

OFFICE OF ENVIRONMENTAL REMEDIATION

NOTICE OF ADOPTION OF RULES RELATING TO NEW YORK CITY'S ENVIRONMENTAL REMEDIATION PROGRAMS

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE Director of Environmental Remediation by subdivision e of section 15 of the New York City Charter, that the Office of Environmental Remediation promulgates and adopts rules relating to the following New York City environmental remediation programs: the Voluntary Cleanup Program, the Brownfield Incentive Grant Program, the Green Property Certification Program and the Clean Soil Bank Program.

The rules were proposed and published in the City Record on January 2, 2018. A public hearing was held on February 1, 2018. Following the hearing, minor changes were made to the published rule to reflect internal City administration comments.

STATEMENT OF BASIS AND PURPOSE

The Office of Environmental Remediation (“Office” or “OER”) was established by Local Law No. 27 of 2009. Charter § 15(e)(6) authorizes its Director to promote community participation in the remediation and redevelopment of brownfields and § 15(e)(8) authorizes the Director to facilitate interactions among City agencies, community based organizations, developers, and environmental experts. Charter § 15(e)(14) authorizes the Director to take such other actions as may be necessary to facilitate the remediation of brownfields, while § 15(e)(18) authorizes the Director to promulgate rules to implement the Office’s programs.

Beginning in 2013, OER created the Clean Soil Bank to recover a valuable material -- clean soil -- from deep excavations at private construction sites. Rather than having it shipped to New Jersey for disposal, such soil is re-directed to other New York City construction sites that need clean backfill. Under this Clean Soil Bank program, the soil is moved from generator to receiving site at no cost, except for the cost of trucking, thus creating significant savings for generators of such soil and receiving sites alike. By way of further background, in a typical Clean Soil Bank transfer the generating site picks up the cost of transporting clean soil to an in-City receiving site. As a result, the generator saves most of the cost of trucking and out-of-state disposal of the clean soil, and the receiving site gets clean soil at no cost.

In the past several years, the Clean Soil Bank has grown substantially: more than 90 transfers involving more than 430,000 tons of clean soil have been made, keeping the soil in New York City and delivering it to private and public construction projects.

OER will now expand the Clean Soil Bank in two ways. First, the Office will promote the exchange of other materials, including compost, asphalt millings, mulch, wood chips, concrete aggregate and topsoil, much of which is generated by City agencies, which otherwise would pay

to dispose of the materials. Second, the Office will open the Clean Soil Bank to larger private construction projects that are not in an OER remedial program.

OER therefore is amending the City's environmental remediation rules as follows:

1. Subchapter 3 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to reflect the current name of the City Voluntary Cleanup Program (§43-1428).

2. Subchapter 4 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to revise its title, and to expand the New York City Clean Soil Bank program to promote the exchange of an expanded list of materials including compost, asphalt millings, mulch, wood chips, concrete aggregate, and topsoil (§43-1440, §43-1441). Adding more materials to the Clean Soil Bank will bring the benefits of an expanded materials exchange to a greater number of private and public parties.

3. Several definitions are amended by the rule:

- The definition of “eligible material” in §43-1441 is revised to reflect the expanded list of materials eligible for exchange through the Clean Soil Bank and Other Materials Exchanges program. The amendments would also allow properties that receive materials to use them for beneficial uses beyond backfill, such as using the soil to create shoreline berms to protect against flooding.

- The definition of “eligible properties” for the Clean Soil Bank and Other Materials Exchanges program is revised to distinguish between City-owned, financed, subsidized, or supported properties and properties not owned, financed, subsidized, or supported by the City (§43-1442). By making this distinction, OER hopes to make it easier for property owners working with the City to be a part of the materials exchange program.

- The definition of “generating properties” is expanded to include City-operated or City-financed materials storage or processing facilities (§43-1442). This change is intended to allow City facilities and stockpiles such as the woodchip stockpile operated by the Parks Department in Queens, to generate materials that can be used at other public or private construction sites.

4. The rules governing the operation of the exchanges are amended to exempt City-operated facilities from the requirement to submit a soil or other materials availability form to the Office (§43-1443). This section is also amended to expand OER's ability to negotiate the terms of exchange for materials on behalf of City agencies if the agencies so desire (§43-1443 (d)). These changes have been made to encourage City agencies to consider participation in the Clean Soil Bank and other materials exchanges.

This § 1443(d) text was revised after the hearing to clarify that OER would participate in negotiation of a material exchange on an agency's behalf only if the agency requested OER's assistance.

5. Projects seeking New York City Green Property Certification are no longer be required to make an application to OER to be considered for Green Property Certification. This change will make it easier for sites outside of the City Voluntary Cleanup Program and the State Brownfield Program to seek Green Property Certification (§43-1431).

6. The Office is waiving the \$1,000 enrollment fee that parties must pay to enroll sites in the Voluntary Cleanup Program for City capital construction projects (§43-1405(3)(E)).

7. Finally, the Office is amending the City’s Brownfield Incentive Grant rules to allow developers of residential buildings where 100% of the units will be affordable units to be eligible for a \$50,000 cleanup grant. Currently such projects are eligible for a \$35,000 grant (§43-1422(c)(2)).

Section 1. Subparagraph E of paragraph 3 of subdivision a of Section 43-1405 of Subchapter 1 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

§43-1405 City Voluntary Cleanup Agreements.

* * *

E. The office may waive all or part of the enrollment fee where:

i. a qualified local brownfield site is within a New York state brownfield opportunity area pursuant to section 970-r of the New York state general municipal law and its proposed development and reuse is consistent with the strategic brownfield goals established in a brownfield opportunity area plan and/or as stated in a letter to the office from a brownfield opportunity area grantee who has an executed brownfield opportunity area contract with the state;

ii. the proposed development on the qualified local brownfield site is an affordable housing development;

iii. the proposed development on the qualified local brownfield site is a community facility development; or

iv. a contiguous property is subdivided into two or more qualified City voluntary sites for the purpose of facilitating the administration of the [local brownfield] City voluntary cleanup program. In such case, the [office] Office may waive the enrollment fee for any of the second and/or subsequent qualified local brownfield sites; or

v. the proposed development is a City capital construction project.

§ 2. Paragraph 2 of subdivision c of section 43-1422 of subchapter 2 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

§43-1422 Grant Awards and Award Limits.

* * *

c. Award limits

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2. *Preferred community development projects.* A grantee for a preferred community development project may be awarded: (1) a pre-enrollment grant of up to \$25,000, (2) a technical assistance grant of up to \$5,000, and (3) once the project is enrolled in the City voluntary cleanup program, an enrollment grant of up to \$35,000, including the sum of the pre-enrollment grant and excluding the sum of the technical assistance grant. A not-for-profit developer of a preferred community development project or a developer of a residential building where 100% of the units are affordable is eligible for an enrollment grant of \$50,000. The amount of the enrollment grant includes the sum of the pre-enrollment grant and excludes the sum of the technical assistance grant. The cost of grant administration shall not be deducted from grants awarded to a grantee of a preferred community development project.

§3. Footnote 9 as set forth in Appendix A of Chapter 14 of Title 43 is amended to read as follows:

⁹A not for profit developer of a preferred community development project, or a developer of a residential building where 100% of the units are affordable, is eligible for a \$50,000 cleanup grant, which includes all proceeds of the predevelopment and environmental investigation grants.

§ 4. Subchapter 3 of chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

**SUBCHAPTER 3
NEW YORK CITY GREEN PROPERTY CERTIFICATION PROGRAM**

§43-1428 Purpose.

The New York [city] City green property certification program is established to acknowledge the benefits to public health and the environment of remedial action to property in New York city performed by enrollees in the [New York city local brownfield] City voluntary cleanup program and in other government remediation programs that achieve equivalent property remediation.

§43-1429 Definitions.

For the purposes of this subchapter, the following terms [shall] have the following meanings:

a. **Agreement.** "Agreement" means (1) for the [New York city local brownfield] City voluntary cleanup program, the [local brownfield] City voluntary cleanup agreement, (2) for the New York state brownfield cleanup program, an agreement between the enrollee and the New York state department of environmental conservation setting forth the enrollee's remedial obligations, or (3) for any other governmental remediation program, the agreements, stipulations, statutory requirements or regulations that govern management of such program.

b. **[Green] New York City green property certification.** " [Green] New York City green property certification" means formal recognition by the [office] Office that a property in New York city under the [New York city local brownfield] City voluntary cleanup program or the New York state brownfield cleanup program, or that a property in New York city that is an equivalent remediation property, has been successfully remediated and that such remediation protects public health and the environment.

c. **Enrollee.** "Enrollee" means an enrollee in the [New York city local brownfield] City voluntary cleanup program, as defined in §43-1402 of this chapter, an applicant in the New York state brownfield cleanup program, pursuant to §27-1405 of the environmental conservation law, or a party who has [submitted an application for admission into the New York city green property certification program as] performed an equivalent remediation of a property.

d. **Equivalent remediation property.** "Equivalent remediation property" means a property that the [office] Office has determined to have met the requirements of §43-1430(a)(2).

e. **Office.** "Office" means the office of environmental remediation.

f. **Recipient.** "Recipient" means an [enrollee] Enrollee who is eligible for and has been issued New York City green property certification, as well as such enrollee's successors and assigns.

§43-1430 **Eligibility.**

a. To be eligible for New York City green property certification, a property [shall] must be located in the city of New York and (1) be admitted to the [New York city local brownfield] City voluntary cleanup program or the New York state brownfield cleanup program or (2) be an equivalent remediation property.

1. A property admitted to the [New York city local brownfield] City voluntary cleanup program or the New York state brownfield cleanup program [shall] will be eligible if the [enrollee] Enrollee has completed the requirements of the [local brownfield] City voluntary cleanup agreement or the state brownfield cleanup agreement and received a notice of completion or certificate of completion from such program.

2. A property [shall] will be eligible as an equivalent remediation property if the [office] Office determines that:

A. the property has been the subject of a governmental remediation program, including the New York state voluntary cleanup program, the New York state petroleum spills remediation program, [and] the New York [city] City e-designation or restrictive declaration hazardous materials program, or an equivalent remedial program;

B. the [enrollee] Enrollee has successfully completed the requirements of such governmental remediation program and received a [certificate] notice of completion or equivalent notification of completion from the appropriate [city] City or state office or agency;

C. for a property where residual contamination will remain after the completion of the remediation, the remedial action required pursuant to such governmental remediation program includes establishment of institutional and engineering controls for the property that are equivalent to those required pursuant to the [New York city local brownfield] City voluntary cleanup program, as provided in subchapter one of this chapter, including the maintenance of a site management plan to ensure compliance with institutional and engineering controls;

D. the property is in compliance with such requirements for institutional and engineering controls; and

E. the remedial action required pursuant to such governmental remediation program includes the investigation and remediation of the entire property for which a New York City green property certification is sought and addresses all media deemed appropriate by the Office, [including] such as soil, soil vapor and groundwater, to an equivalent extent as required pursuant to the [New York city local brownfield] City voluntary cleanup program, as provided in subchapter one of this chapter.

3. The [office] Office may determine that one or more sub-parcels of a property are eligible as an equivalent remediation property and that one or more other sub-parcels are not eligible as an equivalent remediation property.

b. Properties that have fulfilled the eligibility requirements for New York City green property certification pursuant to this section prior to the effective date of this section [shall] will be eligible for such certification.

§43-1431 **Applications.**

a. No application is required for properties admitted to the [New York city local brownfield] City voluntary cleanup program.

b. An application [is required for all other properties] may be submitted for properties, especially those properties whose remediation is not regulated by the Office, including those that have completed the New York state brownfield cleanup program and those for which eligibility under an equivalent remediation property is sought. The [office] Office may require information and documentation sufficient for the [office] Office to determine whether a property is an equivalent remediation property.

§43-1432 **Records.**

a. The [office shall] Office will maintain a public record of all properties certified under the New York [city] City green property certification program. The [office shall] Office will provide confirmation of such certification to any member of the public upon request.

b. The [office shall] Office will provide a certificate and/or make available other symbols of New York City green property certification to the recipient.

§43-1433 **Rescission and termination.**

a. The [office] Office may rescind a New York City green property certification if it determines that a certified property is no longer in compliance with the agreement, the [certificate] notice of completion or equivalent [notice] record of completion, or the site management plan governing institutional and/or engineering controls established within the respective remediation program to which the property is admitted. Compliance for the purpose of this subdivision includes compliance with reporting requirements. The [office] Office may reinstate a New York City green property certification if it determines that the recipient has cured the non-compliance.

1. If the [office] Office seeks to rescind a New York City green property certification, it [shall] will provide notice to the recipient by certified mail specifying the basis for the [office's] Office's proposed action and facts in support of that action.

2. The recipient [shall] will have thirty days after the effective date of the notice to cure the non-compliance and submit proof of cure to the [office] Office or to seek a hearing.

3. If the recipient does not submit proof of cure or seek a hearing within such thirty day period, the New York City green property certification [shall] will be rescinded on the thirty-first day.

4. If the [office] Office determines that the non-compliance has been cured, the proposed rescission [shall] will be withdrawn.

5. If the [office] Office determines that the recipient has not proven that the non-compliance has been cured, the [office shall] Office will provide notice to the recipient by certified mail. The recipient [shall] will have thirty days after the effective date of the notice to seek a hearing. If the recipient does not seek a hearing within such thirty day period, the New York City green property certification [shall] will be rescinded on the thirty-first day.

6. A hearing pursuant to paragraph two or five of this subdivision [shall] will be held before the director of the office of environmental remediation or his or her designee, or in the director's discretion, by the office of administrative trials and hearings. If the matter is referred to the office of administrative trials and hearings, the hearing officer [shall] must submit findings of fact and a recommended decision to the director. The director or his or her designee [shall] must make a

final determination and [shall] notify the recipient within a reasonable period of time of such determination.

7. For purposes of this subdivision, the effective date of notice [shall] will be two business days after the [office] Office mails such notice by certified mail.

b. The recipient of a New York City green property certification may terminate the certification upon written request to the [office] Office.

§43-1434 **Miscellaneous.**

[a.] *Certification categories.* The [office] Office may establish certification categories, including categories that recognize a cleanup for unrestricted use of the property and categories that recognize the use of sustainable methods for remediation and redevelopment of the property.

§ 5. Subchapter 4 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

SUBCHAPTER 4
NEW YORK CITY CLEAN SOIL BANK [PROGRAM] AND OTHER MATERIALS
EXCHANGE PROGRAM FOR SUSTAINABILITY AND RESILIENCE

§43-1440 **Applicability.**

The New York City Clean Soil Bank [is] and other types of materials exchange are available for properties that are enrolled in the [Local Brownfield Cleanup Program] City voluntary cleanup program, properties with an (E) Designation or a restrictive declaration that are remediating their sites under OER oversight, properties in a remedial program administered by DEC, City-owned, City-financed, or City-subsidized capital construction properties, and other City-supported private development properties.

§43-1441 **Definitions.**

"DEC" means the New York State Department of Environmental Conservation.

"**Eligible [soil] materials**" means soil or other materials, such as compost, asphalt millings, mulch, woodchips, concrete aggregate, or topsoil, that [meets] meet the requirements of 6 NYCRR Part 360 and 6 NYCRR Part 375 that are applicable and consistent with lawful [soil] materials transfer [and] or agreements between the [office] Office and DEC.

"**Generating property**" means a property that the [office] Office admits into the New York City Clean Soil Bank or other materials exchange to dispose of surplus eligible [soil] materials.

"**Office**" or "**OER**" means the New York City Office of Environmental Remediation.

"Receiving property" means a property that the [office] Office admits into the New York City Clean Soil Bank and other materials exchange to receive eligible [soil] materials that will be used for backfill or other beneficial uses on the property.

§43-1442 Eligible Properties.

a. The following properties are eligible to participate in the New York City Clean Soil Bank and Other Materials Exchange Program as properties that generate or receive eligible soil materials for exchange:

1. Properties that are enrolled in the [Local Brownfield Cleanup Program,] City voluntary cleanup program;

2. [properties] Properties with an (E) Designation or [with] a restrictive declaration that are remediating their sites under OER oversight[,];

3. [properties] Properties in a remedial program administered by DEC[,];

4. City-owned, City-financed, or City-subsidized capital construction properties[, and other];

5. City-operated or City-financed materials storage or processing facilities; and

6. Other City-supported private development properties [are eligible to participate in the New York City Clean Soil Bank as properties that generate or receive eligible soil for transfer].

b. Generating properties that are not in remedial or other programs operated by the [office] Office or DEC must perform equivalent remedial investigation and remedial action under the [office's] Office's oversight in order to be eligible.

§43-1443 Operation of the New York City Clean Soil Bank and Other Materials Exchange Program.

a. To apply to be a generating property, eligible properties other than City-operated facilities must submit a soil or other materials availability form to the [office] Office. The [office] Office will determine if the soil or other material is eligible for transfer to a receiving property. For soil exchange, this will be done by comparing soil quality to the soil quality required by applicable laws, rules, regulations and agreements between the [office] Office and DEC.

b. To apply to be a receiving property, eligible properties must submit a soil or other materials request form to the [office] Office.

c. If the [office] Office determines that the needs of a receiving property and a generating property may match, the [office] Office will inform each property. In matching eligible properties, the [office] Office will adhere to the following priority order: City-owned [capital] or City-financed construction properties first, properties enrolled in City or State remedial programs second, and City-supported private sites not enrolled in a City or State remedial program third.

d. Parties must negotiate terms for the transfer of eligible [soil] materials directly with each other, although for City-operated generating properties, these negotiations may be facilitated by OER if an agency requests its assistance. Reaching an agreement [to] on final terms for transfer is the responsibility of the generating and receiving property, and not the responsibility of the [office] Office. However, OER may negotiate terms on behalf of City agencies if an agency requests its assistance.

e. Once a generating property has reached an agreement with a receiving property to transfer eligible [soil] materials, the parties must notify the [office] Office.

f. All transfers of soil or other materials must be in compliance with all applicable laws, rules and regulations [and] or with applicable agreements between the [office] Office and DEC.

g. Prior to the transfer of any eligible [soil] materials, all private parties participating in the New York City Clean Soil Bank [Program must agree] and Other Materials Exchange Program may be required to release the City from any liability and indemnify the City.