innocent purchaser's defense.

**3. Non-Priority Lien-**Any cost incurred by the NYCDEP under this law shall constitute a "debt" recoverable from each responsible party and a lien may be placed upon the real property of the responsible party or which was subject to the response measures. The lien becomes effective when either (i) a statement of account of costs is filed in the office of the City Collector and a notice of potential liability is filed, or (ii) three days after a notice has been mailed by certified and registered mail to the owner of the real property that was a subject of the cleanup action. The amount set forth in the statement of accounts continues to be a lien on the property until it is paid but is subordinated to the rights of any mortgagee.

## **B. "E" Designation Program**

During the past few years, New York City has rezoned vast tracts of land to allow residential development to occur in areas that were historically limited to manufacturing uses.<sup>132</sup> Because

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<sup>132</sup> New York City Charter §197-c requires that zoning amendments be reviewed and approved by the City Planning Commission (CPC). After approving a zoning amendment, the CPC issues a report that is submitted to the City Council for approval, disapproval or modification.



these amendments to the New York City Zoning Map<sup>133</sup> were approved after development of environmental impact statements (“EIS”) pursuant to the requirements of the City Environmental Quality Review (“CEQR”),<sup>134</sup> developers and property owners often assume that they will be able to obtain building permits and proceed with their developments without further environmental review.

However, during the process of approving zoning amendments, many tax lots may be assigned an “E-designation” requiring mandatory review by the New York City Department of Environmental Protection’s Office of Environmental Planning and Assessment (“NYCDEP”) for evaluating potential for contamination from hazardous materials as well as noise and air quality impacts.<sup>135</sup> As a result, developers eager to take advantage of the hot residential real estate market could find their projects delayed by unanticipated environmental investigation, may have to modify their design plans during construction to accommodate mitigation measures or even perform post-construction investigation or building modifications. In some instances, the E-designation program may impose investigation or remedial obligations that go beyond those required by the New York State Department of Environmental Conservation (“NYSDEC”).

This section discusses the requirements and procedures that NYCDEP has established under the E-designation program for addressing potential contamination from hazardous materials and provide practical advice on how to minimize delays that could be associated with the E-designation process.<sup>136</sup>

## 1. E-Designation Listing Process

The E-designation is a tool used in connection with environmental reviews performed pursuant to CEQR for zoning map amendments requiring approval pursuant to sections 197-c and 197-d of the NYC Charter where environmental assessments identify the potential for significant

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<sup>133</sup> DCP has developed 126 zoning maps that consist of 35 sections. Each of these 35 maps are each identified by a number from 1 to 35. The Zoning maps are further divided into from one to four quarters, each identified by a letter: a, b, c or d. Each zoning section map covers territory of approximately 8,000 feet (north/south) by 12,500 feet (east/west).

<sup>134</sup> Executive Order No. 91 of 1977, as amended; In 1975, New York State enacted the State Environmental Quality Review Act (SEQRA) that required all state and local government agencies to assess the environmental effects of discretionary actions before undertaking, funding, or approving the actions, with certain exceptions. SEQRA regulations permit a local government to promulgate its own environmental review procedures, provided that they are no less protective of the environment than state procedures. New York City exercised this prerogative in 1977 with Executive Order No. 91 that established CEQR and centralized most environmental review functions in two "co-lead agencies," the NYCDEP and the NYC Department of City Planning (DCP).

To expedite and ensure consistency environmental reviews, the City’s Environmental Quality Review process was substantially modified in 1991 by the CEQR Rules of Procedure (Title 62, Chapter 5 of the Rules of the City of New York) that provide that each City agency acts as lead agency for projects that it approves, funds, and/or directly implements.

<sup>135</sup> The NYCDEP E-designation regulations for hazardous materials appear at Chapter 24 of Title 15 of the Rules of the City of New York.15RCNY§24.

<sup>136</sup> This article does not address requirements for noise or air quality impact E-designations.

impacts from contamination from hazardous materials<sup>137</sup> on tax lots that are likely to be developed as a direct result of the rezoning.<sup>138</sup>

The potential for significant impacts related to hazardous materials can occur when elevated concentrations of hazardous materials exist at a site, when development creates new pathways of exposure to the hazardous materials or when the activity increases the risks by using hazardous.<sup>139</sup> For example, contaminated soil or dust could be transported to adjacent sites during excavation or construction. Construction activities could cause contaminants to migrate offsite. Contaminated vapors from gasoline or chlorinated solvents from soil or groundwater may concentrate beneath impermeable barriers or migrate into adjacent buildings creating a potential health hazard.

Pursuant to Section 11-15 of the Zoning Resolution of the City of New York, three city agencies play key roles in implementing the E-designation program. NYCDEP has adopted comprehensive regulations governing the implementation of the E-designation program for potential contamination from hazardous materials.<sup>140</sup> NYCDEP has identified certain types of facilities, uses and conditions that warrant an E-designation or at least require some level of investigation to determine if an E-designation is warranted.<sup>141</sup> The agency is also responsible for setting standards and procedures for assessing and remediating contamination from hazardous materials, determining when proposed developments must comply with the requirements of the E-designation program as well as when those requirements have been satisfied.<sup>142</sup> As will be discussed in more detail later, NYCDEP has developed three types of approvals: Notice of No Objection, Notice to Proceed, and Notice of Satisfaction.

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<sup>137</sup> 15 RCNY §24-03 defines “hazardous materials” as any material, substance, chemical, element, compound, mixture, solution, product, solid, gas, liquid, waste, byproduct, pollutant, or contaminant which when released into the environment may present a substantial danger to the public health or welfare or environment, including but not limited to those classified or regulated as “hazardous” and “toxic” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §9601 et seq.; List of Hazardous Substances 6 NYCRR Part 597; New York City Hazardous Substances Emergency Response Regulations 15 RCNY Chap. 11; all Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §6901 et seq.; Toxic Substances Control Act (TSCA), 15 U.S.C. §2601; Transportation of Hazardous Materials Act, 49 U.S.C. §5101; Clean Water Act (CWA), 33 U.S.C. §1251 et. Seq.; and /or Clean Air Act (CAA) 33USCA § 7401 et. seq.

<sup>138</sup> The E-designation regulations promulgated by NYCDEP identify two classes of sites subject to the program. 15 RCNY §24-03 defines a “development site” as one or more tax lots within the rezoned area that are not under the control or ownership of the applicant seeking the rezoning and that is likely to be developed as a result of the zoning map amendment. A “project site” refers to one or more tax lots within the rezoned area that are under the control or ownership of the applicant seeking to remove the E-designation and that the applicant proposes to redevelop

<sup>139</sup> Examples of actions that can lead to exposure of hazardous materials include excavation, dewatering, grading, or construction activities on a contaminated site; creating fugitive dust from exposed soils containing hazardous materials; demolition of buildings and structures that include hazardous materials such as asbestos and lead-based paint; and building on former landfills or swampland where methane production is occurring or may occur in the future.

<sup>140</sup> The process for evaluating noise and air quality impacts are delineated in the air and noise chapters of the CEQR Technical Manual.

<sup>141</sup> 15 RCNY §2404; 15 RCNY § App. A

<sup>142</sup> 11-15(c) of the Zoning Resolution of the City of New York (hereinafter “ZR 11-15)

The New York City Department of City Planning (“DCP”) has the primary responsibility for identifying tax lots that are to be assigned an E-designation in connection with a zoning map amendment. DCP may assign an E-designation to tax lots when the agency determines that a tax lot has a potential for development and where there is a possibility of contamination from hazardous materials.<sup>143</sup> DCP will generally make this determination based on the current or past uses of the affected parcel or proximity to a manufacturing or commercial site. When a tax lot is proposed for E-designation pursuant to an application for rezoning under §197-c and §200 or §201 of the City Charter because of the potential for hazardous material contamination, DCP is required to notify the property owner no less than 60 days prior to such designation.<sup>144</sup>

The CEQR Technical Manual contains a list of actions that may require hazardous materials assessments. Sites that have been potentially impacted from the presence of existing or historical land uses involving hazardous materials should automatically be examined further to evaluate possible exposure pathways<sup>145</sup> and potential impacts on public health or the environment. The list of actions requiring environmental assessments includes but is not limited to the following:

- Rezoning of a manufacturing zone to a commercial or residential zone;
- New development in a manufacturing zone;
- Development adjacent to a manufacturing zone or existing manufacturing or commercial facilities (including nonconforming uses) listed in Appendix I of the Technical Manual
- Rezoning from commercial to residential, including mixed-use zones, if the rezoned area would have allowed a use that may have stored, used, disposed of, or generated hazardous materials.
- Development on a vacant or underutilized site if there is a reason to suspect contamination or illegal dumping;
- Development in an area with fill material of unknown origin.<sup>146</sup>

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<sup>143</sup> The maps of E-designated lots are available at [www.nyc.gov/html/dcp/html/zone/zmapintr.shtml](http://www.nyc.gov/html/dcp/html/zone/zmapintr.shtml). The zoning maps will display an (E) symbol indicating the general location of properties that have CEQR (E) Requirements Declarations. A chart of the CEQR (E) Requirements declarations is available at <http://www.nyc.gov/html/dcp/pdf/zone/ceqr.pdf>

<sup>144</sup> 62 RCNY §2-02(e); ZR 11-15(d)

<sup>145</sup> Potential routes of exposure to elevated levels of hazardous materials can include direct contact between contaminated soil and skin (dermal), breathing of volatilized chemicals or chemicals associated with suspended soil particles (inhalation), swallowing soil (ingestion), or drinking contaminated water (oral). Public health may also be threatened when soil gasses or soil vapors migrate naturally through the subsurface or along preferential pathways (i.e., building foundations, utility conduits, duct work, and so on) and concentrate under barriers of low permeability (i.e., concrete slabs, asphalt, clay liners, and so on) resulting in potentially explosive conditions.

<sup>146</sup> Fill material historically used in New York City has included hydraulic dredge material that may contain petroleum and heavy metal contamination, and ash from the historical burning of garbage in residential and commercial buildings in the City. Fill material may produce methane if it is composed of organic wastes and/or if present in former low-lying swamp areas. Thus, it is not uncommon to find elevated levels of hazardous materials in fill material where the past and current activities may not suggest that contaminants should be present. This is especially true for properties that are adjacent to waterways where large volumes fill material may have been used. In some cases fill material can form preferential pathways for the movement of contaminants especially when utility conduits have been filled with permeable material.

- Development on or adjacent to a solid waste landfill site, inactive hazardous waste site, power-generating/ transmitting facility, or railroad tracks or a railroad right-of-way.
- Development where underground and/or aboveground storage tanks are on or adjacent to the site;
- An action directly affecting a site on which asbestos-containing materials or transformers possibly containing PCBs are present;
- Development adjacent to former municipal incinerators or coal gasification sites;
- Granting of variances or permits allowing residential use in manufacturing zones.

NYCDEP has identified codified this list of facilities, manufacturing or commercial activities and conditions that warrant an environmental assessment (the “Appendix A List”).<sup>147</sup> If the affected parcel or an adjacent property has had one of the environmentally-suspect activities or conditions, DCP is required to perform a preliminary screening assessment which generally consists of a review of historical documentation or regulatory records to determine current or past uses of the potential development site.

Perhaps the key enforcement mechanism of the E-designation process is that the New York City Department of Buildings (“DOB”) is prohibited from issuing building permits for tax lots with E-designations without first receiving a notice from NYCDEP that the environmental requirements for the lot have been satisfied.<sup>148</sup> The DOB E-designation process operates much like that used for Landmarks Preservation Approval. After receiving notice of an amendment to the zoning map from DCP, DOB will record the E-designation in its Building Information System (“BIS”) Property Profile Overview Screen to alert examiners and clerks that NYCDEP approval is a required application item for the proposed work. During their initial review, plan examiners and clerks will review the application to make sure that the required NYCDEP approval is satisfied<sup>149</sup>. Where there is a merger or subdivision of tax lots or zoning lots with an E-designation, the E-designation will apply to all portions of the property.<sup>150</sup> Thus, when an E-designated lot is subdivided, all the newly created lots will be E-designated.

For building applications involving E-designated lots, the DOB will not issue any approval, building permit, sign-off, certificate of completion, Certificate of Occupancy (“TCO”) or final

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<sup>147</sup> This list also appears at 15 RCNY § App. A

<sup>148</sup> Operations Policy and Procedure Notice #2/05 (“OPPN #2/05”). This memo applies to DOB approvals affected by ZR §§ 11-15 and 93-051 (Hudson Yards District). OPPN #2/05 summarizes procedures and requirements for permit applications affecting lots that have an hazardous materials E designation as set forth in Operations Policy and Procedure Notice #1/03 (“OPPN #01/03”). OPPN#2/05 also establishes that these procedures also apply to lots located within the Special Hudson Yards District that have E designations for potential hazardous materials contamination, noise and/or air quality impacts.

<sup>149</sup> Id. BIS identifies the E-designation lots in the “Little E Restricted” field as “HAZMAT/NOISE/AIR” as appropriate

<sup>150</sup> Id.

Certificates of Occupancy (“COO”) without either a “Notice of No Objection” or a “Notice to Proceed” from NYCDEP for the following categories of construction activity:

- Any development;
- An enlargement, extension or change of use involving a residential or community facility use; or
- An enlargement that disturbs the soil on said lot<sup>151</sup>

DOB will not issue any application approvals until it receives either a NYCDEP Notice of No Objection or a Notice to Proceed, and will not issue any final sign-offs until receipt of a Notice of Satisfaction (when a Notice to Proceed was previously issued) or a previously issued a Notice of No Objection.<sup>152</sup> Although the E-designation program is comprehensive, there are a number of moving parts that sometimes do not mesh as seamlessly as envisioned and can result in knotty problems for regulators and developers. For example, sometimes, a developer knowing that a zoning change is imminent may submit a building permit application so that construction could begin as soon as the zoning change is approved. If DCP has not yet completed the E-designation process, the BIS might not reflect any need for NYCDEP approval. Thus, DOB could issue a building permit without requiring any approval from NYCDEP and then be notified that the parcel has been assigned an E-designation. What happens if the developer then proceeds with the project without compliance with the NYCDEP requirements? The NYCDEP E-designation regulations prohibit the DOB from issuing any TCO or COO without NYCDEP issuing a determination that the developer has complied with E-designation requirements.<sup>153</sup> Thus, when the developer applies for its TCO or COO, the BIS will indicate that the developer must obtain NYCDEP approval. In such case, NYCDEP could require the developer to perform post-construction investigation such as having to drill through the slab to collect soil vapor samples or implement post-construction modifications such as a vapor barrier.

Moreover, any permit issued by the DOB for work on an "E"-designated application is conditioned upon full satisfaction of all NYCDEP environmental requirements related to the hazardous materials E-designation. Thus, a failure to obtain the appropriate NYCDEP approval prior to an application for certificate of occupancy, or prior to final inspection and verification of compliance with applicable law can result in a revocation of the permit. For example, if a developer obtains a NYCDEP Notice to Proceed but NYCDEP refuses to issue a Notice of Satisfaction because of failure to adequately comply with NYCDEP requirements, DOB may revoke the permit.<sup>154</sup>

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<sup>151</sup> OPPN #-2/05

<sup>152</sup> OPPN #2/05

<sup>153</sup> 15 RCNY §24-07(b) and (c)

<sup>154</sup> OPPN #2/05. DOB has issued OPPN #2/05 that discusses its permit revocation procedures. In general, DOB will issue a letter of intent to revoke that may contain an immediate order to stop work. If the applicant does not provide an adequate response within ten (10) days or an extended grace period approved by DOB, then it will issue a “Revocation of Approval and Permit” letter that will contain an immediate order to stop work. If the applicant cures the violation, DOB will issue a “Rescission of Notice of Intent to Revoke” letter

If projects are modified after construction, it is possible that further excavation could cause previously unanticipated health impacts to residents or construction workers or may result in significant impacts in the future. An applicant may have to file a post-approval amendment (PAA) and obtain NYCDEP approval of the modified application or plans where the PAA would disturb soil or increase the scope of the remedial work previously approved by NYCDEP<sup>155</sup>

Another question that frequently arises is how does the E-designation process work when a redevelopment only involves an interior renovation to an existing building (e.g., conversion of industrial space to residential units) where no exposed soil will be disturbed. Project proponents frequently argue that since no soil is being disturbed, the E-designation procedures concerning contamination from hazardous materials should not be triggered and DOB should not hold up a building permit until the developer prepares a work plan acceptable to NYCDEP. If the issue of concern is the potential for disbursement of asbestos fibers from asbestos-containing materials within a building structure to be renovated, NYCDEP could issue a Notice of No Objection so long as it complies with the NYCDEP's asbestos workpractice rules. However, where the current or former use involved use of chemicals that could have infiltrated or been absorbed into building materials such as floor beams or walls, or if the structure is likely to contain lead-based paint, NYCDEP could issue a Notice to Proceed requiring the applicant to perform certain indoor air sampling.

Thus, it is advisable for developers who believe that an E-designation is likely to be imposed on a property to consult with NYCDEP about the proposed construction plan as soon as possible. If a developer is unsure if a particular lot has or is likely to be assigned an E-designation, the developer should contact DCP.

## **2. E-Designation Investigation and Remediation Process**

Many sites in urban areas contain soils and/or groundwater that may be contaminated. However, the presence of hazardous materials on a site may not be obvious. Sites that appear to be clean and have no commonly known sources of contamination may have been affected by past uses on the site or in the surrounding area, as well as fill material of unknown origin.

Developers must complete and submit to NYCDEP a Phase I Environmental Site Assessment that is conducted in accordance with the requirements of the E-1527 "Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process" developed by the American Society for the Testing of Materials ("ASTM") for Development Sites; Certified Architectural Plans; and a detailed written description of the proposed development project. Based on the review of the aforementioned material, NYCDEP may determine that hazardous materials may have impacted a site. If this is the case, NYCDEP will request a Phase II Environmental Site Assessment to characterize the type and potential extent of contamination from those materials.

A Phase II scope of work (Phase II protocol) and Health and Safety Plan (HASp) prepared in accordance with the CEQR Technical Manual must be approved by NYCDEP prior to

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<sup>155</sup> OPPN #2/05

implementation.<sup>156</sup> Because NYCDEP sampling protocols may differ in some respects from that required by the NYSDEC, the developer should consult with NYCDEP prior to developing the Phase II protocol.<sup>157</sup> Once NYCDEP approves the Phase II protocol and HASP, the Phase II Investigation may begin.

Approval of a Phase II protocol does not eliminate the need to comply with any reporting requirements under state or federal environmental laws. If a petroleum spill or discharge or evidence of a reportable quantity of hazardous materials or hazardous wastes that poses a potential or actual threat to public health or the environment is discovered on the affected tax lot, the developer must comply with all Federal, State, or local notification requirements.<sup>158</sup>

### 3. Remediation Plans

Upon completion of the Phase II, a Phase II ESA Investigative Report must be prepared and submitted to NYCDEP.<sup>159</sup> Based on NYCDEP's review of the Phase II sampling results NYCDEP may require preparation and implementation of a Remedial Action Plan (RAP) and site-specific Health and Safety Plan (site specific-HASP).<sup>160</sup> NYCDEP should be notified at least ten (10) days prior to implementing the RAP. NYCDEP's goal is to eliminate, reduce to acceptable levels, or control sources of contamination that may result in a significant impact on public health or the environment. NYCDEP allows a "risk-based" approach in determining the proper course of remediation. The risk-based approach evaluates the current and proposed future land use of the site along with the proposed action (i.e., construction, excavation, etc) against the known contaminants of concern and potential exposure pathways in determining what remedial course of action, if any, is appropriate for a site.

The RAP may require excavation of contaminated soil, removal of USTs (including dispensers, piping, and fill-ports), placement of at least two (2) feet of clean soil in all areas that will either be landscaped or otherwise not covered by an impermeable cap, installation of a vapor barrier to prevent migration of contaminated vapors from soil or groundwater, NYCDEP may allow historically impacted soils such as "Urban Fill" to be addressed as part of the construction for redevelopment of the property. In other words, the removal of impacted soils can be combined with the demolition and excavation activities for the new project.

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<sup>156</sup> 15 RCNY §24-06(b)

<sup>157</sup> The Phase II ESA Work Plan for "E" designated sites will generally include soil samples collected just below grade and at the depth of the bottom of the proposed excavations. If the water table is near the elevation of the bottom of the proposed excavation, groundwater samples should also be collected in case dewatering will be required and to ensure safety of the construction workers. The potential for off-gassing of contaminants into the proposed structure will also be evaluated. In accordance with the CEQR Technical Manual, NYCDEP will require that each sample be analyzed by a NYSDOH ELAP-Certified laboratory for Volatile Organic Compounds (VOCs) by EPA Method 8260; Semi-volatile Organic Compounds (SVOCs) by EPA Method 8270; Pesticides/PCBs by 8081/8082; and TAL Metals.

<sup>158</sup> 15 RCNY §24-10

<sup>159</sup> 15 RCNY §24-06(f)

<sup>160</sup> 15 RCNY §24-06(i)

The NYCDEP will generally use NYSDEC guidance for determining remedial objectives. The groundwater of the five boroughs is classified as Class GA groundwater except where the criteria for saline groundwater are met. NYCDEP will usually follow the NYSDEC Water Quality Regulations for Surface Waters and Groundwater<sup>161</sup> and the TOGS #1.1.1 when evaluating groundwater contamination. However, if volatilization of contaminants from groundwater is a concern, NYCDEP will look to the draft soil vapor guidance developed by NYSDEC and NYSDOH.

After a remediation action plan has been reviewed and approved, NYCDEP will issue a Notice to Proceed (discussed below) to the DOB that all permits except a TCO or COO may be issued.<sup>162</sup> The NYCDEP-approved RAP must be implemented within a year. Upon the expiration of the one-year approval period, the developer will have to resubmit a new RAP for approval unless a request for an extension is filed within 30 days of the RAP expiration date and NYCDEP has approved the extension.<sup>163</sup>

It should be noted that implementation of any remedial measures does not absolve the site owner from additional investigation and remedial measures in the future should conditions warrant (i.e., site use changes). In addition, NYSDEC or other agencies may require additional investigation or remedial measures.

In addition to a RAP, the applicant must also prepare a site-specific Health and Safety Plan (site-specific HASP) to protect the health and safety of all on-site personnel. The site-specific HASP must describe each of the potential hazards at the site and describe the methods to mitigate these hazards. Special attention must be given to the methods to monitor for potential exposure and the various levels of protection required for the tasks to be completed at the site. The site-specific HASP should also describe any community monitoring that may be needed.

Once the items of concern outlined in the RAP or a substantially-equivalent remediation approved by the NYSDEC, the work must be summarized in a Closure Report that is certified by a Professional Engineer or Architect. This report should demonstrate that all remediation activities have been implemented.<sup>164</sup> If a petroleum spill was addressed under NYSDEC oversight as part of the RAP, a copy of the State's spill case closure letter should be included in the Closure Report. It should also include copies of manifests for soil removed from the site and describe the installation of any vapor barriers

Upon review and approval of the Closure Report, NYCDEP will issue a Notice of Satisfaction to DOB. This notice shall include a description of any post-construction remedial obligations such as an operation, maintenance and monitoring (OM&M) program that may be required beyond the issuance of a TCO or COO.<sup>165</sup>

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<sup>161</sup> 6 NYCRR Parts 700-705

<sup>162</sup> 15 RCNY §24-07(b)(2)

<sup>163</sup> 15 RCNY §24-07(b)(3)

<sup>164</sup> 15 RCNY §24-07(c)(1)

<sup>165</sup> 15 RCNY §24-07(c)(2)



It should be noted that if a developer has determined that a Phase II ESA is warranted, the results of a Phase I, Phase II Work Plan and the Sampling HASP can be submitted to NYCDEP for review at the same time. Likewise, the Phase II report, RAP and Remediation HASP may also be submitted together.<sup>166</sup>

#### **4. NYCDEP Approvals**

NYCDEP will issue approvals indicating if the proposed development would affect potential hazardous material contamination on the subject parcel(s), if remediation is necessary in connection with the permit, and if the applicant has completed the remediation work to the satisfaction of the NYCDEP.

##### **1). Notice of No Objection**

If NYCDEP determines that the proposed "E"-sensitive application work does not present hazardous material contamination concerns (or that the "E"-sensitive application work is not subject to ZR § 11-15), NYCDEP will issue a "Notice of No Objection" letter to the Department of Buildings. This is typically limited to projects that do not require subsurface activities such as excavations for foundations or utilities.

The Notice of No Objection letter states that NYCDEP does not oppose issuance of an application approval and permit, and that NYCDEP approval is not required upon completion of the "E"-sensitive application work. Thus, a Notice of No Objection shall satisfy both the "NYCDEP Notice to Proceed" required item and the "NYCDEP Notice of Satisfaction" required item and DOB may issue a permit without further review of the application work by NYCDEP.

The Notice of No Objection is issued to the appropriate DOB Borough Commissioner. The notice identifies, at a minimum, the application number, street address, block and lot. In addition, NYCDEP indicates its approval and date of approval on one complete set of application plans. The Notice of No Objection is retained in the DOB job folder.<sup>167</sup>

##### **2). Notice to Proceed**

If NYCDEP determines, based upon review of the Phase II ESA testing results, that remedial work is required because of the potential for hazardous material contamination on the E-designated parcel(s), DOB will not issue a demolition, excavation or building permit until it receives a "Notice to Proceed" from NYCDEP. The Notice to Proceed will indicate that NYCDEP has approved the RAP and site-specific HASP, and that the application has met the environmental requirements related to the E-designation provided that all such requirements are fully implemented and a Closure Report is submitted to NYCDEP for review and approval upon completion of the permitted work.

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<sup>166</sup> 15 RCNY §24-06(g)

<sup>167</sup> OPPN #01/03

NYCDEP issues the Notice to Proceed to the appropriate DOB Borough Commissioner. The Notice to Proceed identifies, at a minimum, the application number, street address, block and lot. Upon receipt of the Notice to Proceed, DOB will issue the necessary permits. However, the permits are subject to NYCDEP's final review and approval of the completed application work. The Notice to Proceed is retained in the DOB job folder.<sup>168</sup>

### **3). Notice of Satisfaction**

NYCDEP will issue a "Notice of Satisfaction" (NOS) to the appropriate DOB Borough Commissioner after the Closure Report has been reviewed and approved by NYCDEP. The NOS states that the work has met all environmental requirements related to the E-designation and identifies any OM&M requirements. Once the NOS is received, DOB may issue the COO.

If all possible impacted soils have been removed, a Final Notice of Satisfaction (FNOS) may be issued to the appropriate DOB Commissioner and DCP indicating that there are no longer any "E" requirements for the property and request that the "E" designation be removed. However, these types of final NOS are very rare. In fact, only three have been issued to date. Moreover, it should be noted that DCP will remove the E-designation only when it has received a Notice of Satisfaction for all lots on a given block specified in the CEQR declaration for the rezoning.<sup>169</sup>

### **5. Coordination with the NYSDEC Brownfield Program**

In some instances, an applicant may seek to address potential impacts from hazardous materials identified in a Draft Environmental Impact Statement by enrolling in the NYSDEC BCP<sup>170</sup>. In such cases, applicants often assert that there is no need for the tax lot to be assigned an E-designation or that the E-designation process will be addressed through the BCP and therefore no NYCDEP approvals are required before issuance of DOB permits. This poses concerns particularly where the rezoning would allow the developer to be issued a building permit as a matter of right ("as-of-right") without any further review from DCP or NYCDEP. A developer may build a structure "as-of-right" if the DOB determines that the project complies with the zoning and the building code.

Because it is possible that an applicant may not be accepted into the BCP or that the applicant could elect to withdraw from the BCP, NYCDEP will generally require the applicant to enter into a Restrictive Declaration or other contingency to ensure that future development would proceed in a manner protective to public health.<sup>171</sup>

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<sup>168</sup> OPPN #01/03

<sup>169</sup> 15 RCNY §24-08(c)

<sup>170</sup> N.Y. ENVTL. CONSERV. LAW § 27-1401 et seq.

<sup>171</sup> The E- Designation rules apply where one or more tax lots are in an area that is subject to a zoning amendment and are not under the control or ownership of the person seeking the zoning amendment and have been identified as likely to be developed as a direct consequence of the rezoning action. 15 RCNY §24-02. Therefore, for those lots under the control or ownership of the person seeking the zoning amendment NYCDEP requires a Restrictive Declaration to ensure that required sampling and remediation occur prior to issuance of any DOB permit and that development otherwise proceeds in a manner that is protective of human health and the environment. The Restrictive Declaration is recorded in the land records and is binding on all future owners or lessees or assigns.

The E-designation program is a powerful tool for remediating contaminated sites. Because it is linked to development projects, it operates in some ways like some state property transfer statutes such as the New Jersey Industrial Site Recovery Act<sup>172</sup> and the Connecticut Transfer Act.<sup>173</sup> Like these state laws, the E-designation can result in unanticipated environmental costs and project delays. For this reason, NYCDEP conducts pre-submission meetings with applicants to discuss the requirements and scheduling of the E-designation program.<sup>174</sup> NYCDEP also reviews submissions and provide comments within 30 days of submission.<sup>175</sup> NYCDEP strongly encourages applicants contemplating filing an “E” sensitive application to consult with NYCDEP prior to submitting the required documentation to expedite the approval process.

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Thus, the Restrictive Declaration can be an effective tool for ensuring that the site use remains unchanged and that no alterations occur to the site without NYCDEP approval to ensure potential impacts from hazardous materials has been properly addressed.

<sup>172</sup> N.J.S.A. 13:1K-6 et seq.

<sup>173</sup> C.G.S. 22a-134 et seq.

<sup>174</sup> 15 RCNY §24-09(a)

<sup>175</sup> 15 RCNY §24-09(b)