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Remediating Contaminated Sites in New York City Under the E-Designation Program

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I. INTRODUCTION

During the past few years, New York City has rezoned vast tracts of land to allow residential development in areas that historically were limited to manufacturing uses. Because these amendments to the New York City Zoning Map were approved after preparation of environmental assessment statements (EASs) or environmental impact statements (EISs) pursuant to the City Environmental Quality Review (CEQR),¹ 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 (DEP) for evaluating the potential of contamination by hazardous materials as well as noise and air quality impacts.² As a result, developers eager to take advantage of the hot residential real estate market could find their projects delayed by an unanticipated environmental investigation and may have to modify their design plans during construction to accommodate mitigation measures or even perform disruptive post-construction investigations 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 (DEC).

¹ Executive Order No. 91 of 1977, as amended, established CEQR and centralized most environmental review functions in two "co-lead agencies," the Department of Environmental Protection (DEP) and the DCP. To expedite environmental reviews, the City's CEQR 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) which provide that each City agency acts as lead agency for projects that it approves, funds, and/or directly implements.

² The DEP E-designation regulations for hazardous materials appear at Chapter 24 of Title 15 of the Rules of the City of New York. 15 RCNY § 24. The process for evaluating noise and air quality impacts is found in the air and noise chapters of the CEQR Technical Manual.

This article will discuss the requirements and procedures that DEP 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.³

II. E-DESIGNATION LISTING PROCESS

A. Property Subject to E-Designation

The E-designation is a tool used when environmental reviews identify the potential for significant impacts from hazardous materials⁴ contamination on tax lots that are likely to be developed as a direct result of rezoning.⁵ CEQR requires environmental reviews for zoning map amendments that need approval pursuant to Sections 197-c and 197-d of the New York City Charter.

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 substances.⁶ 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. DEP has adopted comprehensive regulations governing the implementation of the

E-designation program for potential contamination from hazardous materials. DEP 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.⁷ 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 finding when those requirements have been satisfied.⁸ As will be discussed in more detail later, DEP has developed three types of approvals: Notice of No Objection, Notice to Proceed, and Notice of Satisfaction.

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.⁹ 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 Section 197-c and Section 200 or Section 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.¹⁰

The CEQR Technical Manual contains a list of actions that may require hazardous materials assessments. Developers are advised to examine sites that have been potentially impacted from the presence of existing or historical land uses involving hazardous materials to evaluate possible exposure pathways¹¹ and potential impacts on public health or the environment.

³ This article does not address noise or air quality impact E-designations.

⁴ 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 Ch. 11; 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), 42 U.S.C. § 7401 *et seq.*

⁵ The E-designation regulations promulgated by DEP identify two classes of sites subject to the program — development sites and project sites. 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 are 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.

⁶ 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.

⁷ 15 RCNY § 2404; 15 RCNY App. A.

⁸ 11-15(c) of the Zoning Resolution of the City of New York (ZR 11-15).

⁹ The maps of E-designated lots are available at 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 www.nyc.gov/html/dcp/pdf/zone/ceqr.pdf.

¹⁰ 62 RCNY § 2-02(e); ZR 11-15(d).

¹¹ Potential routes of exposure to 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 gases or soil vapors migrate naturally through the subsurface or along preferential pathways (i.e., building foundations, utility conduits, duct work, etc.) and concentrate under barriers of low permeability (i.e., concrete slabs, asphalt, clay liners, etc.) resulting in potentially explosive conditions.

Actions that may require hazardous materials assessments include but are not limited to the following:

- Rezoning 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;¹²
- 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; or
- Granting of variances or permits allowing residential use in manufacturing zones.

DEP has codified a list of facilities, activities or conditions requiring hazardous materials assessment.¹³ 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.

B. Interaction with the Department of Buildings

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 DEP that the environmental requirements for the lot have been satisfied.¹⁴ The DOB E-designation process operates much like that used for Landmarks Preservation Commission 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 DEP 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 DEP approval is obtained.¹⁵ 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.¹⁶ 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 approvals, building permits, sign-offs, certificates of completion, Temporary Certificates of Occupancy (TCO) or final Certificates of Occupancy (COO) without either a Notice of No Objection or a Notice to Proceed from DEP 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 the lot.¹⁷

DOB will not issue any application approvals until it receives either a DEP Notice of No Objection or a Notice to Proceed, and will not issue any final sign-offs (i.e., TCO or COO) until receipt of a Notice of Satisfaction (when a Notice to Proceed was previously issued) or a previously issued Notice of No Objection.¹⁸ Although the E-designation program is comprehensive, there are a number of moving parts that sometimes do

¹² Fill material historically used in New York City has included hydraulic dredge material that may contain petroleum and heavy metal contamination, and ash from burning 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 of 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.

¹³ 15 RCNY App. A.

¹⁴ 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 a 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.

¹⁵ *Id.* BIS identifies the E-designation lots in the Little E Restricted field as HAZMAT/NOISE/AIR, as appropriate.

¹⁶ *Id.*

¹⁷ OPPN #2/05.

¹⁸ OPPN #2/05.

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 DEP approval. Thus, DOB could issue a building permit without requiring any approval from DEP 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 DEP requirements? The DEP E-designation regulations prohibit the DOB from issuing any TCO or COO without DEP issuing a determination that the developer has complied with its E-designation requirements.¹⁹ Thus, when the developer applies for its TCO or COO, the BIS will indicate that the developer must obtain DEP approval. In such case, DEP 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 DEP environmental requirements related to the hazardous materials E-designation. Thus, a failure to obtain the appropriate DEP 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 DEP Notice to Proceed but DEP refuses to issue a Notice of Satisfaction because of failure to adequately comply with DEP requirements, DOB may revoke the permit.²⁰

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 DEP approval of the modified application or plans where the PAA would disturb soil or increase the scope of the remedial work previously approved by DEP.²¹

Another question that frequently arises is how does the E-designation process work when a redevelopment involves only 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 DEP. If the issue of concern is the potential for disbursement of asbestos fibers from asbestos-containing materials within a building to be renovated, DEP could issue a Notice of No Objection as long as the renovation complies with the DEP's asbestos workpractice rules. However, where the current or former use involved 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, DEP could require 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 DEP 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.

III. 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, or by fill material of unknown origin.

Developers with projects on E-designated sites must complete and submit to DEP a Phase I Environmental Site Assessment (Phase I ESA) conducted in accordance with the requirements of the E-1527 "Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process" developed by the ASTM International for Development Sites; Certified Architectural Plans; and a detailed written description of the proposed development project. Based on the review of the aforementioned material, DEP may determine that hazardous materials may have impacted a site. If this is the case, DEP will request a Phase II Environmental Assessment (Phase II ESA) 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 DEP prior to implementation.²² Because DEP sampling protocols may differ in some respects from that required by DEC, the developer should

¹⁹ 15 RCNY § 24-07(b) and (c).

²⁰ OPPN #2/05. OPPN #2/05 also discusses DOB's 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 10 days or an extended grace period approved by DOB, then DOB will issue a Revocation of Approval and Permit letter with an immediate order to stop work. If the applicant cures the violation, DOB will issue a Rescission of Notice of Intent to Revoke letter.

²¹ OPPN #2/05.

²² 15 RCNY § 24-06(b).

consult with DEP prior to developing the Phase II protocol.²³ Once DEP 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.²⁴

IV. REMEDIATION PLANS

Upon completion of the Phase II sampling, a Phase II ESA Investigative Report must be prepared and submitted to DEP.²⁵ Based on DEP's review of the Phase II sampling results, DEP may require preparation and implementation of a Remedial Action Plan (RAP) and a site-specific HASP.²⁶ DEP should be notified at least 10 days prior to implementing the RAP. DEP'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. DEP allows a risk-based approach in determining the proper course of remediation. A 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, for example, excavation of contaminated soil, removal of underground storage tanks (including dispensers, piping, and fill-ports), placement of at least two feet of clean soil in all areas that will either be landscaped or otherwise not covered by an impermeable cap, and the installation of a vapor barrier to prevent migration of contaminated vapors from soil or groundwater. DEP 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.

The DEP will generally use DEC guidance for determining remedial objectives. DEC has not promulgated formal regulations for remediating contaminated sites. Instead, DEC has issued a series of guidance documents that establish cleanup

goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for Volatile Organic Compounds (VOCs), Semi-volatile Organic Compounds (SVOCs), heavy metals, pesticides and PCBs is the Technical and Administrative Guidance 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 has also been 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.

The groundwater of the five boroughs is classified as Class GA groundwater except where the criteria for saline groundwater are met. DEP will usually follow the DEC Water Quality Regulations for Surface Waters and Groundwater²⁷ and the TOGS #1.1.1 when evaluating groundwater contamination. However, if volatilization of contaminants from groundwater is a concern, DEP will look to the draft soil vapor guidance developed by DEC and the State Department of Health.

After a remediation action plan has been reviewed and approved, DEP will issue a Notice to Proceed (discussed below) to the DOB, indicating that all permits except a TCO or COO may be issued.²⁸

The DEP-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 at least 30 days before the RAP expiration date and DEP has approved the extension.²⁹

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 (e.g., site use changes). In addition, DEC or other agencies may require additional investigation or remedial measures.

²³ The Phase II ESA Work Plan for E-designated sites generally will 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, DEP will require that each sample be analyzed by a State Department of Health (DOH) laboratory certified by the Environmental Laboratory Accreditation Program (ELAP) for: Volatile Organic Compounds (VOCs) by EPA Method 8260; Semi-volatile Organic Compounds (SVOCs) by EPA Method 8270; Pesticides/PCBs by 8081/8082; and Target Analyte List (TAL) Metals. TAL Metals are metals that are commonly found in the environment and that are typically sampled in site investigations.

²⁴ 15 RCNY § 24-10.

²⁵ 15 RCNY § 24-06(f).

²⁶ 15 RCNY § 24-06(i).

²⁷ 6 NYCRR Parts 700-705.

²⁸ 15 RCNY § 24-07(b)(2).

²⁹ 15 RCNY § 24-07(b)(3).

In addition to a RAP, the applicant must also prepare a 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 for monitoring 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 are approved by DEC have been completed, 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.³⁰ If a petroleum spill was addressed under DEC 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, DEP 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.³¹

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 DEP for review at the same time. Likewise, the Phase II report, RAP and site-specific HASP may also be submitted together.³²

V. DEP APPROVALS

DEP 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 DEP.

A. Notice of No Objection

If DEP 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), DEP 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 DEP does not oppose issuance of an application approval and permit, and that DEP approval is not required upon completion of the E-sensitive

application work. Thus, a Notice of No Objection will satisfy both the DEP Notice to Proceed required item and the DEP Notice of Satisfaction required item, and DOB may issue a permit without further review of the application work by DEP.

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, DEP 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.³³

B. Notice to Proceed

If DEP determines, based upon review of the Phase II ESA 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 DEP. The Notice to Proceed indicates that DEP 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 DEP for review and approval upon completion of the permitted work.

DEP 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 DEP's final review and approval of the completed application work. The Notice to Proceed is retained in the DOB job folder.³⁴

C. Notice of Satisfaction

DEP will issue a Notice of Satisfaction (NOS) to the appropriate DOB Borough Commissioner after the Closure Report has been reviewed and approved by DEP. 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 impacted soil has been removed and groundwater is remediated (if applicable), 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 requesting 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 from the zoning maps when it has received a Notice of Satisfaction for all lots on a given block specified in the CEQR declaration for the rezoning.³⁵

³⁰ 15 RCNY § 24-07(c)(1).

³¹ 15 RCNY § 24-07(c)(2).

³² 15 RCNY § 24-06(g).

³³ OPPN #01/03.

³⁴ OPPN #01/03.

³⁵ 15 RCNY § 24-08(c).

VI. COORDINATION WITH THE DEC 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 DEC Brownfields Cleanup Program (BCP).³⁶ 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 DEP 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 without any further review from DCP or DEP.³⁷

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, DEP 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.³⁸

VII. CONCLUSION

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 Act³⁹ and the Connecticut Transfer Act.⁴⁰ Like those state laws, the E-designation can result in unanticipated environmental costs and project delays. For this reason, DEP conducts pre-submission meetings with applicants to discuss the requirements and scheduling of the E-designation program.⁴¹ DEP also reviews submissions and provides comments within 30 days of submission.⁴² DEP strongly encourages applicants contemplating filing an E-sensitive application to consult with DEP prior to submitting the required documentation to expedite the approval process.

The contents of this article are the opinions of the authors and do not represent the official position of the New York City Department of Environmental Protection.

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³⁶ N.Y. Envtl. Conserv. L. § 27-1401 *et seq.*

³⁷ A developer may build a structure as-of-right if the DOB determines that the project complies with the zoning and the building code.

³⁸ 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, DEP 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. 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 DEP approval to ensure that potential impacts from hazardous materials have been properly addressed.

³⁹ N.J. Stat. Ann. § 13:1K-6 *et seq.*

⁴⁰ Conn. Gen. Stat. § 22a-134 *et seq.*

⁴¹ 15 RCNY § 24-09(a).

⁴² 15 RCNY § 24-09(b).