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Authors:

[Matthew J. Sinkman](#)

New Enforcement Rules for New York City Environmental Remediation Programs

Owners and developers of sites enrolled in New York City's environmental remediation programs should be aware of [new enforcement rules](#). The rules provide for new reporting requirements and strengthened enforcement mechanisms and penalties.

Background About New York City Environmental Remediation Programs

The New York City (NYC) Mayor's [Office of Environmental Remediation](#) (OER) manages NYC's [Voluntary Cleanup Program](#) (VCP) and [E-Designation Program](#) (EDP).

Under the VCP, environmental site investigations and remediations are conducted with OER oversight. After a site is remediated, OER issues a notice of completion (NOC), which provides that NYC "shall not take or require any further investigatory or remedial action" at the site.^[1] The New York State Department of Environmental Conservation (NYSDEC) is also unlikely to require further action at sites with NOCs, pursuant to a [Memorandum of Agreement](#) between NYSDEC and OER.^[2] NOCs may be assigned to third parties, such as the purchaser of a site that has been cleaned up.^[3] The VCP also provides [other benefits](#), including hazardous waste fee exemptions and monetary grants.

By contrast to the VCP, the EDP is a mandatory program. It applies to specific sites given ["E-Designations" or similar Restrictive Declarations](#) because of potential contamination or other issues identified during a zoning action. For instance, sites previously zoned only for manufacturing that have been rezoned to allow for residential or commercial development would likely be given an E-Designation.^[4] (A searchable database of covered sites is available at [OER's website](#).) At covered sites, building permits and certificates of occupancy (COOs) may not be obtained until environmental investigations and (sometimes) cleanups overseen

by OER are completed and OER issues a notice of satisfaction (NOS).^[5] Like with NOCs issued under the VCP, NYSDEC is unlikely to require further action at sites remediated to OER's satisfaction and for which a NOS has been issued because OER generally follows NYSDEC cleanup guidelines.^[6]

New Reporting Requirements and Enforcement Rules for Sites in the VCP and EDP

Sites remediated under either the VCP or EDP may require the implementation of long-term environmental site controls specified in Site Management Plans (SMPs). According to [OER](#), however, owners and developers sometimes violate program requirements relating to SMPs, which can "present a risk to public health and the environment." OER adopted the new rules for this reason.

The new rules require annual reporting of compliance by owners of sites in the EDP that have SMPs that include engineering controls (ECs) or institutional controls (ICs).^[7] (ECs are physical means of controlling contamination; ICs are non-physical means of preventing exposure to contamination, such as restrictions on how a site may be used.^[8]) Owners also must timely notify OER of the failure of any ECs or ICs and the reasons for such failure, and provide a work plan to correct the failure.^[9] Sites in the VCP with ECs and ICs are already required to submit certifications with SMPs,^[10] so the new rules harmonize the EDP and VCP on this issue.

There are also new related enforcement rules applicable to both the VCP and the EDP. Failure to certify compliance with ECs or ICs will now result in a "default penalty" of \$20,000 and a "minimum penalty" of \$10,000.^[11] This strengthens earlier provisions that allowed for a civil penalty of "not more than" \$25,000 for violating an SMP.^[12]

Additionally, the new rules provide that summonses may be issued and served in compliance with the Civil Practice Laws and Rules and civil penalties recovered in either court or the Office of Administrative Trials and Hearings.^[13] Failure to appear at a hearing will result in the default penalty of \$20,000.^[14]

However, there is also an opportunity to cure by submission of a "certification of correction" form prescribed by OER, along with

documentary proof of compliance with an SMP.^[15] Those submissions must be made within 45 days of service of a summons.^[16] If OER is satisfied with the submissions, then it may withdraw the prosecution and “the respondent will no longer be subject to monetary penalty.”^[17]

If you would like more information about OER’s new rules or the VCP or EDP generally, contact [David J. Freeman](#) or [Matthew J. Sinkman](#).

[1] See 43 RCNY § 1408(e)(1).

[2] See Memorandum of Agreement at p. 5 § IV (p. 9 of .PDF). The United States Environmental Protection Agency (EPA) is also unlikely to take action. EPA is generally prohibited from taking action or asserting claims regarding sites that are in compliance with state cleanup plans. See 42 U.S.C. § 9628(b)(1).

[3] See 43 RCNY § 1408(g).

[4] See 15 RCNY § 24-04.

[5] See 43 RCNY § 1474(c).

[6] See, e.g., 43 RCNY § 1474(a)(1)(A) (requiring Remedial Action Plans to address “Elevated levels of contaminants pursuant to applicable [NYSDEC] standards, criteria, and guidance”).

[7] See 43 RCNY § 1474(a)(4)(C)(i). OER may provide for an alternate reporting period. See *id.*

[8] See 43 RCNY §§ 1402(s), (cc).

[9] See 43 RCNY §§ 1474(a)(4)(C)(iv)–(v).

[10] See 43 RCNY § 1407(l)(3).

[11] See 43 RCNY § 1480.

[12] See New York City Admin. Code § 24-907.

[13] See 43 RCNY § 1481(a).

[14] See 43 RCNY § 1481(b).

[15] See 43 RCNY § 1482.

[16] *Id.*

[17] *Id.*