

NEW YORK CITY OFFICE OF ENVIRONMENTAL REMEDIATION

NOTICE OF ADOPTION OF OER'S ENFORCEMENT RULES

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED in the Office of Environmental Remediation ("OER") by Section 15(e)(15) and Section 1043 of the City Charter, that OER has promulgated rules relating to its enforcement authority.

The rule was proposed and published in the City Record on September 27, 2022. A public hearing was held on October 28, 2022. After receiving and reviewing public comments, OER has adopted this final rule.

Statement of Basis and Purpose of Rule

The Office of Environmental Remediation ("Office" or "OER") operates a local land cleanup program that promotes cleanup and redevelopment of vacant and contaminated land in New York City. With OER's oversight, property owners and real estate developers implement remedial actions to clean up land prior to the construction of new buildings. Having operated its program for over 10 years, OER has identified an area where owners and developers violate program requirements, which OER seeks to address through this rulemaking.

Enforcement action is appropriate when owners violate an OER Site Management Plan ("SMP") by failing to submit reports to OER certifying that their long-term site controls continue to function as intended. Depending on a project's remedy, property owners may be subject to ongoing site management obligations to ensure their sites remain safe for building occupants after cleanup is complete. Such obligations typically include periodic site inspections and reporting to OER and are documented in an SMP. Failure to comply with an SMP could undermine the efficacy of a remedy and present a risk to public health and the environment.

In accordance with New York City Administrative Code § 24-907, as amended by Local Law No. 28 of 2022, these rule amendments enable OER to issue summonses and impose civil penalties against parties that violate SMPs or other OER program requirements (43 RCNY Subchapter 8). With this new enforcement mechanism, OER's goal is to bring these parties into compliance and ensure continued protection of public health and the environment.

The amendments also clarify existing OER SMP requirements for owners of (E) Designation and Environmental Restrictive Declaration sites that implement a remedy with OER's oversight and are subject to ongoing site management obligations (43 RCNY § 1474(a)(4)(C)).

New York City Charter §§ 15(e)(4), 15(e)(15), and 15(e)(16) and Administrative Code §§ 24-903(i) and 24-907 authorize OER to administer these rules.

New material is underlined.

Section 1. Subparagraph (C) of paragraph (4) of subdivision (a) of section 43-1474 of Subchapter 7 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

- C. The Declaration of Covenants and Restrictions may include a procedure for the periodic reporting to OER of the attainment and maintenance of any requirements contained in the Declaration of Covenants and Restrictions pursuant to this subsection;
 - i. Where an OER site management plan requires periodic reporting, the owner of such site must annually submit, unless an alternate period is provided in writing by OER, a written institutional control/engineering control certification:
 - (a) by a Qualified Environmental Professional, as defined in section 43-1402 of Subchapter 1 of this Chapter, for all active remedial systems;
 - (b) by a Qualified Environmental Professional for all mitigation or passive remedial systems; or
 - (c) where the only control is an institutional control on the use of the property or a physical barrier or cover, the written certification may be made by the property owner.
 - ii. The certification must be included in a report summarizing the site management performance for the certification period, in such form and manner as OER may require, and must state that:
 - (a) the inspection of the site conducted to confirm the effectiveness of the institutional and engineering controls required by the remedy was performed under the direction of the party making the certification;
 - (b) the institutional controls and/or engineering controls employed at such site are in place;
 - (c) nothing has occurred that would impair the ability of such controls to protect the public health and environment;
 - (d) the owner will continue to allow access to such real property to representatives of OER to evaluate the continued maintenance of such controls;
 - (e) nothing has occurred affecting the institutional controls and/or engineering controls that would constitute or result in a violation or failure to comply with any site management plan for such controls;
 - (f) the report and all attachments were prepared under the direction of, and reviewed by, the party making the certification;
 - (g) to the best of their knowledge and belief, the work and conclusions described in the certification are in accordance with the requirements of the site's remedy and generally accepted science and engineering practices; and

- (h) the information contained in the certification is accurate and complete.
- iii. Only one certification must be filed for each site. If a site is comprised of multiple properties or parcels, the owner will arrange to file one consolidated certification.
- iv. In the event that the certification cannot be provided due to a failure of one or more of the institutional or engineering controls, the owner must provide to OER the following:
 - (a) timely notification explaining the cause for such failure;
 - (b) a work plan to implement the corrective measures necessary to provide the certification; and
 - (c) a schedule for the corrective measures.
- v. In addition to the periodic reporting requirement, the owner must timely notify OER of any failure of one or more of the institutional or engineering controls and must provide a work plan to remedy any failure of the institutional or engineering control.
- vi. OER will review the work plan referenced in clauses (iv) and (v) of this subparagraph as provided in sections 43-1474 and 43-1476, and the owner must implement the corrective measures in accordance with the approved work plan. The owner must submit a certification, satisfying the requirements of item (b) of clause (iv) of this subparagraph upon completion of the corrective measures.

§ 2. Chapter 14 of Title 43 of the Rules of the City of New York is amended by adding a new Subchapter 8 to read as follows:

Subchapter 8: Enforcement

§ 43-1480 Civil penalties.

Pursuant to Section 24-907 of the Administrative Code, the Office may impose civil penalties in accordance with the following penalty schedule:

<u>Section/Rule</u>	<u>Violation Description</u>	<u>Minimum Penalty</u>	<u>Default Penalty</u>
43 RCNY § 1407(l)(3); 43 RCNY § 1474(a)(4)(C)	Failure to submit an institutional control/engineering control certification per an OER site management plan	\$10,000	\$20,000

§ 43-1481 Summons.

- a. Pursuant to Section 24-907 of the Administrative Code, civil penalties may be recovered in an action in a court of competent jurisdiction or in a proceeding before an administrative tribunal within the jurisdiction of the Office of Administrative Trials and Hearings. Such

proceedings will be commenced by the service of an administrative summons returnable before such tribunal.

1. A summons will be served by delivery to an owner or other person in control of the property or premises, upon a member of the partnership, limited liability company or other group, upon an officer, director or managing agent of a corporation, or upon any other person of suitable age and discretion owning or in control of such property. Service may be made to such person(s) at the address of the premises that is the subject of the summons or at such person's last known residence or business address by personal delivery in accordance with Article 3 of the New York Civil Practice Law and Rules or Article 3 of the Business Corporations Law.
- b. Unless the Office has accepted a certification of correction described in §1482 of this subchapter, failure to appear at a hearing before the tribunal will result in a default penalty indicated on the penalty schedule contained in §1480 of this subchapter.

§ 43-1482 Correction and certification of correction.

- a. If the respondent files a certification of correction acceptable to the Office within forty-five days from the date of service of the summons, the Office will withdraw prosecution of the summons before the scheduled hearing date, and the respondent will no longer be subject to monetary penalty.
 1. The required certification must be submitted on the form prescribed by the Office.
 2. The certification must be signed by an individual with personal knowledge of the correction and must be notarized.
 3. The certification must be accompanied by true and legible copies of any and all documentary proof of compliance. Examples of such proof include, but are not limited to, an acceptable site management inspection report.
 4. Where more than one violation is listed on the same summons, the respondent may submit a single certification of correction form covering all of the corrected violating conditions.
- b. The Office will review all certifications of correction and accompanying documentation to determine their acceptability. The Office will notify the respondent if the certification of correction is accepted or rejected and, if rejected, the reasons for the rejection.
- c. Failure to submit an acceptable certification of correction for all violating conditions indicated on the summons within the time period prescribed in subdivision a of this section will require the respondent to appear at a hearing before the tribunal.