

OFFICE OF ENVIRONMENTAL REMEDIATION
NOTICE OF OPPORTUNITY TO COMMENT ON PROPOSED RULE RELATING
TO A LOCAL BROWNFIELD CLEANUP PROGRAM

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 and section 24-903 of the Administrative Code of the City of New York, that the Office of Environmental Remediation proposes to promulgate rules relating to a local brownfield cleanup program.

A public hearing on the proposed rules will be held on October 19, 2009 at 1 P.M. at 110 William Street, New York, N.Y. in Rm. 4 A/B. Written comments regarding the proposed rules may be sent to Dr. Daniel C. Walsh, Director of Environmental Remediation, 253 Broadway, 14th floor, New York, NY 10007 on or before October 30, 2009.

Written comments and a summary of oral comments received at the hearing will be available for public inspection, within a reasonable time after receipt, between the hours of 9:30 AM and 4:30 PM at the Office of Environmental Remediation, 253 Broadway, 14th floor, New York, New York 10007.

Persons who request that a sign language interpreter or other form of reasonable accommodation for a disability be provided at the hearing are asked to notify Dr. Walsh at the foregoing address by October 9, 2009.

Section 1. Title 43 of the Rules of the City of New York is amended by adding a new Chapter 14 to read as follows:

CHAPTER 14
Environmental Remediation
SUBCHAPTER 1
Local Brownfield Cleanup Program Requirements

§ 43-1401 Purpose

The purpose of this subchapter is to provide for the orderly and efficient administration of chapter nine of title twenty-four of the administrative code of the city of New York, the New York city local brownfield cleanup program.

§ 43-1402 Definitions

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

- a. "Affordable housing development" means a development that will be built by a non-profit developer or supported by a city agency on a local brownfield site where at least twenty percent of the housing units are affordable to families that earn no more than eighty percent of an area's average median income, as determined by the United States department of housing and urban development, and that has been issued a letter of interest from a federal, state or local housing subsidy program.
- b. "Alternatives analysis" means a study undertaken to develop and evaluate options for remedial action in accordance with section 43-1407(i).
- c. "Applicant" means a person who has submitted a request to participate in the local brownfield cleanup program but is not yet an enrollee.
- d. "Certificate of completion" means a written certificate that is issued by the office to an enrollee who has successfully investigated and remediated a local brownfield site to the satisfaction of the office.
- e. "Certificate holder" means the enrollee named in the certificate of completion issued by the office, as well as such enrollee's successors and assigns who have received a transfer of such certificate in accordance with section 43-1408(g).

f. "Change of use" means the transfer of title to all or part of a local brownfield site that results in a change in the party or parties implementing a site management plan; the erection of any structure on the site; the creation of a park or other public or private recreational facility on the site, or any activity that is likely to disrupt or expose contamination or to increase direct human exposure to contamination; or any other conduct that will or may tend to significantly interfere with an ongoing or completed remedial program at such site and the continued ability to implement the engineering and institutional controls associated with such site, including such condition as may be included in a property's site management plan.

g. "Community facility development" means a development of a local brownfield site where the developer is a 501(c)(3) corporation and the development is a facility that provides specific benefits to the local community, including but not limited to, health care facilities or facilities providing open space for community use, or is the recipient of a federal, state, or city grant, excluding grants provided by the office.

h. "Community protection statement" means a statement contained in the remedial action work plan that provides a summary description of specific efforts to be taken during the remedial action to provide for protection of the health and safety of residents and others in the vicinity of the site . The community protection statement is intended to be written in concise, non-technical language to assist community members in understanding the full range of protective actions to be taken during the remedial program."

i. "Concentrated solid or semi-solid hazardous wastes" means solid or semi-solid hazardous wastes present in surface or subsurface soil, surface water, sediment or groundwater in a concentrated form, such as precipitated metallic salts, metal oxides, or chemical sludges.

j. "Contaminant" means hazardous waste and/or petroleum.

k. "Contamination" or "contaminated" means the presence of hazardous waste and/or petroleum in any environmental media, including soil, historic fill, surface water, groundwater, air, or indoor air.

l. "Days" means calendar days.

m. "Declaration of covenants and restrictions" means controls on the use of a site that are listed on the deed and that seek to prevent potential exposure to any residual contamination remaining at the site.

n. "Delegated brownfield site" means any real property for which state and/or federal law requires the investigation or remediation, or a portion of an investigation or remediation, to be supervised and/or approved by a state and/or federal agency, but where such state and/or federal agency has expressly authorized in writing that such real property may be investigated and remediated under the city's supervision or according to a mutually agreed-upon form of supervised oversight, subject to any and all appropriate restrictions as may be required by law or agreed to by the parties.

o. "Director" means the director of the office of environmental remediation or such individual's designee.

p. "Disposal" means the abandonment, discharge, deposit, injection, dumping, spilling, leaking or placing of any contaminant so that such contaminant or any related constituent thereof may enter the environment. Disposal also means the thermal destruction of a contaminant and the burning of a contaminant as fuel for the purpose of recovering usable energy.

q. "Document repository" means a repository of documents from a site's remedial program that is established in a publicly accessible building near the location of such site or on a publicly accessible website administered by the office.

r. "Ecological resources" means all flora and fauna and the habitats that support them, excluding such biota as pets, livestock, and agricultural and horticultural crops.

s. "Emergency" means a spill, or other event or condition, whether natural or human-made, as a result of which a release or threatened release of contamination presents an immediate threat to life, health, property, or natural resources.

t. "Engineering control" means any physical barrier or method employed to actively or passively contain, stabilize, or monitor contamination, restrict the movement of contamination to ensure the long-term effectiveness of a remedial program, or eliminate potential exposure pathways to contamination. Engineering controls include, but are not limited to, pavement, caps, covers, subsurface barriers, soil vapor barriers, soil vapor extraction systems, slurry walls, building ventilation systems, fences, access controls,

provision of alternative water supplies via connection to an existing public water supply, adding treatment technologies to such water supplies, and installing filtration devices on private water supplies.

u. "Enrollee" means an applicant who has been accepted into the local brownfield cleanup program and has signed a local brownfield cleanup agreement.

v. "Environment" means any water including surface or groundwater, sediment, water vapor, any land including land surface or subsurface, air including soil vapor, fish, wildlife, other biota, all other natural resources and humans.

w. "Feasible" means suitable to site conditions, capable of being successfully carried out with available technology, implementable and cost effective.

x. "Financial assurance" means a financial mechanism or multiple financial mechanisms, including, but not limited to, surety bonds, trust funds, letters of credit, and insurance, as determined to be adequate by the office, to ensure the long term implementation, maintenance, monitoring and enforcement of the engineering and institutional controls at a local brownfield site.

y. "Grossly contaminated media" means soil, sediment, surface water or groundwater that contains sources or substantial quantities of mobile contamination that may be in the form of non-aqueous phase liquid that is identifiable either visually, through strong odor, by elevated contaminant vapor levels or is otherwise readily detectable without laboratory analysis.

z. "Groundwater" means water below the land surface in a saturated zone of soil or rock. This includes perched water separated from the main body of groundwater by an unsaturated zone.

aa. "Hazardous waste" means a hazardous waste as defined in section 27-1301 of the environmental conservation law.

ab. "Historic fill material" means non-indigenous material, deposited or disposed of to raise the topographic elevation of real property, which material may have been contaminated prior to emplacement, and is in no way connected with the subsequent operations at the location of the emplacement and which includes, without limitation, construction and demolition debris including uncontaminated solid waste resulting from

the construction, remodeling, repair and demolition of utilities, structures, land clearing and roads. It may also include solid waste resulting from dredge spoils, incinerator residue, demolition debris, coal ash, fly ash, and non-hazardous waste. "Historic fill material" does not include any material which is chemical production waste or waste from processing of metal or mineral ores, residues, slag or tailings. In addition, historic fill material does not include a municipal solid waste site built after nineteen hundred sixty two.

ac. "Institutional control" means any non-physical means of enforcing a restriction on the use of real property, including a declaration of covenants and restrictions, that limits human or environmental exposure, restricts the use of groundwater, provides notice to potential owners, operators, or members of the public, or prevents actions that would interfere with the effectiveness of a remedial program or with the effectiveness and/or integrity of operation, maintenance, or monitoring activities at or pertaining to a local brownfield site.

ad. "Interim remedial measure" means activities to address both emergency and non-emergency site conditions, which can be undertaken without extensive investigation and evaluation, to prevent, mitigate or remedy environmental damage or the consequences of environmental damage attributable to a site, including, but not limited to, the following activities: construction of diversion ditches; collection systems; tank removal; leachate collection systems; construction of fences or other barriers; installation of water filters; provision of alternative water systems; removal of source areas; or plume control.

ae. "Light to moderate levels of contamination" means detectable levels of contamination, the presence of which does not require an applicant or enrollee to conduct any mandatory, governmental-supervised investigation or remediation of the contamination under any state or federal law.

af. "Local brownfield cleanup agreement" or "agreement" means an agreement executed by an applicant and the office that sets forth the parties' responsibilities in the remediation of a site in the local brownfield cleanup program.

ag. "Local brownfield site" or "site" means any real property within the city, the redevelopment or reuse of which may be complicated by the presence or potential presence of light to moderate levels of contamination, including, but not limited to, real property containing historic fill material and real property rejected from state programs

on grounds that the environmental contamination is not sufficient to warrant state involvement, or any real property that meets the definition of a delegated brownfield site. “Local brownfield site” may include sites designated as E-designation hazardous material sites. “Local brownfield site” or “site” does not include real property: (1) containing discharges of petroleum, except as authorized by the state department of environmental conservation upon agreement with the office or by state law, (2) at the time of application to this program and pursuant to section 27-1305 of the environmental conservation law, listed in the state registry of inactive hazardous waste disposal sites and classified as either (A) causing or presenting an imminent danger of causing irreversible or irreparable damage to the public health or environment—immediate action required, or (B) significant threat to the public health or environment—action required; (3) listed on the national priorities list pursuant to 42 U.S.C. section 9605; (4) subject to an enforcement action under title seven or nine of article twenty-seven of the environmental conservation law, except a treatment, storage or disposal facility subject to a permit; provided, that nothing herein contained shall be deemed to exclude from the scope of the term “local brownfield site” a hazardous waste treatment, storage or disposal facility having interim status according to regulations promulgated by the state department of environmental conservation; (5) subject to an order for cleanup pursuant to article twelve of the navigation law or pursuant to title ten of article seventeen of the environmental conservation law except such property shall not be deemed ineligible if it is subject to a stipulation agreement; or (6) subject to any other on-going city, state or federal environmental enforcement action related to the contamination which is at or emanating from the real property.

ah. "Non-aqueous phase liquid" or "NAPL" means a contaminant that is a liquid which may be denser or lighter than water and does not mix easily or dissolve in water, but remains as a separate phase.

ai. "Office" means the office of environmental remediation.

aj. "Off-site contamination" means any contamination that is beyond the real property boundaries of a local brownfield site, the source of which may be located within or beyond the boundaries of such site.

ak. "On-site contamination" means any contamination that is within the real property boundaries of a local brownfield site, the source of which is located within or beyond the boundaries of such site.

al. "Operable unit" means a portion of the remedial program for a site that for technical or administrative reasons can be addressed separately to investigate, eliminate or mitigate a release, threat of release or exposure pathway resulting from the site contamination. Operable units may address geographical portions of a site, media specific action, specific site problems, or an initial phase of a remedial action, or may consist of any set of remedial actions performed over time or any actions that are concurrent but located in different parts of a site. An operable unit may be proposed by the office or an enrollee; however, only the office can approve the use of operable units.

am. "Ownership" means the possession of equity in the capital, the stock or the profits of an entity or, in the case of real property, fee title to such property.

an. "Participant" means an enrollee who either:

1. was the owner of the local brownfield site at the time of disposal or discharge of contaminants, or
2. is otherwise a person responsible according to applicable principles of statutory or common law liability, unless such person's liability arises solely as a result of such person's ownership or operation of or involvement with the site subsequent to the disposal or discharge of contaminants.

ao. "Permanent cleanup" means a cleanup or remedy that would allow a site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls.

ap. "Person" means an individual, trust, firm, joint stock company, limited liability company, corporation, joint venture, partnership, association, state, municipality, commission, political subdivision of a state, public benefit corporation or any interstate body. A person does not include a person exempted from liability pursuant to section 27-1323 of the environmental conservation law.

aq. "Petroleum" means oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and crude oils, gasoline and kerosene.

ar. "Presumptive remedy" means technologies or approaches appropriate for the remediation of specific types of contamination which, based on historical patterns of remedy selection and the office's scientific and engineering evaluation of performance data, can be used to accelerate the remedy selection process.

as. "Professional engineer" means an individual licensed or otherwise authorized under article one hundred forty-five of the education law to practice engineering.

at. "Program" means the local brownfield cleanup program pursuant to chapter nine of title twenty-four of the administrative code of the city of New York.

au. "Qualified environmental professional" means a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases to the surface or subsurface of a property or off-site areas, sufficient to meet the objectives and performance factors for the areas of practice identified by this chapter. Such a person must:

1. hold a current professional engineer's or a professional geologist's license or registration issued by the state or another state, or hold a baccalaureate degree or higher in engineering or geology and have the equivalent of three years of full-time relevant experience in site investigation and remediation of the type detailed in this chapter; or
2. be a site remediation professional licensed or certified by the federal government, a state or a recognized accrediting agency, to perform investigation or remediation tasks consistent with office guidance, and have the equivalent of three years of full-time relevant experience.

av. "Registry" means the registry of inactive hazardous waste disposal sites maintained by the New York state department of environmental conservation pursuant to section 27-1305 of the environmental conservation law.

aw. "Release" means any pumping, pouring, emitting, emptying, or leaching, directly or indirectly, of a contaminant so that the contaminant or any related constituent thereof, or

any degradation product of such a contaminant or of a related constituent thereof, may enter the environment, or the disposal of any contaminant.

ax. "Remedial action work plan" means a written document providing for the development and implementation of a remedial program for contamination within the boundaries of the local brownfield site; provided, however, that a participant shall also be required to provide in the remedial action work plan for the development and implementation of a remedial program for contamination that has emanated from the local brownfield site.

ay. "Remedial investigation" means a process undertaken to determine the nature and extent of contamination at a site or operable unit of a site. The remedial investigation emphasizes data collection and site characterization, and generally is performed in support of the selection of a remedy.

az. "Remedial investigation work plan" means a written document establishing a schedule of field activities to determine the nature and extent of contamination at and/or emanating from a local brownfield site.

ba. "Remedial investigation report" means a report that fully characterizes the nature and extent of contamination at and/or emanating from a local brownfield site.

bb. "Remedial program" means all activities undertaken to investigate, design, eliminate, remove, abate, control, or monitor existing health hazards, existing environmental hazards, potential health hazards, and potential environmental hazards in connection with a site, and all activities undertaken to manage waste and contamination from a site including, but not limited to, the following:

1. Site characterization and remedial investigation activities needed to develop and evaluate remedial alternatives;

2. Interim remedial measures;

3. Design activities;

4. Remedial actions, including, but not limited to, construction related activities and the implementation of remedial treatment technologies, including without limitation grading, contouring, trenching, grouting, capping, excavation, transporting, incineration and other

thermal treatment, chemical treatment, biological treatment, or construction of groundwater and/or leachate collection and treatment facilities;

5. Post-remedial site management including, but not limited to, the operation, maintenance, and monitoring of remedial treatment technologies, reporting, and the certification of institutional and engineering controls;

6. Restoration of the environment;

7. Appropriate involvement by government and by the public; and

8. Oversight by the office.

bc. "Sediment" means unconsolidated particulate material found at the bottom of lakes, rivers, streams and other water bodies at bed elevations equal to or lower than the mean high water level.

bd. "Site management" means the management of physical barriers and methods and non-physical means to limit human and environmental exposure to contamination at and/or emanating from a site, as well as the implementation of any necessary monitoring, reporting, certification and/or operation and maintenance of a remedy, after the issuance of a certificate of completion.

be. "Source area" or "source" means a portion of a site or area of concern at a site where the investigation has identified a discrete area of soil, soil vapor, sediment, surface water or groundwater containing contaminants in sufficient concentrations to migrate in that medium, or to release significant levels of contaminants to another environmental medium, which could result in a threat to public health or the environment. A source area typically includes, but is not limited to, a portion of a site where a substantial quantity of any of the following are present:

1. Concentrated solid or semi-solid hazardous substances;

2. Non-aqueous phase liquids; or

3. Grossly contaminated media.

bf. "Sustainability statement" means a written summary to be included in the executive summary of a remedial action work plan that describes proposed actions to be taken by an enrollee, including the enrollee in conjunction with OER, during the course of a

remedial program to increase sustainability of a remediation. Examples of sustainable actions include those designed to reduce carbon emissions, reduce storm water discharges, reduce use of virgin resources and attain specific sustainability goals reported by the city in PlaNYC 2030, the report issued by the office of long-term planning and sustainability in April 2007 that provides a blueprint for sustainable long-term growth for the city.

bg. "Volunteer" means an enrollee other than a participant, including without limitation a person whose liability arises solely as a result of such person's ownership or operation of or involvement with the local brownfield site subsequent to the disposal or discharge of contaminants, provided, however, that such person exercises appropriate care with respect to contamination found at the site by taking reasonable steps to:

1. stop any continuing release;
2. prevent any threatened future release; and
3. prevent or limit human, environmental, or natural resource exposure to any previously released contamination.

bh. "Waste" means (1) any garbage, refuse, or sludge from a waste water treatment plant, water supply treatment plant, or air pollution control facility, and (2) any other discarded material, whether or not such material may eventually be used for some other purpose and including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations or from community activities.

§ 43-1403 Eligibility

a. Ineligible sites. Any real property that does not meet the definition of a local brownfield site shall be ineligible for the local brownfield cleanup program.

b. Ineligible parties. A person is ineligible for participation in the local brownfield cleanup program if the person is subject to:

1. A pending action or proceeding relating to the local brownfield site in any civil or criminal court in any jurisdiction, or before any city, state or federal administrative agency or body, wherein the city, state or federal government seeks penalties or the investigation, removal, or remediation of contamination;

2. An order providing for the investigation, removal, or remediation of contamination relating to the proposed local brownfield site.

c. Public interest consideration. The office may reject an application to participate in the local brownfield cleanup program upon a determination that the public interest would not be served by granting such application. In making this determination, the office shall consider, but is not limited to, the complexity of the remedial work, the degree of on-site and off-site contamination, and, for sites that would require significant office staff resources to oversee, the availability of staff resources to oversee the project.

§ 43-1404 Applications

a. Pre-application. A person interested in applying to the local brownfield cleanup program may request a pre-application meeting with the office. At the pre-application meeting, the person and representatives of the office shall discuss the suitability of the property for participation in the program. Following the meeting, the office may issue a pre-enrollment letter stating its intent to accept the site into the program, pending review of the final application.

b. Timing of application. The applicant shall submit an application after a remedial investigation report and remedial action work plan have been prepared, provided that at the office's discretion, an applicant may apply to the program with only a remedial investigation work plan.

c. Application contents.

1. Applications to participate in the local brownfield cleanup program shall be submitted to the office in such form and manner and containing such information as the office may require.

2. Applications, including attachments, shall be submitted electronically.

3. Applications shall include (A) a completed application form, (B) a completed local brownfield cleanup agreement, pursuant to section 43-1405, executed by the applicant, and (C) a remedial investigation report and a remedial action work plan or, when permitted by the office, a remedial investigation work plan. Remedial investigation

reports, remedial action work plans, and remedial investigation work plans must conform to guidance templates issued by the office.

4. Applications shall also include a citizen participation plan, a proposed document repository, a notice of the application and a draft fact sheet describing all work plans or reports submitted with the application. The notice of application and fact sheet must be approved by the office prior to release to the site contact list.

5. Applications shall state the basis for which the property qualifies as a local brownfield site.

A. An application that states that a property qualifies as a local brownfield site based on the presence or potential presence of light to moderate levels of contamination shall include a certification from a qualified environmental professional, made after the completion of the remedial investigation report, that there are no known on-site environmental conditions that would require the applicant to conduct any mandatory, governmental-supervised investigation or remediation of the contamination under any state or federal law. Any applicant who submits an application prior to completing a remedial investigation report shall submit such certification, including the determination that the property does not constitute a significant threat, to the office within 10 days of the completion of the remedial investigation report. The office shall not execute a final agreement for entry into the program without receipt of this certification.

B. An application that states that a property qualifies as a local brownfield site based on its meeting the definition of a delegated brownfield site shall include a detailed statement setting forth the environmental conditions whose investigation or remediation, or a portion thereof, state or federal law requires a state or federal agency to supervise or approve. In addition to technical information regarding the environmental conditions, such statement shall specify whether the environmental conditions have already been reported to the state and/or federal government and whether the state and/or federal government has issued any approval or disapproval of any work plan at the site. The applicant shall include with the application copies of any and all documents concerning the federal and state involvement in the cleanup.

d. General review and approval of application. The office shall review the application and notify the applicant whether the application is accepted or rejected.

1. Upon receipt of an application, the office shall determine whether the application contains sufficient information for the office to determine eligibility for the program. If the application contains sufficient information, the office shall deem the application complete.

2. The office shall notify the applicant in writing whether the application is complete. Such notification shall advise that the application is either:

A. complete; or

B. incomplete, specifying the information that must be submitted or supplemented to make the application complete.

e. Admission into the local program. Once the office has determined that an application to participate in the local program is complete, the office shall evaluate the application for eligibility and, if the applicant is eligible, shall admit the applicant into the program.

1. Light to moderate levels of contamination. If the office determines that a property qualifies as a local brownfield site based on the presence or potential presence of light to moderate levels of contamination and that the applicant meets all other conditions of eligibility pursuant to section 43-1403, the office shall admit the applicant into the program.

2. Delegated brownfield sites. When a property is a property for which state or federal law requires the investigation or remediation, or a portion of an investigation or remediation, to be supervised and/or approved by a state and/or federal agency, the following process shall apply:

A. if the state and/or federal agency has expressly authorized in writing that such real property may be investigated and remediated (i) under the city's supervision or (ii) according to a mutually agreed-upon form of supervised oversight, including oversight by the state and/or federal agency of city supervision of the investigation and remediation or an allocation of responsibility for supervision coordinated between the state and/or federal agency and the office, the office shall determine that such property is a delegated brownfield site and, if the applicant meets all other conditions of eligibility pursuant to section 43-1403, the office shall admit the applicant into the program. For a property investigated and remediated according to a mutually agreed-upon form of supervised oversight:

i. the office shall coordinate investigation and remediation through communications with the appropriate state or federal agency; and

ii. the office shall not issue a certificate of completion for such property until all investigation and remediation required by state or federal law to be supervised and/or approved by a state and/or federal agency have been completed as determined by the appropriate state or federal agency.

B. if the state and/or federal agency has not provided such express written authorization and the office determines that a portion of such property may qualify as a local brownfield site based on the presence or potential presence of light to moderate levels of contamination, the office shall advise the applicant that the applicant may modify the application to (i) describe the site boundaries, pursuant to section 43-1405(a)(1), as such portion of such property, and (ii) comply with subparagraph A of paragraph five of subdivision c of this section. The office shall evaluate the modified application pursuant to paragraph one of this subdivision.

i. If the applicant does not so modify the application, the office shall reject the application.

ii. If the applicant does modify the application and the applicant is admitted into the program, the office subsequently may, upon request of the applicant or enrollee, amend the description of site boundaries in the local brownfield cleanup agreement to expand the boundaries of such local brownfield site to include the remainder of such property or another portion of such property, provided that all investigation and remediation required by state or federal law to be supervised and/or approved by a state and/or federal agency have been completed on such property or such other portion of such property and appropriately documented in a remedial action report.

C. if neither the provisions of subparagraphs A or B apply, the office shall reject the application.

f. Citizen participation upon entering the local program.

1. Simultaneously with the submission of an application to participate in the local brownfield cleanup program, the applicant shall ensure that the document repository contains all relevant site documents and shall distribute an office-approved notice of application and an office-approved fact sheet describing any associated work plans or

reports to the site contact list. Prior to submission of an application, applicants shall work with the office to obtain approval of the notice of application and fact sheet. The initial public comment period shall not begin until the applicant certifies that the office-approved notice of application and fact sheet have been distributed to the site contact list.

2. The office shall publish the notice of application in the City Register.

3. The enrollee shall publish the notice of application in a community newspaper.

4. The office reserves the right to require a second initial public comment period if a substantial change to an application occurs after the initial notice of the application is made to the site contact list according to paragraph 1 of this subdivision.

§ 43-1405 Local Brownfield Cleanup Agreements

a. The following terms and conditions apply to local brownfield cleanup agreements required for eligibility in the program.

1. Description of site boundaries. The agreement shall contain a description of the site's boundaries.

2. The enrollee shall provide access to the site and all relevant information regarding activities at the site, including all environmental studies and testing, in accordance with section 24-903(f) of the administrative code of the city of New York.

3. Enrollment fee.

A. The enrollee shall pay an enrollment fee of one thousand dollars. An enrollment fee shall not be required unless an application is accepted and an agreement is executed.

B. The enrollment fee is payable upon execution of the agreement by the office. The office shall not execute an agreement without receipt of any applicable fee.

C. Each payment shall be in the form of a certified check or money order made payable to the New York city office of management and budget and shall be sent to:

New York City Mayor's Office of Environmental Remediation
Attn.: Budget Manager
253 Broadway, 14th Fl.
New York, NY 10007

The enrollee shall include the project name and project number on its check.

D. The enrollee shall provide written notification within 90 days of any change in its address.

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

i. a local brownfield site is within a New York state brownfield opportunity area pursuant to section 970-r of the 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 local brownfield site is an affordable housing development;

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

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

4. Emergencies. The enrollee shall promptly take all appropriate action, in accordance with all applicable laws, to prevent, abate, minimize and/or report any emergency, including filing with the New York state department of environmental conservation appropriate reports of actual or potential environmental releases. The enrollee shall immediately notify the office's project manager upon becoming aware of any emergency. Nothing in this paragraph shall be deemed to limit the authority of the office or the city to take, direct, or order all appropriate action to protect public health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release from the site in accordance with applicable law. Nothing herein shall limit the enrollee's responsibility to report such conditions and to take such other action as required by city, state or federal law.

5. Force majeure.

No enrollee shall suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement of an agreement to implement all or part of a remedial program as a result of a force majeure event.

6. Dispute resolution.

A. The enrollee shall submit any dispute relating to the agreement to the designated individual under the agreement in writing no more than fifteen days after the enrollee knew or should have known of the facts that are the basis of the dispute. The designated individual shall render a written decision and furnish a copy thereof to the enrollee. The written decision shall be the final office determination, unless the enrollee files a written appeal of that decision with the designated appeal individual within twenty days of receipt of that decision.

B. Upon receipt of the written appeal pursuant to subparagraph A of this paragraph, the designated appeal individual shall review the record and decision. The designated appeal individual shall take one of the following actions, with written notice to the enrollee:

- i. remand the matter to the office's project manager for further negotiation or information, if it is determined that the matter is not ripe for review;
- ii. determine that there is no need for further action and confirm the determination of the designated individual; or
- iii. make a determination on the record as it exists.

C. The decision of the designated appeal individual shall be the final office decision and shall be appealable to the New York state supreme court, New York county, by an article seventy-eight petition.

D. The designated individual to:

- i. hear disputes is a chief of a bureau of the office; and
- ii. review dispute decisions is the director of the office.

E. The invocation of dispute resolution shall not extend, postpone, or modify obligations with respect to any item not in dispute unless the office agrees in writing to an extension, postponement or modification.

F. The office shall keep an administrative record of dispute resolution proceedings.

7. Indemnification.

The enrollee shall indemnify the city, its representatives and employees from any claim, suit, action, and cost arising out of or resulting from the fulfillment or attempted fulfillment of the agreement.

8. Notice of agreement. The enrollee shall provide written notice of a local brownfield cleanup agreement to any prospective purchaser, lessee, tenant or occupant of any interest in a local brownfield site.

9. Reporting to state and federal agencies.

A. If a release of petroleum or other condition that requires reporting and/or notice to a state and/or federal agency is found to exist on a site during the course of the remedial program, then the enrollee shall immediately notify the appropriate state and/or federal agency in accordance with applicable law and regulation and provide copies of such notification to the office. In such event the office reserves the right to modify the agreement or terminate it in accordance with paragraph 10 of this subdivision.

B. If such release of petroleum or such other condition renders the site a property for which state or federal law requires the investigation or remediation, or a portion of an investigation or remediation, to be supervised and/or approved by a state and/or federal agency, then the office shall review the site pursuant to section 43-1404(d)(3). If the office determines that the site is no longer eligible for the local brownfield cleanup program, then the office shall terminate the agreement, in accordance with paragraph ten of this subdivision.

10. Termination of the agreement.

A. Termination of the agreement by the enrollee. The enrollee may terminate a local brownfield cleanup agreement at any time and for any reason, provided that:

i. The enrollee provides written notice to the office and site contact list at least fifteen days in advance of the termination;

ii. The termination does not pose an immediate threat to public health or the environment;
and

iii. At the time of termination, the site is in no worse condition, from an environmental and public health perspective, than before the applicant entered into the local brownfield cleanup agreement.

B. Termination of the agreement by the office. The office may terminate the local brownfield cleanup agreement for cause, including, but not limited to, if the enrollee is no longer eligible for the local brownfield cleanup program or the enrollee fails to substantially comply with the agreement's terms and conditions, including, without limitation, the failure to initiate, proceed with, or complete the remedial program in accordance with its schedule.

i. Prior to termination of an agreement by the office, the office shall:

(a) notify the enrollee in writing of its intention to terminate the agreement and the reasons for the intended termination; and

(b) provide the enrollee with a reasonable opportunity of not less than thirty days to correct deficiencies.

ii. The local brownfield cleanup agreement shall be terminated thirty-one days after the effective date of the office's notice, as provided in section 43-1410(e), unless the enrollee:

(a) seeks dispute resolution within fifteen days of the effective date of the notice; or

(b) cures the deficiency within the thirty day period after the effective date of the notice.

iii. Nothing herein shall preclude the office from terminating an agreement with less than thirty days notice if the office determines that information provided or certifications made by the enrollee are materially inaccurate or incomplete. Prior to terminating an agreement pursuant to this subparagraph, the office shall provide the enrollee with written notice, indicating the reason for the termination, and an opportunity to demonstrate that such information or certifications were materially accurate and complete.

C. Termination by either the enrollee or the office does not affect the enrollee's obligations to pay fees pursuant to paragraph three of this subdivision and to indemnify the city pursuant to paragraph seven of this subdivision, until and including the date of termination.

11. Additional terms and conditions. The office may require that a local brownfield cleanup agreement include additional terms and/or conditions.

b. The agreement shall be binding while in effect on each party, its successors and assignees. No change in the ownership or corporate or business status of any party or of the site shall alter any signatory's responsibilities under this agreement.

§ 43-1406 Work plans and reports

a. Work plans. All work undertaken as part of a remedial program under a local brownfield cleanup agreement shall be detailed in a work plan, unless determined otherwise by the office.

1. All work plans shall:

A. be prepared and implemented in accordance with the requirements of all applicable laws, rules and regulations;

B. consider applicable office guidance;

C. be submitted to the office for review and approval, pursuant to subdivision d of this section; and

D. include, at a minimum, a schedule for performance of anticipated activities with sufficient detail to allow the office to evaluate the work plan.

2. All field activities conducted pursuant to an approved work plan shall be overseen by a qualified environmental professional. Such qualified environmental professional may be an employee or a consultant retained by the enrollee to supervise the field activities.

3. The enrollee shall notify the office at least seven days in advance of any field activities to be conducted under an office-approved work plan, as well as any pre-construction meetings, job progress meetings, substantial completion meeting and inspection, and final meeting and inspection. The office may attend such activities, meetings and inspections, provided, however, that the enrollee may exclude the office from portions of activities, meetings and inspections in which privileged matters are discussed.

b. Reports.

1. All reports including, but not limited to, all reports, design documents, plans or site management plans, that are submitted to the office in draft or final form pursuant to a local brownfield cleanup agreement for any phase of the remedial program shall be submitted in accordance with the schedule contained in an approved work plan, report or design document or any subsequent schedule agreed to and approved by the office.

2. Reports shall include, but not be limited to, all:

A. environmental or health data generated relative to the site;

B. information, other than in subparagraph A of this paragraph, obtained as part of the implementation of the work plan; and

C. assessments and evaluations required by the work plan.

3. Each final report, shall contain a certification by the person with primary responsibility for the day to day performance of the activities under the work plan. The certification shall:

A. be on such form as provided by the office;

B. be completed by a professional engineer, where such work involves engineering oversight or management, or by such other qualified environmental professional as the office may find acceptable, where work does not involve engineering oversight or management; and

C. certify that all activities were performed in full accordance with the approved work plan and any modifications approved by the office.

c. Remedial action report.

1. In accordance with the schedule contained in an approved remedial action work plan or an addendum to such remedial action work plan for detailed remedial design, a remedial action report shall be submitted that includes but is not limited to:

A. site boundaries;

B. a description of activities completed pursuant to the approved remedial action work plan or an addendum to such remedial action work plan for detailed remedial design;

C. a description of any institutional controls that will be used, including mechanisms to implement, maintain, monitor, and enforce such controls; and

D. a site management plan.

2. The remedial action report shall be prepared in accordance with all relevant statutes and regulations and upon consideration of applicable guidance.

3. The remedial action report shall be prepared and certified as provided in paragraph three of subdivision b of this section.

4. The remedial action report certification shall state that:

A. such party is, and at all pertinent times hereinafter mentioned was, a currently registered professional engineer or qualified environmental professional;

B. such party is the individual who had primary direct responsibility for the implementation of the subject remedial program;

C. all requirements of the remedial program have been complied with;

D. all engineering components of the remedial program have been certified by a professional engineer;

E. the data demonstrates that remediation requirements have been or will be achieved in accordance with time frames contained in the approved remedial program;

F. all activities described in this report have been performed in accordance with the remedial program and any subsequent changes as agreed to and approved by the office;

G. any use restrictions, any other institutional controls, any engineering controls and/or any site management plan requirements are contained in a duly recorded declaration of covenants and restrictions; and

H. any required financial assurance mechanisms required pursuant to section 43-1410(c) have been executed.

5. The office shall review the remedial action report, the submissions made in the course of the remedial program, and any other relevant information regarding the site and make a determination as to whether the goals of the remedial program have been or will be achieved in accordance with established time frames and whether all investigation and

remediation required by state or federal law to be supervised and/or approved by a state and/or federal agency have been completed.

6. Upon the office's approval of the remedial action report, the office shall issue a written certificate of completion and a clean property certification.

d. Review of work plans and reports.

1. The office shall approve, propose modifications to or reject a proposed work plan or report submitted pursuant to an agreement.

2. Approval. Upon the office's written approval of a work plan or report, such work plan or report shall:

A. be incorporated into and become an enforceable part of any agreement pertaining to the site's remedial program;

B. in the case of a:

i. work plan, be implemented in accordance with the schedule contained therein; or

ii. report, the approval shall initiate the next phase of the remedial program in accordance with the agreement; and

C. such work plan or report shall be placed by the enrollee in the site document repository.

3. Proposed modification. If the office requests that the enrollee modify a work plan or report or the office provides the enrollee with a modified work plan, the office shall provide the enrollee with the reasons for such requested modification in writing. Within fifteen days of such notice, the enrollee shall elect in writing to:

A. modify the work plan or report as requested by the office, or accept an office modified work plan or report, within thirty days of receipt of the notice;

B. invoke dispute resolution, pursuant to section 43-1405(a)(6); or

C. terminate the agreement, pursuant to section 43-1405(a)(10).

4. Rejection. If the office rejects a work plan or report, the office shall provide the enrollee with the reasons for such rejection in writing. Within fifteen days of that written notice, the enrollee shall elect in writing to:

A. modify the rejected work plan or report, within thirty days of receipt of the written notice;

B. invoke dispute resolution, pursuant to section 43-1405(a)(6); or

C. terminate the agreement, pursuant to section 43-1405(a)(10).

e. The office shall use its best efforts to approve, modify, or reject a proposed work plan within forty-five days from its receipt or within fifteen days of the close of the comment period for such work plan, whichever is later.

§ 43-1407 Remedial program

a. The remedial program shall be fully protective of public health and the environment including, but not limited to, soil, groundwater, drinking water, surface water, air (including indoor air), sensitive populations (including children), and ecological resources (including fish and wildlife).

1. Remedial actions shall be selected and the remedial action work plan shall be approved based upon consideration of the following:

A. A remedial program that achieves a permanent cleanup of a contaminated site is preferred over a remedial program that does not do so;

B. The selection of remedial actions shall take into account the current, intended, and reasonably anticipated future land uses of the site and its surroundings; and

C. The selection of remedial actions shall be consistent with the track-based approach and soil cleanup objectives defined in 6 New York codes, rules, and regulations (“NYCRR”) subpart 375-3. For cleanups performed pursuant to track four of that subpart, the enrollee shall demonstrate that the remedial action would be protective of public health and the environment. This demonstration shall be included in the alternatives analysis developed pursuant to subdivision i of this section; and

D. All remedial action work plans, shall be approved by the office and by the New York city department of health and mental hygiene.

2. To achieve stated goals, the remedial program may include, but is not limited to, the actions set forth in this paragraph.

A. A site may be divided into operable units.

B. Multiple work plans and reports may be approved for a site, pursuant to section 43-1406.

C. The remedial program shall address bulk storage tanks or containment vessels, source removal and control, and groundwater protection and control measures, pursuant to subdivisions b through d of this section.

D. Remedial actions selected for a site may consider the use of presumptive remedial actions that the office has determined to have been demonstrated to be feasible and to meet the remediation requirements.

E. Remedial actions selected for a site may consider the use of innovative technologies that are demonstrated to be feasible to meet the remediation requirements.

F. Where the remedial program for a site requires ongoing site management, the enrollee shall develop a site management plan for the site that shall include, as applicable for the remedial program, the following plans:

i. institutional and engineering control plan;

ii. monitoring plan;

iii. operation and maintenance plan; and

iv. reporting plan.

G. The remedial program at a site shall analyze the impact of contamination at a site on the following environmental media:

i. soil;

ii. groundwater;

iii. surface water and sediments;

iv. soil vapor;

v. ambient air; and

vi. biota.

H. Where an interim remedial measure is proposed at a site, such measure shall be conducted pursuant to a work plan approved by the office. Such work plan shall require the submission of a final report upon conclusion of the interim remedial measure.

b. Bulk storage tanks and containment vessels.

1. All known petroleum storage tanks on the site that are under the ownership or control of the enrollee shall be registered pursuant to section 43-1410(f).

2. All known chemical storage tanks on the site that are under the ownership or control of the enrollee shall be registered pursuant to section 43-1410(f).

3. All known petroleum or chemical storage tanks on the site that are under the ownership or control of the enrollee that are out-of-service shall be closed pursuant to section 43-1410(f).

4. Where any contaminant is found to be stored on the site in containment vessels other than storage tanks, such as drums, transformers, sumps, and pits, or where petroleum storage tanks or chemical storage tanks are discovered on site during the course of the remedial program and such tanks contain any contaminant, such contaminants shall be addressed pursuant to state and federal law and in programs designed for that purpose, or by the city under an agreement with a state or federal agency authorizing the city to supervise the investigation and remediation of such sites.

c. Source removal and control measures.

The following is the hierarchy of source removal and control measures that are to be used to remediate a site, ranked from most preferable to least preferable:

1. Removal and/or treatment. All sources, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid and/or grossly contaminated media shall be removed and/or treated; provided however, that if the removal and/or treatment of all such contamination is not feasible, such contamination shall be removed or treated to the greatest extent feasible.

2. Containment. Any source remaining following removal and or treatment pursuant to this subdivision shall be contained; provided however, that if full containment is not feasible, such source shall be contained to the greatest extent feasible.

3. Elimination of exposure. Exposure to any source remaining following removal, treatment and/or containment pursuant to this subdivision shall be eliminated through additional measures, including but not limited to, as applicable, the timely and sustained provision of alternative water supplies and the elimination of volatilization into buildings; provided however, that if such elimination is not feasible such exposure shall be eliminated to the greatest extent feasible.

4. Treatment of source at the point of exposure. Treatment of the exposure resulting from a source of environmental contamination at the point of exposure, including but not limited to, as applicable, wellhead treatment or the management of volatile contamination within buildings, shall be considered as a measure of last resort.

d. Groundwater protection and control measures.

1. On-site groundwater contamination. The remedial program shall consider the protection of groundwater and shall consider guidance issued by the New York state department of environmental conservation including, but not limited to, any groundwater remediation strategy issued pursuant to section 15-3109 of the environmental conservation law. The following are the measures to be considered:

A. source removal or control pursuant to subdivision c of this section.

B. groundwater quality restoration. Restoration of groundwater shall be evaluated to determine the feasibility of measures to restore groundwater quality to meet applicable standards and guidance.

C. plume containment/stabilization. All remedies shall, to the extent feasible, prevent the further migration of groundwater plumes, whether on-site or off-site; provided, however that a volunteer in the local brownfield cleanup program shall only be obligated to evaluate the feasibility of containing the plume on-site. The development of remedial alternatives pursuant to subdivision i of this section shall include an evaluation of feasible remedial alternatives that can achieve groundwater plume containment/stabilization.

2. Off-site source of groundwater contamination with no on-site source (or contribution).

A. On-site groundwater contamination may be attributed to an off-site source if the office determines that:

i. no act of the enrollee has contributed to the upgradient contamination, or caused such contamination to become worse;

ii. there is an off-site source of contamination, located on one or more upgradient locations, that has impacted on-site groundwater as a result of the migration of the contaminant in, or on, the groundwater; and

iii. there is not an on-site source(s) that may be causing or contributing more than inconsequential amounts to the groundwater contamination.

B. Where the office has determined that the criteria in subparagraph A of this paragraph have been satisfied, the enrollee shall:

i. have no remedial responsibilities with respect to such groundwater contamination migrating under the site;

ii. continue to satisfy the criteria in subparagraph A of this paragraph; and

iii. identify a remedy for the site that eliminates or mitigates, to the extent feasible, the on-site public health exposures caused by any off-site groundwater contamination entering the site.

3. Off-site source of groundwater contamination with an on-site source (or contribution):

A. On-site groundwater contamination may be attributed to both an on-site and an off-site source, if the office determines that:

i. there is an off-site source of contamination, located at one or more upgradient locations, that has impacted on-site groundwater as a result of the migration of the contaminant in, or on, the groundwater; and

ii. there is an on-site source(s) that may be contributing to the groundwater contamination.

B. Where the office has determined that the criteria in subparagraph A of this paragraph have been satisfied, the enrollee shall:

i. identify a remedy for the site that includes removal, containment or treatment of the on-site sources contributing to the groundwater contamination; and

ii. include in the remedy actions that eliminate or mitigate on-site public health exposures, to the extent feasible, resulting from any off-site contamination entering the site.

4. Groundwater protection decision-making shall consider the following factors pursuant to section 15-3109 of the environmental conservation law and any groundwater strategy issued pursuant to such section:

A. recognition that both short- and long-term remediation strategies may be necessary to address groundwater contamination;

B. criteria for the prioritization of long-term groundwater remediation activities to be performed shall include, but not be limited to:

i. the current or reasonably anticipated future use of contaminated groundwater as drinking water;

ii. the current or reasonably anticipated future use of a groundwater aquifer into which contaminated groundwater is flowing as drinking water;

iii. the current or reasonably anticipated future use of contaminated groundwater for non-potable purposes including, but not limited to, recreational uses, institutional uses and agricultural or non-agricultural irrigation;

iv. community needs;

v. feasibility of remediation; and

vi. protection of natural resources and minimization of the impairment of the resource; and

C. notwithstanding clauses i and ii of subparagraph B of this paragraph, while the current use of groundwater as drinking water may be considered, the absence of such use shall not exclude the need for remediation.

e. Scope of the investigation.

1. The goals of a remedial investigation include, but are not limited to, the following:

A. delineation of the areal and vertical extent of the contamination at, and emanating from, all media at the site and the nature of that contamination;

B. characterization of the surface and subsurface characteristics of the site, including topography, surface drainage, stratigraphy, depth to groundwater, and any aquifers that have been impacted or have the potential to be impacted;

C. identification of the sources of contamination, the migration pathways and actual or potential receptors of contaminants;

D. evaluation of actual and potential threats to public health and the environment; and

E. production of data of sufficient quantity and quality to support the necessity for, and the proposed extent of, remediation and to support the evaluation of proposed remedial alternatives.

2. Such investigation shall emphasize data collection, sampling and monitoring, as necessary, and shall include but not be limited to:

A. characterization of site geologic and hydrogeologic conditions, including groundwater flow, contaminant movement, and the characteristics of the groundwater system;

B. assessment of the existing and potential impact of groundwater contamination on New York city drinking water supply wells, surface water quality, air quality, and indoor air quality;

C. sampling and analysis necessary to gather sufficient information to evaluate human and environmental exposure pathways, as well as any actual or potential adverse effects due to site contamination; and

D. delineation of the nature and extent of contamination sufficient to determine the necessity for and the proposed extent of remediation, in order to support the development and evaluation of proposed alternatives in the remedy selection process.

3. Historical data may be submitted in lieu of collecting new data or to supplement new data, provided that the appropriate quality assurance requirements are met and that the data were collected in a manner consistent with appropriate sampling protocols. All information relevant to the ongoing work must be referenced in the investigation reports, including sampling protocols employed.

4. On-site contamination. Enrollees must fully investigate and characterize the nature and extent of contamination on the local brownfield site.

5. Off-site contamination. Responsibility for off-site contamination is determined by the enrollee's status as follows:

A. A volunteer shall perform a qualitative exposure assessment of the contamination that has migrated from the site in accordance with guidance provided by the office. This guidance shall be consistent with section 27-1415(2)(b) of the environmental conservation law and guidance of the New York state department of environmental conservation, division of environmental remediation. For sites being addressed by a volunteer, the volunteer has no obligation to implement a remedy to address an off-site exposure identified by this assessment.

B. A participant shall fully investigate and characterize the nature and extent of contamination that has migrated or emanated from the site to off-site locations.

6. The remedial investigation report must demonstrate whether conditions at the site without remediation meet the applicable unrestricted use soil cleanup objectives set forth in the table in 6 NYCRR section 375-6.8(a).

7. Where the applicable unrestricted use soil cleanup objectives set forth in the table in 6 NYCRR section 375-6.8(a) will not be achieved, any determination that the requirements of the brownfield cleanup program have been met without the need for remediation shall be supported by a remedial alternatives analysis.

f. Remedial action selection.

1. Remedial actions shall be selected upon consideration of these ten factors:

A. Overall protectiveness of the public health and the environment.

B. Standards, criteria and guidance. The remedial actions shall:

i. conform to standards and criteria that are generally applicable, consistently applied, and officially promulgated; that are directly applicable; or that are not directly applicable but are relevant and appropriate, unless good cause exists to dispense with conformity. Good cause exists if any of the following is present:

(a) the proposed action is only part of a complete program or project that will conform to such standard or criterion upon completion;

(b) conformity to such standard or criterion will result in greater risk to the public health or to the environment than alternatives;

(c) conformity to such standard or criterion is technically impracticable from an engineering or scientific perspective; or

(d) the program or project will attain a level of performance that is equivalent to that required by the standard or criterion through the use of another method or approach.

C. Long-term effectiveness and permanence: a program or project that achieves a complete and permanent cleanup of the site is preferred over a program or project that does not do so.

D. Reduction in toxicity, mobility or volume of contamination through treatment: a program or project that permanently and significantly reduces the toxicity, mobility or volume of contamination is to be preferred over a program or project that does not do so. The following is the hierarchy of technologies and factors to be considered in selecting a remedial action, ranked from the most preferable to the least preferable:

i. destruction of contamination, on-site or off-site;

ii. separation or treatment of contamination, on-site or off-site;

iii. solidification or chemical fixation of contamination, on-site or off-site; and

iv. control and isolation of contamination, on-site or off-site.

E. Short-term impacts and effectiveness.

F. Ability to be implemented.

G. Cost-effectiveness, including capital costs and annual site maintenance plan costs.

H. Community acceptance.

I. Land uses, provided that the office determines that there is reasonable certainty associated with such uses. In assessing reasonable certainty, the office shall consider:

i. the current, intended, and reasonably anticipated future land uses of the site and its surroundings in the selection of the remedy for soil remediation;

ii. the office's determination on the use of the site shall be in accordance with subdivision k of this section; and

iii. the reasonably anticipated future use of the site and its surroundings, which shall be documented in the analysis of alternatives, taking into consideration factors including, but not limited to, the following:

(a) current use and historical and/or recent development patterns;

(b) applicable zoning laws and maps;

(c) brownfield opportunity areas pursuant to section 970-r of the general municipal law;

(d) applicable comprehensive community master plans, local waterfront revitalization plans as provided for in article forty-two of the executive law, or any other applicable land use plan formally adopted by the city of New York;

(e) proximity to real property currently used for residential use, and to commercial, industrial, agricultural, and/or recreational areas;

(f) any written or oral comments on the proposed use that are submitted by members of the public through activities performed under the citizen participation plan pursuant to section 43-1409(c);

(g) environmental justice impacts, which for purposes of this section include the extent to which the proposed use may reasonably be expected to cause or increase a disproportionate burden on the community in which the site is located, including low-income minority communities, or to result in a disproportionate concentration of commercial or industrial uses in what has historically been a mixed use or residential community;

(h) federal or state land use designations;

(i) population growth patterns and projections;

(j) accessibility to existing infrastructure;

(k) proximity of the site to important cultural resources, including federal or state historic or heritage sites or Native American religious sites;

(l) natural resources, including proximity of the site to important federal, state or city natural resources, including waterways, wildlife refuges, wetlands, or critical habitats of endangered or threatened species;

(m) potential vulnerability of groundwater to contamination that might emanate from the site, including proximity to wellhead protection and groundwater recharge areas and other areas identified by the state's comprehensive groundwater remediation and protection program established in title thirty-one of article fifteen of the environmental conservation law;

(n) proximity to flood plains;

(o) geography and geology; and

(p) current institutional controls applicable to the site.

J. sustainability of the remedy.

2. Enrollees shall, based upon the characterization of the nature and extent of contamination on-site and qualitative exposure assessment, propose a remedy for the contamination present on the site and address further contaminant migration from the site.

3. Participants shall also, based upon the characterization of the nature and extent of contamination that has migrated from the site, propose a remedy which addresses the off-site contamination.

4. The office shall approve, a remedy for a site after consideration of an alternatives analysis, including an evaluation consistent with subdivision i of this section presented in a site specific remedial action work plan.

5. Selection of a remedial action. The enrollee may select the remedial action from an office-approved alternatives analysis.

g. Application of soil cleanup objectives.

1. General. The office may approve a remedial program that utilizes different tracks and soil cleanup objectives for different uses between different areas of a site, provided that such areas can be defined and described in the declaration of covenants and restrictions and that the necessary institutional and engineering controls can be effectively imposed,

implemented, operated, monitored and maintained in accordance with the office-approved site management plan.

2. Cleanup objectives for other media. The enrollee shall evaluate exposure to public health and the environment resulting from contamination in all other environmental media and shall propose cleanup objectives to eliminate or mitigate the exposure. The enrollee shall include any cleanup objectives approved by the office for other media in the alternatives analysis to ensure that the remedial program meets the requirements of this subdivision and subdivision i of this section.

h. Cleanup tracks. For sites or portions of sites where the office has determined that remediation is needed to meet the remedial program requirements, each remedial alternative that is developed and evaluated shall, in addition to all other requirements in this subdivision and subdivision i of this section, conform to the requirements of one of the following cleanup tracks defined below:

1. Track one: unrestricted use. The following provisions apply to a site, or portion thereof, being remediated pursuant to track one:

A. The remedial program shall achieve a cleanup level that will allow the site to be used for any purpose without any restrictions on the use of the site as described in paragraph one of subdivision k of this section.

B. The soil component of the remedial program shall achieve the unrestricted soil cleanup objectives pursuant to the table in 6 NYCRR section 375-6.8(a) for all soils above bedrock.

C. The remedial program shall not include the use of long-term institutional or engineering controls; provided, however, that a restriction on groundwater use may be included as a component of the remedial program if the enrollee:

i. is a volunteer; and

ii. has demonstrated to the office's satisfaction that there has been a bulk reduction in groundwater contamination to asymptotic levels.

D. The remedial program may include the short-term employment of institutional or engineering controls provided that:

- i. the remedial program includes an active treatment system, either ex-situ or in-situ, that will operate for, or require, no more than five years to meet the applicable contaminant-specific soil cleanup objectives or remedial goals established for contaminated media other than soils;
 - ii. the remedial program requires the institutional control to assure the operation and integrity of the remedy, as well as to address potential human health exposures during this period; and
 - iii. the remedial program includes a provision for the enrollee to implement an alternative remedy to meet the soil cleanup objectives in the event that the short-term institutional period is exceeded.
2. Track two: Restricted use with generic soil cleanup objectives. The following provisions apply to a site, or portion thereof, being remediated pursuant to track two:
- A. The remedial program may provide for the restriction of the use of the site as described in paragraph two of subdivision k of this section.
 - B. The soil component of the remedial program shall achieve the lowest of the three applicable contaminant-specific soil cleanup objectives for all soils above bedrock, as set forth in 6 NYCRR sections 375-6.4, 375-6.5 and 375-6.6, except as provided in subparagraph C below.
 - C. The requirement to achieve contaminant-specific soil cleanup objectives pursuant to the table in 6 NYCRR section 375-6.8(b) for all soils above bedrock shall not apply to soils at a depth greater than fifteen feet below ground surface, provided that:
 - i. the soils below fifteen feet do not represent a source of contamination;
 - ii. the declaration of covenants and restrictions for the site requires that any contaminated soils remaining at depth will be managed along with other site soils, pursuant to a site management plan;
 - iii. off-site groundwater affected by on-site contamination does not exceed standards; and
 - iv. on-site groundwater use is restricted.

D. The remedial program shall not use long-term institutional or engineering controls to achieve the restricted soil cleanup objectives. The use of short-term institutional or engineering controls is permitted, provided that:

i. the remedial program includes an active treatment system, either ex-situ or in-situ, that will operate for, or require, no more than five years to meet the applicable contaminant-specific soil cleanup objectives or remedial goals established;

ii. the remedial program requires the institutional control to assure the operation and integrity of the remedy, as well as to address potential human health exposures during this period; and

iii. the remedial program includes a provision for the enrollee to implement an alternative remedy to meet the soil cleanup objectives in the event that the short-term institutional period is exceeded.

E. The remedial program may include the use of long-term institutional or engineering controls to address contamination related to other media including, but not limited to, groundwater and soil vapor.

3. Track three: Restricted use with modified soil cleanup objectives. The remedial program for a site being remediated pursuant to track three shall satisfy the provisions for a track two remedial program; provided, however, that the office may approve the modification of one or more of the contaminant-specific soil cleanup objectives set forth in the table in 6 NYCRR section 375-6.8(b) based upon site-specific data. Any such modification shall be performed in accordance with 6 NYCRR section 375-6.9.

4. Track four: Restricted use with site-specific soil cleanup objectives. The following provisions apply to a site, or portion thereof, being remediated pursuant to track four:

A. In developing the site-specific soil cleanup objectives, the enrollee may, solely or in combination:

i. use the soil cleanup objectives, as set forth in 6 NYCRR subpart 375-6;

ii. develop or modify site specific soil cleanup objectives, as set forth at 6 NYCRR section 375-6.9; or

iii. propose site-specific soil cleanup objectives that are protective of public health and the environment.

B. The remedial program may include the use of long-term institutional or engineering controls to remediate all media.

C. Exposed surface soils in a track four remedy shall be remediated as follows:

i. for residential use:

(a) the top two feet of all exposed surface soils that exceed the site background values for contaminants of concern and that are not otherwise covered by the components of the development of the site (such as buildings or pavement) shall not exceed the applicable contaminant-specific soil cleanup objectives pursuant to subparagraph B of paragraph two of this subdivision; and

(b) where it is necessary to utilize off-site soil to achieve this requirement, the soil brought to the site shall satisfy the requirements of the office.

ii. for commercial use:

(a) the top one foot of all exposed surface soils that exceed the site background values for contaminants of concern and that are not otherwise covered by the components of the development of the site (such as buildings or pavement) shall not exceed the applicable contaminant-specific soil cleanup objectives pursuant to subparagraph B of paragraph two of this subdivision; and

(b) where it is necessary to utilize off-site soil to achieve this requirement, the soil brought to the site shall satisfy the requirements of 6 NYCRR section 375-6.7(d);

iii. for industrial use:

(a) the top one foot of all exposed surface soils that exceed the site background values for contaminants of concern and that are not otherwise covered by the components of the development of the site (such as buildings or pavement) shall not exceed the applicable contaminant-specific soil cleanup objectives pursuant to subparagraph B of paragraph two of this subdivision; and

(b) where it is necessary to utilize off-site soil to achieve this requirement, the soil brought to the site shall satisfy the requirements of 6 NYCRR section 375-6.7(d).

5. All tracks. For remedial programs under all tracks, the threat to public health and the environment resulting from contamination in environmental media other than soil shall be evaluated in the development of remedial alternatives and addressed in the alternatives analysis to ensure that the remedial program meets the requirements of this subchapter.

i. Alternatives analysis.

1. An alternatives analysis evaluates each remedial alternative developed for a local brownfield site, using the selection factors set forth in subdivision f of this section.

2. The enrollee shall prepare an alternatives analysis for each site, or operable unit of a site, unless:

A. The remedy proposed meets the requirements of track one, or

B. The office has approved the use of a presumptive remedy proposed from an office-approved list of presumptive remedies.

3. Contents of an alternatives analysis. Each alternatives analysis shall include, but is not limited to, the following:

A. A description of each alternative evaluated in the analysis. The enrollee shall develop and evaluate alternatives that address:

i. on-site contamination if the enrollee is a volunteer; or

ii. on-site and off-site contamination if the enrollee is a participant.

B. A discussion of how each alternative would achieve the requirements of the remedial program, including the track-specific requirements.

C. An analysis of each alternative against the remedy selection factors set forth in subdivision f of this section, followed by a comparison of this analysis to any other alternatives under consideration.

D. An evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed institutional or engineering controls set forth in subdivision l of this section.

E. If applicable, an evaluation of feasible remedial alternatives that can achieve groundwater plume stabilization in accordance with subdivision d of this section.

F. An identification of the alternative preferred by the enrollee.

G. A summary of the proposed remedy and basis for concluding that the proposed remedy represents the best alternative among those considered.

H. Any other information as required by the office.

4. Alternatives to be evaluated. The enrollee shall develop the alternatives analysis in consultation with the office.

5. Plume stabilization. In developing remedies for a site where plume stabilization is a necessary component of the remedy, in accordance with subparagraph C of paragraph one of subdivision d of this section, and where such plume is emanating from an on-site source,

A. A participant shall address, to the extent feasible, the on-site and off-site plume. This requirement includes such actions to maintain and monitor any stabilization of the plume.

B. A volunteer shall address, to the extent feasible, the on-site plume and prevent or mitigate the further migration of any plume off-site at the site boundary. This requirement includes actions to maintain and monitor any stabilization of the plume.

j. Remedial action work plan.

1. The office shall issue a decision document establishing the remedy for a site. The remedial action work plan shall implement the decision document.

2. The remedial action work plan shall provide for the development and implementation of the remedial program for:

A. on-site contamination if the enrollee is a volunteer; or

B. on-site and off-site contamination if the enrollee is a participant.

3. A remedial action work plan shall include at a minimum:

A. a summary of the site history and the nature and extent of contamination;

B. remedial action objectives;

C. a summary of the current, intended, and reasonably anticipated future uses of the site;

D. identification of the cleanup track to be used for remediation of the site as provided in subdivision h of this section;

E. identification and evaluation of any and all institutional or engineering controls to be employed as part of the site remedy as required pursuant to subdivision l of this section, if applicable, and subparagraph D of paragraph three of subdivision i of this section;

F. an alternatives analysis as set forth in subdivision i of this section; and

G. any other information as required by the office.

4. A remedial action work plan shall serve as the remedial design document for a site and shall:

A. be certified by a qualified environmental professional or a registered professional engineer, except that it shall be certified by a registered professional engineer for all engineering design and construction components;

B. include, but not be limited to, the following:

i. plans and specifications sufficient to construct the remedy;

ii. a site health and safety plan;

iii. a community air monitoring plan and community protection statement;

iv. quality assurance and quality controls plans for sampling, analysis, and construction; and

v. where required by the office, a sustainability statement.

C. include a program design for site management, if the remedy includes any institutional or engineering controls.

k. Use of a site. A site or a portion of a site may be used for either unrestricted or restricted use.

1. "Unrestricted use" means a use without imposed restrictions, such as a declaration of covenants and restrictions or other land use controls; or

2. "Restricted use" means a use with imposed restrictions, such as a declaration of covenants and restrictions. The imposed restrictions are part of the remedy selected for

the site and are stipulated in a site management plan. The imposed restrictions rely on institutional controls or engineering controls to manage remaining exposure to contamination at a site. Restricted uses include:

A. "Residential use" is the land use category that allows a site to be used for any use other than raising livestock or producing animal products for human consumption. Restrictions on the use of groundwater are allowed, but no other institutional or engineering controls are allowed with respect to the residential use soil cleanup objectives. When considering the applicability of this land use category, the office shall consider the ability to implement the proposed site management plan and its implementation program, including the need for common ownership of the site in order to implement the site management plan.

B. "Restricted-residential use" is the land use category that shall only be considered when there is common ownership or a single owner/managing entity of the site. When considering the applicability of this land use category, the office shall consider the ability to implement the proposed site management plan and its implementation program.
Restricted-residential use:

i. shall, at a minimum, include restrictions that prohibit:

(a) any vegetable gardens on a site, although community vegetable gardens may be considered with office approval; and

(b) single family housing.

ii. includes active recreational uses, which are public uses with a reasonable potential for soil contact.

C. "Commercial use" is the land use category that shall only be considered for the primary purpose of buying, selling or trading of merchandise or services at street grade or below street grade. Commercial use includes passive recreational uses, which are public uses with limited potential for soil contact.

D. "Industrial use," also known as manufacturing use, is the land use category that shall only be considered for the primary purpose of manufacturing, production, fabrication or assembly processes and ancillary services. Industrial use does not include any recreational component.

3. The office may approve a remedial program that relies upon no restrictions on use (unrestricted use) or on a range of restrictions on use (restricted uses). The following hierarchy represents the range from a less restrictive to a more restrictive land use:

A. residential;

B. restricted-residential;

C. commercial; and

D. industrial.

4. The office's determination of the allowable use of a site as part of a remedial program:

A. is not a determination by the office relative to a specific future use;

B. shall be the least restrictive use of the site, as set forth in paragraph three of this subdivision, allowed by such remedial program and permits more restrictive uses to occur on the site (for example, a site cleanup to a commercial use would also be protective of industrial use); and

C. may disregard the enrollee's proposed use and approve a remedy upon a use that is consistent with existing zoning laws or maps.

5. The office shall not approve a proposed remedial program when the proposed use of the site does not conform with applicable zoning laws or maps or the reasonably anticipated future use of the site as determined by the office, unless:

A. the proposed use is based on a cleanup level that would allow a less restrictive use of the site than would be allowed based upon current zoning laws or maps (for example, the office may approve a cleanup to residential levels for a property which is zoned for commercial use); or

B. it can be shown to the office's satisfaction that zoning changes are or will be sought, in which event the office shall conditionally approve the remedy but shall not issue a certificate of completion for such use until such use is consistent with existing zoning laws or maps. In this instance, a certificate of completion may be issued for a more restrictive use consistent with the zoning, and reissued by the office for the less restrictive use once it is consistent with the zoning.

6. For purposes of determining the appropriate land use category, the office shall consider the nature of the uses and the activities that are occurring, or may occur, at the site:

A. on the ground level and below ground level of any structure; or

B. on the surrounding land.

1. Institutional controls, engineering controls and restrictive declarations.

1. Institutional and engineering controls. Institutional and/or engineering controls may be included in a remedial action work plan provided that they are evaluated in the alternatives analysis. A remedy that includes institutional controls and/or engineering controls shall include the following:

A. a complete description of any use restrictions and/or any other institutional controls, their role in achieving the remedial objectives of the remedy and the mechanisms that will be used to implement, maintain, monitor, report, and enforce such restrictions and controls;

B. a complete description of any engineering controls and any site management plan requirements, including the mechanisms that will be used to continually implement, maintain, monitor, report, and enforce such controls and requirements;

C. an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, reporting, and enforcement of any proposed institutional or engineering controls and an analysis of the costs of implementing, maintaining, monitoring, reporting, and enforcing such controls, including costs that may be borne by the state or city;

D. an analysis sufficient to support a conclusion that effective implementation, maintenance, monitoring, reporting, funding and enforcement of institutional and/or engineering controls can be reasonably expected;

E. where required by the office, financial assurance, in accordance with section 43-1410(c), to ensure the long term implementation, maintenance, monitoring, reporting, and enforcement of any such controls; and

F. any engineering control must be used in conjunction with institutional controls to ensure the continued integrity of such engineering control.

2. Declaration of covenants and restrictions.

A. Any use restrictions, any other institutional controls, any engineering controls and/or any site management requirements applicable to the local brownfield site shall be contained in a declaration of covenants and restrictions, which shall be:

i. created and recorded, prior to the issuance of the certificate of completion by the office, in the recording office for the borough(s) where any portion of the site is located; and

ii. in a form and manner as prescribed by the director.

B. The office shall notify the department of buildings and other relevant agencies of the declaration of covenants and restrictions.

C. Agents, employees or other representatives of the city may enter and inspect the property restricted by a declaration of covenants and restrictions with reasonable prior notice to the property owner, to assure compliance with the restrictions identified by the declaration of covenants and restrictions.

3. Institutional control/engineering control certification.

A. The enrollee or owner at a site at which institutional or engineering controls are employed as part of a remedy, shall annually submit, unless an alternate certification period is provided in writing by the office, a written certification:

i. by a professional engineer, or by such other qualified environmental professional as the office may find acceptable; or

ii. where the only control is an institutional control on the use of the property, the written certification may be made by the property owner.

B. The certification shall be included in a report summarizing the site management effort for the certification period, in such form and manner as the office may require, and shall certify that:

i. the inspection of the site to confirm the effectiveness of the institutional and engineering controls required by the remedial program was performed under the direction of the party making the certification;

ii. the institutional controls and/or engineering controls employed at such site:

(a) are in-place; and

(b) are in the office-approved format.

iii. nothing has occurred that would impair the ability of such controls to protect the public health and environment;

iv. the enrollee or owner will continue to allow access to such real property to representatives of the office to evaluate the continued maintenance of such controls;

v. nothing has occurred that would constitute a violation or failure to comply with any site management plan for such controls;

vi. the report and all attachments were prepared under the direction of, and reviewed by, the party making the certification;

vii. to the best of his/her knowledge and belief, the work and conclusions described in the certification are in accordance with the requirements of the site remedial program, and generally accepted science and engineering practices; and

viii. the information presented is accurate and complete.

C. Where contaminants in groundwater at the site boundary contravene drinking water standards, the institutional and engineering control certification shall:

i. certify that no new information has come to the enrollee's or owner's attention, including groundwater monitoring data from wells located at the site boundary, if any, to indicate that the assumptions made in the qualitative exposure assessment of off-site contamination are no longer valid; and

ii. certify every five years that the assumptions made in the qualitative exposure assessment remain valid.

D. Only one institutional control/engineering control certification shall be filed per site. If a site is comprised of multiple properties or parcels, the enrollee or owner shall arrange to file one consolidated certification.

E. In the event that the certification cannot be provided due to a failure of one or more of the institutional or engineering controls, the enrollee or owner shall provide the office:

i. timely notification explaining the cause for such failure;

ii. a work plan to implement the corrective measures necessary in order to be able to provide the certification; and

iii. a schedule for those corrective measures.

F. In addition to the periodic reporting requirement, the enrollee or owner shall timely notify the office of any failure of one or more of the institutional or engineering controls and shall provide a work plan to remedy any failure of the institutional or engineering control.

G. The office shall review the work plan referenced in subparagraphs E and F of this paragraph as provided in section 43-1406(c)(5) and the enrollee or owner shall implement the corrective measures in accordance with the approved work plan. The enrollee or owner shall submit a certification, meeting the requirements of clause ii of subparagraph E of this paragraph upon completion of the corrective measures.

§ 43-1408 Certificate of completion

a. The office shall issue a certificate of completion upon its approval of the remedial action report.

1. Prior to issuance of a certificate of completion, the enrollee shall certify that all investigation and remediation required by state or federal law to be supervised and/or approved by a state and/or federal agency have been completed and appropriately documented in a remedial action report.

2. The date of the approval of the remedial action report by the office shall be the issuance date for the certificate of completion.

b. The office shall issue the certificate of completion to the enrollee.

c. A certificate of completion shall include all of the following:

1. An acknowledgment that the requirements of the remedial program were satisfied or are expected to be satisfied in accordance with the time-frames contained in the approved remedial program;

2. A description of the site by borough, block and lot, by adequate legal description, by reference to a plate showing the boundaries, or by other means sufficient to identify the site location with particularity;

3. A prohibition against the use of the site in a manner inconsistent with any land use limitation imposed as a result of the remediation efforts without additional appropriate remedial activities;

4. A statement as to no further action by the city, pursuant to subdivision e of this section.

5. A recommendation that no other governmental entity take or require any investigatory or remedial action against the site and the enrollee, his or her successors, and his or her assigns, regarding the contamination addressed at the site.

6. A description of any engineering and institutional controls or site management activities required by the approved work plan and a notification that failure to manage the controls or complete site management activities in compliance with the terms of the remedial program and the covenants and restrictions for the site, may result in the office requiring additional investigation and/or remediation and the city department of buildings withholding any permits for the site for activities that would interfere with the engineering and institutional controls or the site management plan.

d. Recording of the certificate of completion.

1. Within sixty days of issuance, the enrollee shall record the notice of the certificate of completion in the recording office for the borough(s) where any portion of the site is located.

2. The notice of the certificate of completion shall be deemed recorded when it is delivered to the recording officer.

3. The enrollee shall submit to the office proof of such recording within thirty days after recording, or within thirty days after the enrollee's receipt of such proof of filing from the recording office, whichever is later.

e. No further action by the city.

1. Subsequent to the issuance of a certificate of completion, subject to the provisions of section 24-906 of the administrative code and except as provided in the agreement, the

remedial action work plan, site management plan, declaration of covenants and restrictions, or certificate of completion, the city shall not take or require any further investigatory or remedial action against the site and the enrollee, his or her successors, and his or her assigns, regarding matters addressed at the site. If the office seeks to exercise its rights reserved pursuant to section 24-906(b) of the administrative code, it shall provide notice to the certificate holder, as provided in paragraph two of subdivision f of this section.

2. "Matters addressed" at the site shall mean all response actions taken by the enrollee to implement the agreement for the site and all response costs incurred and to be incurred by any person or party in connection with the work performed under such agreement, which costs have been paid by the enrollee, including fees for costs incurred by the city pursuant to the agreement.

3. To the extent authorized under 42 USC section 9613(f)(3)(B), following the award of a certification of completion, the enrollee is entitled to seek contribution for matters addressed from any person except those who are entitled to contribution protection pursuant to 42 USC section 9613(f)(2) or, if applicable, section 27-1421 of the environmental conservation law.

f. Modification or revocation of a certificate of completion.

1. The office may modify or revoke a certificate of completion upon a finding that:

A. the enrollee has failed to manage the controls or monitoring in full compliance with the terms of the remedial program pursuant to paragraph six of subdivision c of this section;

B. the enrollee has failed to comply with the terms and conditions of the agreement executed by the office;

C. the enrollee misrepresented a material fact tending to demonstrate that the cleanup levels were reached;

D. the enrollee violated the terms and conditions of the declaration of covenants and restrictions; or

E. good cause exists.

2. If the office seeks to modify or vacate a certificate of completion, it shall provide notice to the certificate holder by certified mail specifying the basis for the office's proposed action and facts in support of that action.

3. The certificate holder shall have thirty days after the effective date of the notice to cure the deficiency or seek a hearing. The effective date of the notice shall be two business days after the office mails the modification or revocation by certified mail. If the certificate holder or current title owner does not cure the deficiency or seek a hearing within such thirty day period, the certificate of completion shall be modified or vacated on the thirty-first day.

g. Transfer of a certificate of completion. A certificate of completion may be transferred to successors and assigns of the parties named in the certificate.

1. The office shall be provided:

A. Advance notice of the transfer of a certificate of completion, pursuant to section 43-1410(d); and

B. A written notice of transfer, filed within thirty days of the transfer on an office-approved form, in accordance with the filing requirements of the original certificate set forth in subdivision d of this section.

2. Upon filing of the notice, the certificate of completion shall be deemed issued to the successor or assign. Any party to whom a certificate of completion is transferred shall be responsible for the operation and maintenance of any required engineering controls and compliance with all required institutional controls, in accordance with the approved site management plan and declaration of covenants and restrictions.

§ 43-1409 Citizen Participation

a. To facilitate the remedial process and enable citizens to participate more fully in decisions that affect their health, the office shall require applicants and enrollees to provide opportunities for citizen involvement in the development and implementation of a remedial program and shall encourage applicants and enrollees to consult with the public prior to the office adopting final determinations. The primary goal of the citizen participation program is to facilitate communication between the office and enrollees and

the individuals, groups, and organizations that have expressed interest in or are affected by a site, its remedial program or the decision-making process associated with the remediation of a site.

b. All remedial programs shall include a citizen participation program that, at a minimum, shall include, the preparation of a citizen participation plan, establishment of a document repository and a site contact list, and public notice with a prescribed comment period at select milestones.

c. The design of any citizen participation plan, including the level of citizen involvement and the tools utilized, shall take into account the scope and scale of the proposed remedial program, local interest and history, and other relevant factors. Citizen participation plans shall embody the following principles of meaningful citizen participation:

1. Opportunities for citizen involvement shall be provided as early as possible in the decision-making process prior to the selection of a preferred course of action by the office and/or the enrollee;

2. Activities proposed in such plan shall be as reflective as possible of the diversity of interests and perspectives found within the community and shall allow members of the public the opportunity to have their views heard and considered, including, where possible, opportunities for dialogue; and

3. The office and the enrollee shall provide full, timely, and accessible disclosure and sharing of reports, including technical data and the assumptions upon which any analyses are based.

d. Upon application to the local brownfield cleanup program, an applicant shall submit a citizen participation plan to the office that shall include at a minimum the following elements:

1. A site contact list that shall include, but not be limited to, the borough president and council member representing the area in which the local brownfield site is located; the community board for the district in which the local brownfield site is located; any residents living on the site, including tenants and renters; adjacent property owners and residents; the administrator of any school or day care facility located on or near the site; brownfield opportunity area community based organizations and other appropriate community based groups that request to be placed on the list or that are identified by the

office based on the office's best efforts, including through consultation with community boards; and any person who has requested to be placed on the list. If the site is within two blocks of another community board district(s), the additional community board(s) shall be added to the site contact list.

2. The name and address of a document depository and evidence that the depository has agreed to serve as a repository for the remedial project;

3. Overview of the site's history and contamination issues;

4. Identification of major issues of potential concern to the public related to the site and a description of any mitigation planned to address the issues, if appropriate;

5. A description and schedule of the major elements of the site's remedial program;

6. A description and schedule of citizen participation activities conducted or planned relating to the site; and

7. A description of any additional citizen participation activities needed to address public concerns.

e. All citizen participation plans shall be subject to office review and approval. The citizen participation plan shall be updated, as required by the office, during the implementation of the remedial program.

f. Document repository. The enrollee shall establish a document repository at a location accessible to citizens where they can review the remedial program documents.

1. Documents shall be placed in the repository that are:

A. approved by the office as set forth in section 43-1406(d); or

B. otherwise designated by the office for inclusion.

2. An enrollee shall ensure that the repository contains all appropriate documents and shall inspect the repository at each citizen participation milestone listed in subdivision g of this section to ensure the repository contains complete and current project information.

3. The office may allow for a digital document repository to serve as the primary document repository, subject to feedback from the community.

g. Public notice and public comment.

1. In addition to distributing a notice of application as required by section 43-1404(c), public notice, in the form of a fact sheet, and public comment activities are required for each site in the local brownfield cleanup program at the following milestones:

A. Upon the availability of a remedial investigation work plan, if such plan is developed following enrollment into the program. The enrollee shall distribute to the site contact list public notice, in the form of a fact sheet summarizing the contents of the work plan, noting the initiation of a thirty-day comment period, and identifying the location of the repository where the document can be reviewed. The office shall not approve the remedial investigation work plan until the public comment period has ended.

B. Upon the availability of a remedial investigation report and remedial action work plan. The enrollee shall distribute to the site contact list public notice, in the form of a fact sheet, summarizing the contents of the remedial investigation report and remedial action work plan, noting the initiation of a thirty-day comment period, and identifying the location of the repository where the documents can be reviewed. The office shall extend the public comment period to forty-five days upon public request and conduct a public meeting upon public request. The office shall not approve the remedial action work plan until the public comment period has ended.

C. At the start of remediation. The enrollee shall distribute to the site contact list a public notice announcing the start of remediation.

D. Upon the issuance of a certificate of completion. The enrollee shall distribute to the site contact list a fact sheet announcing the completion of remediation and identifying all institutional and/or engineering controls.

2. Public notices and fact sheets

A. Unless otherwise determined by the office, all notices and fact sheets for the required milestones and any additional notices and fact sheets required by the office shall be prepared by the enrollee and approved by the office prior to issuance.

B. Office-approved notices and fact sheets shall be distributed by the enrollee to all parties on the site contact list. No other information may be distributed with the notices and fact sheets.

C. Within five days of distributing such notices and fact sheets, the enrollee shall provide proof of compliance with the notice requirements on a form approved by the office.

D. All notices, fact sheets, and project documents shall be included in the document repository.

3. Where the site or adjacent real property contains multiple dwelling units, the enrollee may propose an alternative method, consistent with the citizen participation goals set forth in subdivision a of this section, for providing notice in lieu of mailing to each individual.

h. Comment period extensions.

1. The office shall consider a request to extend a comment period provided such request is received within five days prior to the end of the comment period.

2. Extensions shall not be greater than thirty days. One automatic extension of fifteen days shall be provided for remedial action work plans upon request.

3. Additional notice is not required upon granting an extension.

i. Interim remedial measures. For interim remedial measures, the office shall not require citizen participation activities unless the scope of the interim remedial measure is likely to represent the remedy or a significant portion of the remedy, in which case the office shall require a thirty-day comment period.

§ 43-1410 Miscellaneous

a. Submissions to the office. Applicants and enrollees shall submit all work plans and reports, including all attachments, appendices, and certifications in an electronic format acceptable to the office. The office may request a printed copy. The office reserves the right to require submission of large figures and drawings on paper.

b. City environmental quality review act applicability.

1. Remedy selection and implementation of remedial actions under office-approved work plans pursuant to chapter nine of title twenty-four of the administrative code are not subject to review pursuant to article eight of the environmental conservation law, provided that design and implementation of the remedy do not:

A. commit the office or any other agency to specific future uses or actions; and

B. prevent evaluation of a reasonable range of alternative future uses of or actions on the local brownfield site.

2. In the event that the use of the site, as set forth in the remedy selection document for the site, changes during the implementation of the remedial program, the office may make a new determination of whether such remedial action remains protective of public health and the environment and, if the office makes such a determination, it shall require that the remedial action be modified to be protective of public health and the environment.

c. Financial assurance.

1. Applicability. The office may require, as a condition of accepting any institutional or engineering controls, that the enrollee post financial assurance to ensure the long term implementation, maintenance, monitoring, reporting, and enforcement of any such controls. In considering whether to require financial assurances, the office shall consider factors including, but not limited to:

A. whether one or more innovative technologies have been employed at the site;

B. the length of time to implement the remedial program;

C. the cost of the remedial program;

D. the complexity of the remedial program; and

E. the financial resources available to the enrollee.

2. Financial assurance required under this subdivision shall be in effect and on file with the office before any certificate of completion is issued. Allowable financial assurance mechanisms include:

A. trust funds;

B. surety bond guaranteeing payments;

C. letters of credit;

D. insurance; or

E. documentation of a financial capability test, as set forth in of 6 NYCRR section 373-2.8(d)(5).

3. Preparation of estimated amount of financial assurance. If the office requires posting of financial assurance as a condition of accepting institutional or engineering controls, the enrollee shall provide an estimated amount of financial assurance for the office's consideration. The enrollee shall be responsible for having a professional engineer or other qualified environmental professional prepare the estimate, and, in the event the financial assurance is being provided through environmental insurance, for having an independent insurance professional provide a certification that such policy meets the requirements of this subdivision. The estimate shall include an itemized listing of each cost and how the cost was calculated, including the cost of contracting with a third party.

4. Office review of estimated amount of financial assurance. Upon receipt of the financial assurance estimate, the office shall review the estimate and shall assess the basis for the type and extent of impacts used in calculations, and whether the estimated amount is sufficient. The office may accept, modify, or reject the financial assurance estimate.

5. Submittal of financial assurance. After approval of the financial assurance amount and prior to the office's issuance of a certificate of completion, the enrollee shall submit an originally-signed financial assurance mechanism to the office. The mechanism shall be in effect when submitted. An enrollee may satisfy this requirement by establishing one or more financial assurance mechanisms. If multiple financial assurances are used, the enrollee shall specify at least one such assurance as "primary" coverage and shall specify the other assurance as "excess." Additionally, an enrollee with obligations for providing financial assurances for multiple sites may combine the required financial assurances for all sites into one or more financial assurance mechanisms.

6. Adjustment of amount of financial assurance. The dollar amount of financial assurance shall be reviewed at least once every five years. During the review, the office may adjust the amount for inflation based on the United States consumer price index. In addition, the enrollee may request at any time that the amount of financial assurance be adjusted based on factors occurring since the posting of the existing financial assurance. The enrollee shall describe in writing the basis for the adjustment request.

7. Release of financial assurance. The office may release the financial assurance or a portion of the financial assurance, and in doing so shall:

A. notify the enrollee in writing of any release or modification;

B. modify the financial assurance requirement to reflect the release or modification of the financial assurance required; and

C. return to the enrollee such released financial assurance, if applicable, with the notice.

8. Substitution of financial assurance. If the enrollee requests substitution of one type of financial assurance for another, the enrollee shall submit to the office a proposal for alternate financial assurance. The alternate financial assurance must be as secure or more secure than the existing financial assurance as determined by the office. Upon approval and receipt of the alternate financial assurance by the office, the office shall release the existing financial assurance and the office shall notify the enrollee in writing.

d. Change of use.

1. A person or entity proposing to make a change of use, except for a transfer of title to a local brownfield site that results in a change in the party implementing a site management plan, shall provide written notification to the office at least sixty days before the proposed change of use.

2. The notice shall advise the office of the proposed change, including, but not limited to, explaining how such change may affect the site's proposed, ongoing, or completed remedial program.

3. Where a change in use arises from a transfer of title to a local brownfield site that results in a new party implementing a site management plan, such notice shall be included in the next annual certification and site management report to the office, pursuant to section 43-1407(1)(3). The notice shall include:

A. The name of the new owner and the new owner's contact information, including a contact representative and the contact information for such representative; and

B. A certification that the new owner has been provided a copy of the local brownfield cleanup agreement and a copy of all approved remedial work plans and reports.

4. The office reserves the right to prohibit a change in use for cause.

e. Effective date of submissions and notices.

1. Unless otherwise provided, the effective date of submissions and notices required under this subchapter shall be the date of receipt.

2. The date of receipt of any writing or notice by the office to the enrollee shall be:

A. If served by hand, the date delivered to the enrollee or its designated representative.

B. If mailed, five days after the mailing.

3. The date of receipt of any submission to the office by the enrollee shall be:

A. If served by hand, the date delivered to the office at 253 Broadway, 14th Floor, New York, New York, 10007.

B. If mailed, five days after the mailing.

f. In the course of implementing a remedial program, if any storage tank(s) subject to regulation under 6 NYCRR parts 596 through 599 or 612 through 614 is discovered and found not to be registered or not to be operated in accordance with the applicable regulatory requirements, such tank(s) shall be registered and either closed in accordance with regulatory requirements or brought into compliance with the applicable regulatory requirements.

§ 2. If any provision of this rule or its application to any particular person or circumstance is held invalid, the remainder of this rule and its application to other persons and circumstances shall not be affected thereby.

STATEMENT OF BASIS AND PURPOSE

Local Law No. 27 of 2009 amended the New York City Charter to create an Office of Environmental Remediation, led by a director. The office oversees all aspects of the city's brownfield policies and administers the E-designation program, as defined in the zoning resolution.

Local Law No. 27 also amended the Administrative Code of the City of New York to add Chapter 9 of Title 24, the Local Brownfield Cleanup Program. Sections

15(e) of the New York City Charter and 24-903 of the Administrative Code require the director to develop and administer the Local Brownfield Cleanup Program and to promulgate rules to effectuate the program. Accordingly, the Office of Environmental Remediation proposes to promulgate the following rules to implement the Local Brownfield Cleanup Program.

The proposed rules are modeled after the rules governing the New York State Brownfield Cleanup Program, in order to ensure effective procedures, strong protections for the public health and the environment, and extensive citizen participation.

Properties with light to moderate levels of contamination that qualify as local brownfield sites would be eligible for the local program. Certain properties would be eligible if a state or federal agency expressly authorizes their participation. Significant threat sites, Class 1 and Class 2 state inactive hazardous waste sites, and National Priority List sites are excluded from the city program.

The proposed rules set forth the application requirements. The Office of Environmental Remediation encourages applicants to enter the local program after a site has been thoroughly characterized with a remedial investigation report and remedial action work plan. To be admitted into the local program, applicants must execute a local brownfield cleanup agreement.

The proposed rules require extensive engagement with the public beginning in the application phase. For example, each enrollee must develop a citizen participation plan, establish a document repository, and provide public notice and an opportunity for public comment at select project milestones.

Enrollees must meet requirements for all work plans and reports submitted to the Office for review and approval, including certification of each final report by a professional engineer or by a qualified environmental professional.

The proposed rules detail the requirements of the Office's remedial program. All remedies must be fully protective of public health and the environment and be approved by the Office and the New York City Department of Health and Mental Hygiene. All remedies must demonstrate compliance with the New York State Department of Environmental Conservation's soil cleanup objectives and track-based approach to remedies.

The Office would issue a certificate of completion to an enrollee upon the Office's determination that a site's remedy, documented in a remedial action report, has been successfully implemented.