

Digging into The City Dreams – Navigating Clean-Up in New York City

Successfully completing a development project in New York City is a dream to many. However, when it comes to development, the process of taking a bite out of the ‘Big Apple’ can be as hectic as the city that never sleeps.

Navigating clean-up during development in NYC can be confusing, compounded by the involvement of several city and state agencies. Understanding the site history and reason for placement of the Little “E” can prepare a developer for the potential environmental contamination found on a property and what may be necessary to address it.



What is a “Little E?”

A property owner with development plans is stopped at the New York City Department of Buildings (DOB) due to a “Little E”, or an E-designation, which requires a notice from the Office of Environmental Remediation (OER) before any of their plans can be approved.

A “Little E” indicates that a property has environmental requirements pertaining to air quality, noise, or hazardous materials. These designations are placed on a property – or tax lot – due to the City’s environmental review process, which is triggered by a discretionary action such as a rezoning. A rezoning allows for a property to be developed into a different use than currently allowed and can affect a single parcel or a whole neighborhood. E-designations, for hazardous materials specifically, may be assigned to tax lots based on a very preliminary assessment. The assessment is used to determine if hazardous materials could be present on a potentially redeveloped parcel, which would then be disturbed during construction and *result in increased human or environmental exposure*.

Site Description			Hazardous Materials Screening	
Site	Block	Lot	Existing Land Use	Within 400 ft
B1	9005	1	Commercial (Building Products)	Gas station; Car Wash
B2	9006	1	Laundromat	Gas station; Car Wash
B3	9009	1	Gas station; Car Wash	Gas station; Car Wash
B4	9009	6	Supermarket	Gas station; Car Wash; Auto Repair
B5	9010	6	Car Wash	Gas station; Car Wash; Auto Repair
B6	9013	26, 55	Auto Repair	Auto Repair; Car Wash
B7	9017	19, 22	Auto Sales	Auto Repair
B8	9055	1	Supermarket	Auto Laundry; Auto Repair
B9	9057	27	Vacant Warehouse	Auto Repair; Cement Mfg.
B10	9076	9	Commercial (Fast Food)	Dry Cleaners/Laundry; Transit SubStation
B11	9077	45, 24, 25	Supermarket	Dry Cleaners/Laundry; Transit SubStation
B12	9084	6	Garage/Residence	Printing
B13	9057	50	Single Family Home	Auto Repair; Printing
B14	9107	13	Laundromat; Retail	Auto Repair; Laundromat
B15	9107	27, 25	Auto Repair	Auto Repair; Laundromat
B16	9108	19	Supermarket	Auto Repair; Laundromat
B17	9109	18	Building Materials	Auto Repair
B18	9113	29	Retail	Auto Repair
B19	9118	107	Commercial Retail	Spill #1114278; Dry Cleaners
B20	9119	37	Supermarket	Gas Station; Spill # 0303304
B21	9120	40	Commercial Retail	Gas Station; Spill #0303304; Transit SubStation

The graph above represents an example of a screening taken from the [Ozone Park Rezoning Environmental Assessment Statement](#) detailing why an E-designation is recommended for specific properties.

The screening method established by city regulations allows for assignment of the E-designation based on current or historical uses on, adjacent to, or within 400 feet of a site. Some types of facilities or uses that warrant an E-designation include:

- Manufacturing
- Printing
- Dry cleaning
- Auto repair
- Medical laboratories
- Machine shops

A more detailed list can be found [here](#). It is for this reason that owners of seemingly benign properties are surprised to learn their property has an E-designation.

The hazardous materials E-designation requires that prior to redevelopment, the applicant retain an environmental consultant, a Qualified Environmental Professional (QEP) and/or Professional Engineer (PE), to investigate the property and develop a remedial plan under the oversight of the Office of Environmental Remediation (OER).

The OER is a small agency within the NYC Mayor’s Office and was created in 2008 to take over responsibility of administering the E-Designation Program from the larger Department of Environmental Protection (DEP). The program process typically includes submission of a Phase I Environmental Site Assessment (ESA), completion of a Remedial Investigation, preparation and implementation of a Remedial Action Plan, and submission of a Remedial Closure Report. The Remedial Investigation is similar to a Phase II ESA but more thorough as the scope is developed in coordination with OER. At a minimum the investigation includes soil, groundwater, and soil vapor samples analyzed for a wide list of constituents including volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), metals, pesticides, polychlorinated biphenyls (PCBs), 1,4-dioxane, and [Per- and polyfluoroalkyl substances \(PFAS\)](#). This is regardless of site history; an industrial property will have the same analytical requirement as a residential one.

The number of sample locations is often adjusted based on the size and history of the site. If a proposed development covers multiple lots with only one having an E-designation, the requirements extend to all parcels.

What’s Next?

After the site has been characterized, a Remedial Action Plan (RAP) is prepared with input from OER who then issues a Notice to Proceed, which is necessary to obtain a building permit from DOB. Every day of active remediation, the environmental consultant is required to be onsite to ensure the elements of the RAP are implemented.

At the end of the project a Remedial Closure Report (RCR) documenting compliance with the RAP is submitted to OER who then issues a Notice of Satisfaction, which is required prior to obtaining a Certificate of Occupancy for the building.

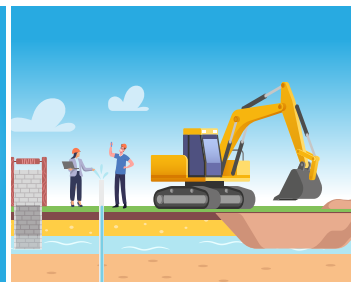
Consider this...



A developer purchases a property that has always been a single-family home with plans to build a condominium. He discovers it has a hazardous materials E-designation likely placed during a rezoning due to the adjacent property with a history of manufacturing.



As a result of the E-designation, the developer is required to hire an environmental consultant to perform an investigation. The investigation revealed that the property is contaminated with PCBs, elevated levels of chlorinated VOCs in the groundwater, and soil vapor orders of magnitude above standards.



The OER, in coordination with NYS DEC, required as part of the remediation the removal of contaminated soil, treatment of groundwater, and installation of a sub-slab depressurization system beneath the new building.



Though there was no indication the contamination originated onsite, the developer was responsible for the investigation and clean-up due to the E-designation.

City Voluntary Clean-Up Program

In addition to the E-Designation Program, OER manages the City Voluntary Clean-Up Program (VCP), the first such municipal program in the country. The VCP was launched in 2010 after a Memorandum of Agreement between OER and the NYS Department of Environmental Conservation (DEC) was signed, effectively allowing OER to oversee the clean-up of light to moderate [contaminated brownfields](#).

As the program name suggests, participation is optional and open to any property in the city ([some exclusions](#)), including those with an E-designation. As completion of the VCP satisfies the requirements of the hazardous materials E-designation but with added benefits, developers often opt to enroll into the VCP as well. Unlike the E-Designation Program, the VCP is a recognized clean-up program by DEC and as such carries with it city and state [liability protection](#). For this reason, [lenders](#) may require enrollment of potentially contaminated properties into the VCP.

Consider this...



A property owner of a site, which was previously used as a service station and auto repair shop, plans to build a retail establishment as-of-right (allowed under current zoning and no E-designation). It has been discovered that there is a petroleum spill case that has been open on the property for over 30 years.



Due to the known contamination, the lender requires the developer enroll into a regulatory clean-up program and obtain a no further action letter. To provide assurance to the lender prior to enrollment, OER issues a comfort letter stating the borrower is actively progressing into the VCP.



The sitewide remediation effort is coordinated with the NYS DEC Spill Case Manager and after construction is complete, the Spill case is closed and OER issues a Notice of Completion.

Requirement	E-Designation Program	VCP
Remedial Investigation	Y	Y
Remedial Action Plan	Y	Y
Community Involvement (Factsheets and 30-Day Public Comment Period)	N	Y
Review by NYS DEC and NYC DOHMH	Possible	Y
Decision Document (OER Approval of Remedy)	Y	Y
Notice to Proceed (for building permits)	Y	N
Daily Reporting/Oversight by Environmental Consultant	Y	Y
Closure Report	Y	Y
Notice of Satisfaction (for building occupancy)	Y	N
Notice of Completion (city and state liability protection)	N	Y
Site Management, Engineering Controls, Institutional Controls	Possible	Possible
Deed Restriction	Possible	Possible

Engineering or Institutional Controls

Depending on the level of clean-up achieved, engineering or institutional controls may be required. If Unrestricted Use or Residential Use Soil Clean-Up Objective levels, as defined in [6NYCRR Part 375](#) regulations, are achieved, a site no longer has environmental responsibilities and OER has the ability to remove the hazardous materials E-designation. If any other soil clean-up level is achieved, engineering controls such as a site cover, vapor barrier, sub-slab and depressurization system are required as well as institutional controls such as land use restriction.

Note, groundwater contamination alone is not sufficient to require these controls as it is not a potable source in the city.

The E-designation can serve as the institutional control as it is linked to the tax lot; however, for VCP only sites, a deed restriction must be recorded to memorialize the controls on the property for future owners. Regardless of the soil clean-up level achieved, if a remedy (VCP or E-designated) includes an active sub-slab depressurization system, a deed restriction is required to be recorded to document ongoing obligations related to the operation of the system, such as submitting an annual certification report by a QEP or PE. If in the future sampling supports turning the system off, the deed restriction is removed/modified as appropriate.

Failing to Comply

As of 2022, OER has the enforcement authority to impose civil penalties on property owners for failing to maintain and report on long-term engineering and institutional controls.

As required by the program rules, the VCP involves the input of additional agencies outside of OER. Prior to the RAP approval, the site must be reviewed by DEC as well as the NYC Department of Health and Mental Hygiene (DOHMH), either of whom can require additional investigation or changes to the proposed remedial plan. If during this review a site is determined to have levels of contamination that potentially poses a significant threat to the public or environment, it is referred to DEC to manage under the State Brownfield Clean-Up Program (BCP). OER must brief DEC on all VCP sites but at their discretion can also discuss highly contaminated E-designated sites for referral. Refusal by the applicant to enter the BCP after being referred can lead to DEC listing the site on the Registry of Inactive Hazardous Waste Disposal Sites (State Superfund).

Types of Sites that can be referred to DEC:

Groundwater in NYC is not a potable source and remedies in the E-Designation Program and VCP generally do not directly address contamination in this medium. DEC, however, has authority over groundwater as a natural resource and can require active remediation.

Consider this...

A chlorinated plume is migrating offsite raising concerns of soil vapor intrusion into neighboring properties. In this instance, OER does not have jurisdiction to address offsite issues. DEC however can require an applicant to investigate offsite under the BCP and if necessary, use State resources to perform offsite remediation.

In contrast to the VCP, sites in the BCP are reviewed by the NYS Department of Health (DOH).

As the BCP deals with heavily contaminated properties, the process is more involved and may require additional investigation, including potentially offsite, beyond the work already performed for OER as well as a more extensive remediation. This can often translate to a delayed construction schedule. If the site is E-designated, OER withholds issuing notices for building permits until DEC gives their approval. If the site is not E-designated, the applicant is still required to satisfy the DEC and the BCP program regardless of construction as failure to do so risks becoming a State Superfund site.

Agency	Role
NYC Department of Environmental Protection (DEP)	Expert city agency for environmental matters
NYC Mayor’s Office of Environmental Remediation (OER)	City agency responsible for administering E-designation Program and running the City Voluntary Clean-Up Program (VCP)
NYS Department of Environmental Conservation (DEC)	State regulatory agency with authority over environmental resources. Reviews all VCP sites and takes over highly contaminated sites. Administers the State Brownfield Clean-Up Program (BCP) and oversees Spill cases
NYC Department of Health and Mental Hygiene (DOHMH)	Reviews all VCP sites and issues comment on investigation and proposed remediation
NYS Department of Health (DOH)	Reviews BCP and Spill sites and may be involved in VCP sites
NYC Department of Buildings (DOB)	Flags job filed for properties with E-designation. Withholds issuance of plan approval/permits and building occupancy until proper notice received from OER

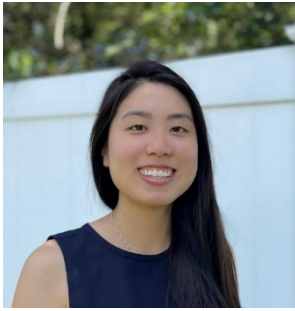
As mentioned, navigating clean-up during development in NYC can be a hectic process. Prior to purchasing or developing a parcel, a Phase I ESA and a cursory check to see if there is an E-designation tied to the property should be performed. Often times, working with OER under the E-designation and VCP is a straightforward process as the remediation is usually tied to the development. However, recognizing a more contaminated property has a possibility of being referred to the State for oversight is necessary.

Environmental Protection

While evaluating if potential contamination is present at a site, it is important to work with a knowledgeable carrier who can consider any state-level programs which may be applicable and help properly mitigate the risks described above. Contact your underwriter today to learn more about how our core products and services can help protect your clients’ operations.

Additional References:

1. <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-28463>
2. <https://www.nyc.gov/site/oer>
3. https://www.nyc.gov/assets/oec/technical-manual/2021_ceqr_tm_ch12_appendix_hazardous_materials.pdf



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