



**LARRY SCHNAPF** is the principal of Schnapf LLC and an adjunct professor at New York Law School where he teaches Environmental Issues in Real Estate and Business Transactions. He is the author of *Managing Environmental Liability in Transactions and Brownfield Redevelopment*, published by JurisLaw Publishing, serves as co-chair of the NYSBA brownfield task force and is the incoming chair of the Environmental Law Section.

# Property Contamination and Its Impact on Commercial Leasing in NYC

By Larry Schnapf

*This is the third article discussing environmental laws affecting commercial leasing transactions. The first installment appeared in the May 2015 issue of the Journal and the second appeared in the January 2016 issue.*

## Office of Environmental Remediation Voluntary Cleanup Program (VCP)

The New York City Office of Environmental Remediation (OER) administers a Voluntary Cleanup Program (VCP)<sup>1</sup> that can be used to address minimally contaminated sites such as contaminated fill sites, the "E" program and oil spills that are confined to the property. OER has entered into a Memorandum of Understanding with the New York State Department of Environmental Conservation (NYSDEC) so that NYSDEC will honor cleanups completed by OER under its VCP.

The New York City VCP is a popular tool for moderately contaminated sites because of the OER's streamlined approach that allows sites to complete remediation fairly quickly. It is perhaps the nimblest remedial program in the country. OER staff is particularly responsive to the needs of applicants and will work hard to find a way to accommodate the construction schedule of an applicant.

Sites that are eligible for VCP are those where redevelopment of real property is complicated by the presence or potential presence of detectable levels of contamination.<sup>2</sup> Properties that are remediated through the VCP receive a Notice of Completion,<sup>3</sup> which includes a New York City liability release and a statement from the NYSDEC that it has no further interest and does not plan to take enforcement action or require remediation of the property. Applicants also receive a Green Property Certification that symbolizes the city's confidence that the property is protective of public health and the environment.<sup>4</sup>

In addition, applicants may be able to tap a modest suite of investigation/cleanup grant programs offered by OER that can help plug the funding gap caused by the need to perform remedial actions. Sites enrolled in the VCP are eligible for the Brownfield Incentive Grants (BIG) Program which funds four types of grants including pre-enrollment investigation costs, remediation, technical assistance to non-profit developers of Preferred Community Development Projects, and purchase of pollution liability insurance or cleanup cost cap insurance. BIG grants may also be used for the Hazardous Materials E-Designation and Restrictive Declaration Remediation programs (see below).<sup>5</sup>

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OER also recently embarked on a brownfield “jump start” program for affordable housing and certain industrial site expansion projects that were contemplating applying to the NYSDEC Brownfield Cleanup Program (BCP). For qualifying sites, OER will provide upfront refundable grants of up to \$125,000 for investigation and \$125,000 for site remediation costs. The funds are repaid to the city after the project receives BCP tax credits.

One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing.<sup>6</sup> While the EPA may occasionally enter into a prospective purchaser agreement or issue a comfort letter, the EPA and state environmental agencies do not have the resources to routinely review the thousands of Phase 1 reports generated annually in commercial real estate or financing transactions. Thus, a purchaser will not know if it has qualified for one of these defenses until the purchaser has been sued or a defendant files a counterclaim in a contribution claim filed by the purchaser, and a court issues a final ruling.

To facilitate redevelopment, OER is willing to issue several types of letters. The first, known as Environmental Review and Assessment (ERA) letters, may be used where the presence of contamination may complicate a real estate or financing transaction.<sup>7</sup> OER will issue an ERA letter where it determines that existing conditions at a property are protective of public health. OER does not anticipate issuing a letter where contamination requires further action beyond that contemplated under the transaction to render a property protective for its intended use. To obtain an ERA letter, a party will meet with OER to discuss the nature of the transaction, prior and current site uses and operational history of the property, the proposed development, known site contamination, and how the ERA letter will facilitate the transaction. As part of the process, OER will review available data on the property, including a Phase 1 and all Phase 2 reports, and compare the identified contamination against the state soil cleanup objectives<sup>8</sup> to determine if the existing or proposed property conditions are protective of the property’s future use. If as a result of this review OER determines further environmental investigation or remedial action is warranted, OER will consider issuing an ERA letter to identify those additional studies and remedial actions if requested by both parties.

Another type of OER letter is known as an “acceptance letter.” This type of letter is particularly useful when a Phase 2 report identifies contaminants above the standards established by the NYSDEC but there are not any completed pathways because of the existence of a building foundation, paved surfaces, etc. OER will review Phase 2 reports and if it agrees that no further action is required, OER will issue a letter indicating it accepts or agrees with the conclusions of the report.

OER will also issue a pre-VCP enrollment “comfort letter.” Frequently, when a consultant recommends further sampling or cleanup, lenders may require a borrower to enroll in a voluntary cleanup program prior to the closing and require the borrower to covenant to obtain a “no further action” letter from the appropriate regulatory agency. Unlike other remedial programs, the OER voluntary cleanup program does not accept applicants until after a site has been characterized and documented in a remedial investigation report. Thus, a borrower may not be able to actually enroll in the VCP until after the closing. To provide assurance to a lender, OER will issue a pre-enrollment letter indicating that the borrower is making progress toward acceptance into the VCP. OER interprets this sentence very broadly and will write letters to satisfy the concerns of lenders.

OER has also developed a “standstill letter,” which can be used when a seller seeks to sell property but environmental issues have complicated a transaction. In such a case, the seller can investigate the site and develop a generic remedy with OER. The site would then be enrolled in VCP but would be in a “standstill” mode with no requirement to proceed with the remedy. It is hoped the existence of an approved remedy will provide comfort to a prospective purchaser and its lender since the buyer will be able to estimate the cleanup costs. After the purchaser acquires title, it can then implement the pre-approved remedy – provided the proposed reuse is consistent with the approved remedy.

All is not lost if you have learned about the NYCVCVP after construction has started or is significantly completed. OER has developed a “look back” track where projects may be able to obtain liability protection if the remedial action conforms to the OER program requirements. However, “look back” applicants will not be eligible for the NYCVCVP funding incentives.

The OER VCP may also be used to satisfy requirements of the National Environmental Policy Act (NEPA)<sup>9</sup> or the State Environmental Quality Review Act (SEQRA) for projects being funded by the New York City Department of Housing Preservation and Development (HPD). The federal Department of Housing and Urban Development (HUD) has established regulations implementing NEPA<sup>10</sup> when HUD staff performs environmental reviews and when local governments assume HUD responsibility.<sup>11</sup> In New York City, HPD has assumed responsibility for environmental review that would normally be performed by HUD.

All property proposed for use in HUD programs must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances where the hazard could affect the health and safety of occupants or conflict with the intended use of the property.<sup>12</sup> As a result, developers of affordable projects receiving funding from HUD or HPD often have to perform environmental reviews for the presence of hazardous materials to comply with NEPA.

HPD must have an Environmental Assessment (EA) prepared to identify all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project.<sup>13</sup> Environmental reviews are generally conducted for new construction, major rehabilitation, leasing, acquisition and change in use under a range of HUD programs. The most common programs for which HPD performs environmental reviews are HUD's HOME Investment Partnership Program (HOME) and the Neighborhood Stabilization Program (NSP). HPD utilizes federal HOME funds to finance the construction of new homes and rehabilitation

in the NYC VCP. Developers can enter the VCP even after the DEP has approved a RAP. Oftentimes, all that a developer will have to do is convert the DEP-approved RAP into the template form used by OER. This is because both the DEP and OER follow the NYSDEC remedial program requirements set forth at 6 N.Y.C.R.R. part 375.

### New York City E-Designation Program

OER also administers the E-Designation program,<sup>14</sup> which began as a land use program but has morphed into an important source of cleanup obligations in New York City. An E-Designation is a NYC zoning map des-

A responsible party that fails to respond to a cleanup order “without sufficient cause” may be liable for penalties, possibly as high as three times the cleanup costs incurred by the DEP.

of existing housing, including vacant and occupied single room occupancy buildings (SROs), small homes (buildings with fewer than 12 units) and multi-family buildings. The reviews must be completed before the release of funds and acquisition of property.

The developer will be required to conduct a Phase 1 review. If Phase 1 identifies Recognized Environmental Conditions (RECs), the developer will have to propose a Phase 2 work plan for approval by the New York City Department of Environmental Protection (DEP). Note that sometimes HUD or HPD may disagree with the Phase 1 findings and require a Phase 2 even if the Phase 1 review did not identify RECs. If the investigation confirms the presence of contamination above applicable levels, the developer will need a remedial action plan (RAP) for review and approval by the DEP.

The existence of an approved RAP enables HPD to issue a Notice of Finding of No Significant Impact (FONSI) certifying that the project will not have a significant impact on the environment and therefore will not require preparation of an Environmental Impact Statement (EIS). HPD will then also issue Notice of Intent to Request a Release of Funds (NOI/RROF). The developer would normally implement the RAP and submit a remedial action report to DEP for final approval.

The DEP approval will simply confirm that the developer has satisfactorily completed the RAP. The certification will not confer any liability protection under CER-CLA or the state Environmental Conservation Law (ECL), nor provide contribution protection. Moreover, the HPD funding often does not cover remediation costs, which can create a funding gap for a project that already has very tight margins.

When facing the prospect of implementing a remedial action, developers should consider enrolling the project

ignation that indicates the presence of an environmental requirement pertaining to potential Hazardous Materials Contamination, Window/Wall Noise Attenuation, or Air Quality impacts on a particular tax lot. The E-Designation is assigned to property lots as part of a zoning action under the City Environmental Quality Review (CEQR) Act. If the CEQR review process indicates that development on a property may be adversely affected by noise, air emissions, or hazardous materials, then the lead agency may assign an E-Designation on the property lot to ensure that the E-Designation requirements are satisfied prior to or during a new development or new use of the property.<sup>15</sup>

A Hazardous Materials (HazMat) E-Designation may be assigned for a variety of reasons including that the property contained:

- Incinerators;
- Underground and/or above ground storage tanks;
- Active solid waste landfills;
- Permitted hazardous waste management facilities;
- Inactive hazardous waste facilities;
- Suspected hazardous waste sites;
- Hazardous substance spill locations;
- Areas known to contain fill material;
- Petroleum spill locations; and
- Any past use identified in Appendix A to the CEQR Technical Manual.<sup>16</sup>

The Department of Building (DOB) incorporates the E-Designations in its Building Information System (BIS). The DOB examiner cannot issue a building permit for new development, changes of use, enlargements or certain other alterations to existing structures until DOB receives either a Notice to Proceed (NTP) or Notice of No Objection (NNO) from OER. To obtain an NTP from OER for a HazMat E-Designation, the applicant has to submit

a Phase 1 environmental site assessment. If recognized environmental conditions (RECs) are identified, a Phase 2 work plan is also required. After implementing the Phase 2 report, OER will determine if a remedial action plan (RAP) is required. If OER determines that a RAP is not required, OER will issue a notice of no objection to the DOB.<sup>17</sup> OER may issue NNOs for actions that do not raise potential exposure to hazardous materials, or air quality or noise impacts. Indeed, approximately 50% of the E-Designation projects OER reviews result in NNOs. If OER determines a RAP is required, the applicant must submit an acceptable RAP before OER will issue an NTP.

When the applicant wants to obtain a Certificate of Occupancy from DOB, it must obtain a Notice of Satisfaction (NOS) from OER demonstrating that the applicant has complied with OER requirements. To obtain the NOS, the applicant must submit a Remedial Closure Report after completion of the RAP. In issuing an NOS, OER may require the execution of a Declaration of Covenants and Restrictions by the title holder for the tax lot(s) subject to the E-Designation or the Environmental Restrictive Declaration, which shall be recorded against the property prior to the issuance of a NOS.<sup>18</sup> If an applicant wants to remove the E-Designation from the property and not have to record a Declaration of Covenants and Restrictions, it would have to implement a track 1 (unrestricted) cleanup.<sup>19</sup>

Parties can also comply or remove the E-Designation by enrolling the site in the state BCP as well as the NYC VCP. It is important to note that when lots with an E-Designation are merged or subdivided, the E-Designation will apply to all portions of the merged lot or to each subdivided lot. Because remediation done under the E-Designation program is not eligible for the state hazardous waste program fee, developers of sites with HazMat "E" designations should consider enrolling the site in the VCP.<sup>20</sup>

A similar approach is used for Restrictive Declarations (RD) that impose an institutional control against a property to ensure that environmental mitigation or requirements that were imposed as a condition of a land use approval are implemented. The RD runs with the land so that it binds current and future owners to comply with certain investigative and remedial requirements that may be required by OER.

Historically, RDs were used when private applicants who owned or controlled a property sought a rezoning or other action under Section 11-15 of the Zoning Resolution of the City of New York. This proved to be a cumbersome process because all parties with an interest in property, including lenders, had to execute an RD. Moreover, the DEP and a city agency approving the discretionary action had to expend resources reviewing the RD.

In 2012, the City Council adopted an amendment to the Zoning Resolution that authorized lead agencies to assign E-Designations for any actions, including those

sought by private applicants, such as rezoning, special permits or variances. The E-Designation can be imposed based on visual or historical documentation for lots not under the ownership or control of the person seeking the zoning amendment or zoning action. When the applicant owns or controls the lots, a Phase 1 may be required.<sup>21</sup> Because of the zoning resolution amendments, RDs will no longer be used to impose environmental conditions on properties. However, owners and developers have to comply with existing RDs.

### New York City Hazardous Substance Emergency Response Law (NYC Spill Law)<sup>22</sup>

The NYC Spill Law operates like a local superfund law. The New York City Department of Environmental Protection (DEP) is authorized to respond to actual or threatened releases of hazardous substances, to recover its response costs<sup>23</sup> from responsible parties, and to impose a lien on the property subject to the cleanup.<sup>24</sup>

DEP may also issue unilateral orders requiring a responsible party to address a release or threatened release that may present an immediate and substantial danger to the public health or welfare or the environment.<sup>25</sup> A responsible person who has been served with a cleanup order may submit a written request for a hearing within 10 working days of service of such order.<sup>26</sup>

Any responsible person who knows or has reason to know of any release of any hazardous substance that exceeds a reportable quantity must immediately orally notify the DEP and submit a written notice within one week of discovery of the release.<sup>27</sup>

Responsible parties may be jointly and severally liable without regard to fault for all response costs incurred by the DEP or another city agency responding to a release of hazardous substances. A responsible party that fails to respond to a cleanup order "without sufficient cause" may be liable for penalties, possibly as high as three times the cleanup costs incurred by the DEP.<sup>28</sup> In addition, any person who knowingly violates or fails to comply with any order, rule or regulation issued under this law shall be guilty of a misdemeanor and, upon conviction, shall face a fine of not less than \$25,000, or imprisonment not to exceed one year, or both, for each violation.<sup>29</sup>

The categories of responsible parties are similar to those under CERCLA but are potentially broader. In general, any current 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 may be liable as a responsible party.<sup>30</sup> In addition, any former owner, operator, lessee, occupant or tenant of the property at the time of disposal of any hazardous substance may be a responsible party.<sup>31</sup>

Responsible parties may assert three statutory affirmative defenses – Act of God, Act of War and the third-party

defense.<sup>32</sup> However, the law lacks innocent purchaser or bona fide prospective purchaser defenses. 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 to avoid the provisions of the law.<sup>33</sup> Interestingly, one of the rare enforcement actions that DEP brought under this law was against a foreclosing lender who took control of a defunct borrower's facility to conduct an auction but left behind dozens of drums containing hazardous waste. The bank ended up footing the bill for removing the waste.

The law provides that costs incurred by the DEP or other city agency in performing a response action constitute a "debt" recoverable from each responsible party and authorizes the filing of a cleanup lien against the real property of the responsible party or the parcel that was subject to the response measures.<sup>34</sup> 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.<sup>35</sup> The amount set forth in the statement of accounts continues to be a lien on the property until it is paid.<sup>36</sup> However, the lien is subordinate to a previously perfected mortgage.<sup>37</sup>

### **NYC Petroleum and Hazardous Materials Storage Rules**

The NYC Fire Code requires owners or operators storing certain quantities of petroleum or hazardous materials to obtain permits and comply with certain design standards. Storage tanks that are not subject to regulation by the NYSDEC under the Petroleum or Chemical Bulk Storage Acts may still be subject to regulation under the Fire Code.

The regulations promulgated by the New York City Fire Department (NYFD) provide that storage tanks that have not been used for more than 30 days but less than one year must undergo temporary closure. For fuel oil tank storage systems with a total capacity of 330 gallons or more, closure must be performed by a licensed person. The owner or operator of the temporarily abandoned tank system or the permit holder must file an affidavit with the NYFD certifying that such system complies with the temporary closure requirements.<sup>38</sup> Owners and operators of temporarily out-of-service tank systems must continue to comply with the fire department's permit and

testing requirements as well as the registration, reporting, inspection and testing regulations of the NYSDEC.

Tank systems used for storing gasoline, diesel, fuel oil or other flammable or combustible liquids that have not been used for one year or more must undergo permanent closure. For fuel oil tank systems exceeding 330 gallons, the permanent closure must be performed by licensed individuals. The owner or operator of a permanently out-of-service storage system or the permit holder for the tank system must also file an affidavit with the fire department certifying that the tank system was removed and disposed of, or abandoned in place in compliance with the requirements of the Fire Code.<sup>39</sup> If an environmental site assessment is required by federal or state law or regulations, the owner or operator of the storage system, the permit holder for the system or the person filing the affidavit of compliance must submit a written statement to the NYFD that an environmental site assessment has been performed in accordance with such law and regulations.<sup>40</sup>

The Fire Code prohibits the discharge of hazardous material unless permitted under federal or state law. The fire commissioner must be notified of discharges of hazardous materials that exceed the applicable reportable quantity for that substance.<sup>41</sup> The owner of a facility or other person responsible for a discharge will be required to undertake all actions necessary to remediate the discharge. When deemed necessary by the commissioner, cleanup may be initiated by the department or other city agency. Costs associated with such cleanup shall be borne by the owner or other person responsible for the discharge. The department will give the owner or other person written notice of cleanup costs and an opportunity to be heard. Payment of these costs shall be recoverable in any manner authorized by law, rule or regulation. Failure to pay costs will result in a lien placed on the premises pursuant to the provisions of Fire Code 117.4.<sup>42</sup>

### **NYC Asbestos Law**

Federal, state and local asbestos regulations can impose significant and unexpected costs and delays for building renovation and demolition projects. Owners and tenants conducting renovation or demolition projects that are likely to disturb asbestos-containing materials are responsible for notifying regulatory agencies and ensuring that asbestos abatement activities performed by their agent or contractor comply with certain asbestos notifications and work practice requirements.

Beginning in the 1970s, the EPA banned the use of many forms of asbestos in building materials. As a result, many building owners, tenants and lenders mistakenly believe that newer buildings do not contain any asbestos-containing materials (ACM). Contrary to this popular misconception, there are a number of building materials in use today that may still contain asbestos. The most common types of asbestos-containing building materials

include vinyl-asbestos tile, roofing felt, roofing coatings, caulking putties, construction mastics, textured coatings, asbestos-cement shingle, corrugated sheet, asbestos-cement flat sheet, pipeline wrap, millboard, asbestos-cement pipe, and asbestos-cement. As a result, it is still important for parties contemplating building renovation or demolitions, and their lenders, not to assume a building does not have ACM based on its construction date but to assess the presence and condition of suspect ACM. Building owners and tenants performing renovation should consider inserting requirements into their construction contracts requiring contractors and architects to use asbestos-free material.

It should be noted that ACM is considered a “non-scope item” in the standard phase ASTM E1527-13 environmental site assessment (Phase 1 ESA) that is customarily used in real estate transactions. This means that the presence of ACM will not be evaluated as part of the Phase 1 ESA unless the party hiring the environmental consultant specifically requests that ACM be included as part of the scope of services.

The asbestos regulations adopted by the DEP are stricter than the federal requirements and can apply to smaller projects that are not subject to the federal asbestos requirements.<sup>43</sup>

The DEP asbestos rules define an “asbestos project” as any work performed in a building or structure or in connection with the replacement or repair of equipment, pipes, or electrical equipment not located in a building or structure that will disturb more than 25 linear feet or more than 10 square feet of asbestos-containing materials. A large asbestos project is defined as one that will disturb 260 linear feet or 160 square feet.<sup>44</sup>

Prior to the start of alteration, renovation, demolition, or even plumbing work, the building owner or tenant is responsible for having an asbestos survey performed by a DEP-certified asbestos investigator to determine if asbestos-containing material may be disturbed during the course of the work.<sup>45</sup>

If after a survey is performed, the DEP-certified asbestos investigator determines that the building (or the portion affected by the work) is free of asbestos-containing material or the amount of ACM to be abated constitutes a minor project, the ACP-5 Form is filed with the DEP.<sup>46</sup> Where the work to be performed constitutes an asbestos project, an asbestos project notification (ACP-7 Form) shall be submitted to DEP at least one week before the work is scheduled to commence.<sup>47</sup> It is important to note that the DEP asbestos notification obligation is separate and different from the federal asbestos notification requirement, which is 10 days. If the start date changes, both the federal and NYC rules require a new notification be submitted. ■

1. 43 Rules of the City of New York §§ 1401 *et seq.* (RCNY).  
2. 43 RCNY § 1402(uu).

3. 43 RCNY § 1408.
4. 43 RCNY §§ 1428–1434. More information about the NYC VCP is available at <http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/vcp.shtml>.
5. 43 RCNY §§ 1415–1423. More information about the BIG program is available at <http://www.nyc.gov/html/oer/html/brownfield-incentive-grants/grant-types.shtml>.
6. See Larry Schnapf, *Environmental Laws Affecting Commercial Leasing Transactions – The Federal Law*, N.Y. St. B.J. (May 2015) p. 38.
7. 43 RCNY § 1450.
8. 6 N.Y.C.R.R. § 375-6.8.
9. 42 U.S.C. §§ 4321 *et seq.*
10. 24 C.F.R. pt. 50.
11. 24 C.F.R. pt. 58.
12. See 24 C.F.R. pts. 50.3(i) and 58.5(i)(2).
13. 24 C.F.R. 58.40(b).
14. 15 RCNY §§ 24-02 *et seq.* The “E” rules are authorized by § 1403 of the New York City Charter and § 11-15 of the Zoning Resolution of the City of New York.
15. The “E” requirements for individual properties are available at <http://www.nyc.gov/html/oer/html/e-designation/ceqr-documents.shtml>.
16. 15 RCNY § 24-04.
17. 15 RCNY § 24-06.
18. 15 RCNY § 24-07.
19. 15 RCNY § 24-08.
20. Information about NYC sites qualifying for the hazardous waste program fee is available at <http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/hazardous-waste.shtml>.
21. 15 RCNY § 24-04.
22. 15 RCNY §§ 24-600 *et seq.*
23. 15 RCNY § 24-604.
24. 15 RCNY § 24-605.
25. 15 RCNY § 24-608.
26. 15 RCNY § 11-05.
27. 15 RCNY § 11-03.
28. 15 RCNY § 24-610(c).
29. 15 RCNY § 24-610(d).
30. 15 RCNY § 24-603(g)(1).
31. 15 RCNY § 24-603(g)(3).
32. 15 RCNY § 24-604.
33. 15 RCNY § 24-603(g)(1).
34. 15 RCNY § 24-605.
35. 15 RCNY § 24-605 (c).
36. 15 RCNY § 24-605(g).
37. 15 RCNY § 24-605 (h).
38. 3 RCNY § 3404-01(c).
39. 3 RCNY § 3404-01(d).
40. 3 RCNY § 3404-01(d)(3).
41. New York City Fire Code 2703.3.1 (FC).
42. FC 2703.3.1.4.
43. The federal renovation and demolition rules apply to projects that are likely to disturb 260 linear feet, 160 square feet or 35 cubic feet of ACM.
44. 15 RCNY § 1-02.
45. 15 RCNY § 1-23.
46. 15 RCNY § 1-23(c).
47. 15 RCNY § 1-25.