New York State Bar Association
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Comments on the New York State Department of Environmental Conservation Regulation of Solid Waste Handling Under 6 NYCRR Part 360

ENVIRONMENTAL LAW SECTION
COMMITTEE ON SOLID WASTE

Environmental #3 September 13, 2016

The Environmental Section of the New York State Bar Association is submitting this comment letter regarding the proposed revisions ("Proposed Regulation" or "Proposed Rule") to the regulation of solid waste handling under 6 NYCRR Part 360, published on March 16, 2016. These new rules propose a dramatic reconfiguration of the regime surrounding landfills, recycling facilities, and beneficial reuse of waste products, a regime that has remained largely unchanged since the mid-1980s. While the Section recognizes the significant need for reexamining the regulatory regime and welcomes the opportunity to assist with the development of these new rules, we feel that there are a number of elements to the rules as proposed that create duplicative and unworkable regulatory regimes that may, in fact, further exacerbate the problems under the current incarnation of Part 360.

1) General Comments

Need for a Redline:

The proposed regulations effectively replace the former Part 360. However, there is no "redlining" of the changes. Parties' comments would be more effective if DEC provided a document which explains how the Department intends each section to differ from the prior regulations. This would make the proposed regulations more accessible, improving the quality of comments and resulting in a more reflective final rule.

The City of New York:

Department of Sanitation of the City of New York extensively regulates the storage, management, transport, and disposal of solid waste and recyclables within the City of New York. Several of the regulations, discussed in more detail below, duplicate or conflict with the City's regulatory requirements, or fail to recognize the different land use constraints that apply in New York City as opposed to more suburban or rural parts of New York State. The Department should consider giving DSNY regulations primacy in certain instances (discussed below) by making those particular proposed sections inapplicable in Cities with a population greater than 1 million.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Undefined Discretion:

The proposed regulations include several sections which give DEC unbridled discretion when making determinations while providing the regulated entity with little or no guidance of the standard to be applied, For example, Section 360.12(c)(3)(i) states that ground granulated blast furnace slag is a pre-determined BUD when used as a raw feed in the manufacture of cement and concrete in accordance with "specifications acceptable to the department." Sections 360.8(a), 360.12(c)(3)(v), 360.12(d)(2)(v), 360.12(e)(2)(i)(b), 360.19(d)(8), and 360.22(a) use the same vague language for everything from BUDs to financial assurance. For each of these instances, the proposed regulations do not explain what standard would be "acceptable to the department." Without regulatory standards, the regulated community does not know what to include or expect when making a submission and Department staff have inadequate guidance and constraints in decision making. DEC must set out specific standards which explain what specifications will be "acceptable to the department," rather than the black box criteria set forth in the current draft.

2) Definitions

Section 360.2(a): Missing Definition:

The proposed regulations do not define the term "disposal," even though it appears in the proposed regulations at least 40 times. For example, section 360.12(a)(1) states "this section also does not apply to waste used in a manner that constitutes 'disposal.'" Only two definitions in the proposed regulations hint at what disposal means, and both are too broad. The definition of solid waste suggests that disposal means "discharge, deposit, injection, dumping, spilling, leaking or placement into any land or water so that the material or any constituent thereof may enter the environment or be emitted into the air or discharged into the groundwater or surface water." This definition more closely corresponds to the CERCLA definition of a "release," which lacks the intent or purpose element that "disposal" should contain. In contrast, the definition of "disposal facility" implies that "disposal" means "intentionally placed and intended to remain." 360.2(b)(85).

> Proposed change: The term "disposal" means the intentional discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Section 360.2(a)(1):

This section states “Solid waste or waste means, except as described in paragraph (4) of this subdivision…” The exceptions to solid waste are codified in section 360.2(a)(3), not (4).

Section 360.2(a)(3):

This section exempts certain "materials that are intended for reuse for their original function, without processing..." If a material has commercial value, and can be reused without processing, the regulations should exempt it from the definition of solid waste whether or not that reuse is for the original function.

> Recommended Change: (i) materials that are intended for reuse for their original function, or that have commercial value and can be reused, without processing...

Section 360.2(b)(281)(i)

This section defines “uncontaminated,” in part, as “not commingled with, and not containing, (i) other waste.” This definition is unworkable. For example, concrete debris may have paint on it, and these regulations do not make clear whether or not the concrete is “commingled” with the paint as “other waste”. This definition should be narrowed and/or a de minimis exemption provided.

> Recommended Changes:
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> (281) *Uncontaminated* means not commingled with, and not containing, (i) petroleum and petroleum products, except those present solely as a result of normal use of vehicles on roadways or parking areas; (ii) pesticides except those present solely as a result of the proper application in normal agricultural or horticultural practices, and (iii) hazardous waste. De minimis amounts of other waste do not preclude solid waste from classification as “uncontaminated.”

Section 360.2(b)(64):

This section defines "Construction and demolition debris" as uncontaminated waste resulting from construction remodeling, repair and demolition of structures...[but not] historic fill...." The demolition of foundations in New York City and other urban areas will frequently result in some small amount of historic fill adhering to the materials being demolished. This definition is confusing (and circular) as the regulations, 360.2(b)(136), also define one type of "historic fill" as "construction and demolition debris". The regulations should recognize a "de minimis" exception for historic fill adhering to materials generated during the demolition of structures or buildings in cities of over 1 million without taking the overall material out of the C&D category.

Section 360.2(b)(100):

This provision defines “expansion” as “an increase in the approved design capacity or throughput beyond the limits approved in the permit for a facility.” This definition should be limited solely to the throughput capacity of a facility. If the facility has the capacity to store more solid waste, it should be able to do so without re-permitting. Posting a bigger bond to cover the potential risks associated with storing more waste would be sufficient.

This definition should be further clarified to exclude an expansion in the footprint of a facility that does not increase throughput. For example, placing a weighing station on adjacent property or a storm water collection receptacle on adjacent property should not be considered an expansion of the transfer facility because they do not increase the throughput of the facility.

> Recommended Changes: (100) Expansion means an increase in the approved ~~design capacity or~~ throughput beyond the limits approved in the permit for a facility. In the case of landfills, expansion also means a lateral or vertical increase in size beyond the limits approved in the permit. An increase in the lateral size of a non-landfill facility that does not increase the throughput of that facility will not be considered an expansion.

Section 360.2(b)(136):

This section defines "Historic fill" as certain types of materials "used before October 12, 1962 to create...usable land...." In many cases, a property owner or developer will not be able to identify when a certain portion of "fill" was "used" on a property. If fill material meets the other definitional requirements of this section, the 10-12-1962 date seems overly restrictive and essentially impossible to demonstrate in certain instances.

> Recommended Change: Delete the 10-12-1962 date requirement.

3) Transition Rules

General Comments:

Generally, the transition rules impose a number of difficult and frequently untenable timelines for compliance with the new rules, most frequently a 90- to 180-day timeframe. However, in discussions with consultants, it became apparent that the various requirements of new registrations or permit applications will require substantial investigations and testing. There is substantial concern over the ability to meet those onerous timelines. For example, a facility that is not currently required to register but will be required to receive a permit under the new regulations will have to conduct a full analysis, including the production of an engineering report, waste control plan, and a

closure plan, within 180 days of the effective date of the rule. Given the depth of analysis required, we recommend extending the transition periods to permit the full range of analysis to occur.

Section 360.4(b)(2):

This section specifies that existing permitted C&D facilities that will be required to move their processing operations indoors must be in compliance at the date of their existing Permit Renewal. It may take as long as two to four years to obtain NYSDEC approval to construct a building to house processing operations, to apply for and obtain a local building department Permit to construct the building, and to actually construct the building. Thus, it will be impossible for facilities that have a permit expiring within the next four years to be in compliance when their permit is due for renewal.

> Recommended Changes: (2) For existing permitted facilities, transporters and events, the permit in effect immediately before the effective date of this Part is continued until the expiration date of the permit, or 4 years from the effective date of this Part, whichever is later, and the facility must comply with the conditions of the permit and the solid waste management facility regulations in effect on the day when such permit was issued for the duration of that permit, or 4 years from the effective date of this Part, whichever is later, unless a modification under Part 621 of this Title is approved or as otherwise specified in this section. At the time of permit renewal, or 4 years from the effective date of this Part, whichever is later, the facility, transporter or event must comply with the criteria as of the effective date of this Part and Parts 361, 362, 363, 364, 365, and Subpart 374-2 of this Title that pertain to the type of facility, transporter or event unless otherwise excluded under this section. Nothing in this paragraph shall be construed to limit or prohibit department-initiated modification of such permit under the provisions of Part 621 of this Title.

Section 360.4(b)(3):

Section 360.4(b)(3) exempts from the new design and construction requirements those facilities that were permitted under the current regulations (although new structural components built after the new regulations become effective must meet the new design and construction standards). In contrast, 360.4(b)(1) requires all formerly exempt and registration facilities to comply with all new regulatory requirements, and do so within very short time frames. This is counterintuitive. In general, currently exempt or registered facilities should be a lower priority for retrofitting because they pose less of an environmental risk. The Department should exempt the retrofitting of *all* facilities constructed prior to the passage of these regulations.

Recommended Change: (3) Retrofitting of facilities that were constructed ~~pursuant to a permit~~ prior to the effective date of this Part is not required in order to comply with the design and construction requirements of this Part and Parts 361, 362, 363, 364 and 365 of this Title. New structural components built after the effective date of this Part must comply with the applicable requirement of this Part and Parts 361, 362, 363, 364, and 365 of this Title.

Section 360.4 (f):

This section requires that existing registered facilities processing over 250 TPD must file for a Permit within 180 days of the effective date of the Rules. Based on discussions with consultants in the industry, we estimate that over 15 currently registered facilities in New York City will therefore need to file a permit application. This would not only overload the DEC's ability to process the applications in accordance with the Uniform Procedures Act, but also overload the consulting industry.

Recommended Change: (f) Registered facility now a facility requiring a permit. Any facility that was required to be registered prior to the effective date of this Part which is subject to permitting requirements as of the effective date of this Part and Parts 361, 362, 363, 364 and 365 of this Title, must have a complete application on file with the department within ~~180~~ 270 days of the effective date of this Part.

4) Pre-determined Beneficial Use Determinations

The purpose of pre-determined BUDs should be to reduce regulatory costs and promote the efficient reuse of materials that, under specified conditions, do not pose a significant threat to public health or the environment. Several of the predetermined BUD requirements do not appear to further this goal.

Section 360.12(a)(3):

This section prohibits storage of material for more than 180 days prior to beneficial use unless the party obtains a registration. This would prevent a builder from segregating BUD material for the winter for a construction project occurring during the following 12 months. It would also preclude storing material to cap a remedial project which often takes a year or more before capping may begin.

Recommended Change: Extend the 180 day limit to one year.

The second clause of 360.12(a)(3) requires that at least 75% of the material produced at a site must leave the site for beneficial use or disposal. Recognizing that this is intended to prevent parties from storing waste material on their site for too long, it is superfluous if

the regulation limits the time allowed for storage. This clause should be removed altogether.

> Recommended Change: "(3) Materials may not be stored for more than ~~180 days~~ 1 year prior to beneficial use unless otherwise approved through a registration, permit condition or case-specific beneficial use determination. ~~For all waste materials, it must also be shown that during any calendar year the amount of material that leaves the site for beneficial use or disposal equals at least 75 percent (by weight) of the amount of that material produced during the calendar year.~~

Section 360.12(c)(3):

This provision states that "the following cease to be waste when the material meets the technical requirements for the intended use identified in this paragraph." Yet none of the options indicate any "technical requirements," and some of the options, such as "fats, oil, grease, and rendered animal parts" don't indicate a particular use. DEC must clarify these technical requirements.

Section 360.12(c)(5):

This section authorizes the Department in its sole discretion to rescind a predetermined BUD if it finds it necessary to prevent "adverse impacts to public health or the environment...." This could be accomplished "upon notice in the Environmental Notice Bulletin". This is problematic. The regulated community relying on a predetermined BUD may not be able to undo what has already lawfully taken place: contracts may have been bid and require fulfillment, materials may already have been placed at a property, infrastructure may require significant changes etc. Also, the regulatory standard for rescinding or significantly limiting a pre-determined BUD should be greater than any "adverse impact" and should require at least a "significant adverse impact". Finally, and of critical importance, the simple publication of notice in the ENB does not satisfy the requirement for changing an adopted regulation. Rather, the Department must adhere to all of the requirements of the State Administrative Procedures Act

Section 360.12(e):

This section, which contains the predetermined BUD for Navigational Dredge, has a number of inconsistencies that should be remedied. The section refers to dredging permits or other applicable permits that are specified in subparagraph 360.2(a)(4)(viii). But this subparagraph does not appear in either the proposed or current Part 360 and thus appears to be an improper citation.

Section 360.12(e)(2)(i) refers to "ecologically sensitive areas", however this term is not defined in Section 360.2 and should be added or more clearly delineated to avoid ambiguity.

5) "Historic Fill" Management Comments

Section 360.13:

This section provides that disturbed historic fill may only be used on the construction site from which it was excavated, and even then, only in particular locations where the presence of contaminants are equal to or greater than those same contaminants in the historic fill. This is an unworkable approach to the management of fill at a construction site, and would require a job to stop while the developer undertook the functional equivalent of a remedial investigation. Pre-characterization of a site is not an answer, as many (if not the vast majority) of urban redevelopment sites are already occupied by buildings and other structures, and development follows on the heels of demolition. There is no place to "pause" for a remedial investigation for the purpose of proving that historic fill can be reused from one part of a development site to a different area of the same site.

The proposed language of the rule also does not provide any clarity for the contours of any such remedial investigation. Subsection (a) provides that historic fill may be used "on areas of the project property where all individual chemical levels in the placement locations are equal to or greater than that of the historic fill"; the rule does not, however, indicate the size of these "areas" where chemical levels are equal. Given that, by definition, historic fill is heterogeneous and that the distribution of chemicals is frequently stochastic, larger "areas" can unnecessarily reduce the viability of reuse. The section also requires that the "area" have lower levels of "all individual chemical levels," not limiting this to contaminants or pollutants of concern.

Moreover, the language of the proposed rule creates the possibility for substantial increases in the amount of historic fill that will enter landfills. In the absence of a demonstration described above, or a case-specific BUD, the regulations would require such fill to be excavated, transported, and then disposed of at a landfill. This makes no sense in an urban area where landfill capacity (if it exists at all) is very scarce.

This section should be amended to allow the use of contaminated non-hazardous historic fill for grading *anywhere* in a city of over 1 million residents so long as: (1) it has a cap or other barrier to protect the public health, (2) the site will not be used for single family housing, and (3) the fill material will not cause a violation of applicable water quality standards. This would promote reuse, reduce waste and have positive economic effects by decreasing construction costs, reducing truck traffic and highway and road strain, and it would also aid in coastal resiliency by providing a local source of fill for raising waterfront properties above base flood elevation.

The regulations can curb the potential for abuse by adding a clause in the prohibited activities section (360.9) to prohibit any person from accepting payment to dispose of historic fill on an unregulated property.

Recommended Change:

360.13

(a) Historic fill that has been disturbed as part of a construction project may be used for filling or for grading in a city over 1 million residents so long as the filled or graded area:

(1) is covered by a building foundation or a paved surface, or it is covered with at least two feet of suitable cover soil, or at least one foot of suitable cover soil for a commercial or industrial land use area. Suitable cover soil means soil that does not contain pollutants above the levels indicated in Table 375- 6.8(b) of this Title, entitled "Restricted Use Soil Cleanup Objectives, Protection of Public Health," for Residential use and Protection of Groundwater, if applicable pursuant to Part 375, or other department issued pollutant criteria cleanup objectives, whichever objective is lower;

(2) is deposited at a site that will not be used for single family housing; and

(3) the fill material will not cause a violation of applicable groundwater standards.

360.9(a) Except as provided in sections 360.4 and 360.14 of this Part, no person shall:

(3) accept compensation for disposal of historic fill on a property except at a permitted landfill.

6) Transfer Facilities

Section 360.14(c):

This section exempts certain solid waste facilities from registration or permit requirements. This should be amended to include an exemption for transfer facilities that only transfer sealed or unopened containers. If the containers are sealed or unopened, they do not pose a threat to the environment and should be treated like any other commodity for transfer.

Recommended Change: (c) General exemptions. In addition to exemptions provided in Parts 361 to 365 of this Title, the following facilities are exempt from this Part: …

(9) A solid waste transfer facility that only transfers sealed or unopened containers.

Section 360.15(g):

This section requires a registration modification whenever "there is a proposed change in any information provided on any prior registration notification submitted to the department." Beneficial constructions, such as the enclosure of C&D transferring activities, should not require a registration modification because they do not increase the throughput of the facility and they further the department's policy goals. The new elements may be identified on registration renewal.

Recommended Change: (g) Registration modification. The owner or operator of a registered facility or event or transporter must submit a new registration modification to the department when there is a proposed change in any information provided on any prior registration notification submitted to the department. The modification cannot be implemented until the owner or operator receives a validated copy of the modified registration from the department. The construction of modifications that do not increase the facility's throughput do not require the submission of a registration modification.

Section 360.15(h):

This section requires a permit for a facility that would otherwise require only a registration "when the department determines…an activity will negatively impact the environment." This vague provision would allow unbridled discretion to the regulator that could be exercised too broadly as it may sweep into a permitting regime facilities that have even minor or de minimis environmental impacts. The Department should incorporate the State Environmental Quality Review Act (Part 617) standard and only exercise this discretion where a facility would be presumptively subject to environmental impact statement review, or would otherwise have a significant adverse environmental impact.

Recommended Changes: (h) The department may require the owner or operator of a facility or event or the transporter that may qualify for registration to apply for and obtain a permit when the department determines that the location, volume of material, or size of the project, or another aspect of the activity will ~~negatively impact the environment~~ have a significant negative environmental impact. Where the department imposes such a requirement on an owner or operator, the department must do so in writing and must state the reason for imposing the requirement.

7) Financial Assurance

Section 360.22(a):

This section requires financial assurance. However, both current registration and permitted facilities are also regulated under comparable New York City regulations and thus have already provided financial assurance. If financial assurance is intended to "secure closure," only one financial assurance mechanism is necessary. The proposed regulations should be amended to include a clause that a financial assurance mechanism issued for cleanup costs to a municipality are sufficient to provide financial assurance for the purpose of these regulations.

> Recommended Change: (a) Applicability. The owner or operator of a facility required to obtain financial assurance must submit financial assurance acceptable to the department to secure closure, and, where applicable, post-closure care including custodial care, and implementation of corrective measures pertaining to the facility. Each owner or operator of a facility required to obtain financial assurance must provide continuous coverage beginning no later than 60 days prior to the initial receipt of waste and until released by the department from financial assurance requirements by demonstrating compliance with the applicable closure, postclosure care, custodial care, and corrective measures requirements pertaining to the facility, and demonstrating that the facility and any waste remaining at the facility do not pose a threat to public health or the environment. If the facility has submitted equivalent financial assurance mechanism under applicable rules of to a municipality, then it may submit proof of this financial assurance instead of establishing financial assurance under this provision.

8) Material Recovery Facilities

Section 361-5.2(a)(1)-(5):

This provision requires facilities receiving less than "250 tons on any day" of recognizable, uncontaminated concrete, asphalt, rock, brick, and stone (RUCARBS) to adhere to the registration mandates of that section, and any receiving more than 250 tons to obtain a permit. Instead of being based on "any day," this threshold should be based on an annual average. For example, if a catastrophic weather event happens, and a facility suddenly receives more than 250 tons on one day, it must acquire a permit under the proposed rule, but it would not under an annual average standard, which better reflects daily use.

> Recommended changes: (1) Facilities that receive less than 250 tons ~~on any day~~ per day based on an annual average of only the following recognizable, uncontaminated wastes: concrete and other masonry materials (including steel or fiberglass reinforcing embedded in concrete), brick, soil, and rock.

[And so for (2)-(5)]

Section 361-5.2(a)(1):

Moreover, the 250 TPD permitting threshold is too low. As an example, the State Environmental Quality Review Guidance states that indications of significant adverse project impacts include a substantial adverse change in traffic levels. A numerical example of a substantial adverse change is identified in the NYC CEQR March 2014 Technical Manual, which specifies that an increase of up to 50 vehicle trip ends per hour is not considered an adverse impact. This equates to approximately 10 trucks entering a facility per hour, assuming each 30-ton truck load is equivalent to 2.5 passenger cars as contemplated in the Manual. Over an eight-hour day (which is short for the waste industry), a facility could process 80 truckloads, which is equivalent to 2,400 tons per day of RUCARBS. Thus, a facility accepting up to 2,400 TPD of RUCARBS would not have an adverse impact and should not require a permit.

Section 361-5.2(a)(2):

See above comment which applies to asphalt pavement receiving facilities.

Section 361-5.2(a)(6):

See above comment which also applies to facilities receiving mixed material, although an appropriate limit would be 2,000 TPD based on ten 25-ton trucks entering a facility per hour, assuming each is equivalent to 2.5 passenger cars.

Section 361-5.4(a):

This section requires that all C&D processing facilities that receive more than 250 TPD of RUCARBS to receive, process and sort their material in an enclosed building. There is no reason to require enclosure of RUCARBS facilities, which by definition process only uncontaminated materials. This will impose a tremendous financial burden on these facilities. At a minimum, existing permitted, registered, or exempt facilities that receive and process only RUCARBS should be grandfathered from the enclosure requirement.

Sections 361-5.4(d):

This section and 360.13(b) allow a C&D processing facility to receive historic fill only if it consists solely of RUCARBS. However, if a C&D facility is permitted to accept C&D materials other than RUCARBS, it should be allowed to accept historic fill containing those materials. For example, if it is permitted to accept asphalt from construction debris, it should be allowed to accept historic fill that contains asphalt.

Recommended Changes:

361-5.4(d): The facility shall not accept historic fill unless the generator of the historic fill can demonstrate that the fill consists of only the waste described in paragraph 361-5.2(a)(1) of this Subpart. A permitted facility can also accept historic fill consisting of the components of C&D debris that the facility is permitted to accept.

Section 361-5.4(f)(1)(iii):

This section limits storage piles to 20 feet in height, 40 feet wide, and a total volume of 750 cubic yards. This is too restrictive for non-objectionable materials such as RUCARBS, which should be exempt from this requirement. In New York City, the Department of Sanitation allows piles to be 40 feet high, and their volume is not limited. For other C&D materials, most facilities typically surround piles on three sides. The 20 feet requirement is unnecessarily restrictive, especially for indoor operations, which should only be limited by the height of the building.

Recommended Changes: (iii) storage piles of any materials must not exceed ~~20~~ 40 feet in height and ~~40~~ 100 feet in width, and the volume of the storage piles must not exceed ~~20,000~~ 270,000 cubic feet unless written approval from the department is obtained. Facilities that process only recognizable, uncontaminated waste concrete and other masonry materials (including steel or fiberglass reinforcing embedded in concrete), brick, soil, rock, asphalt pavement and source-separated recyclables from construction and demolition debris sites for use under an approved case-specific beneficial use determination in accordance with section 360.12 of this Title are exempt from this requirement.

Section 361-5.4(f)(3):

This provision requires that storage piles have 25 to 50 feet between the piles, and that they be 50 feet from the property boundary. These are very restrictive limits in a dense urban setting: some facilities within New York City would be unable to comply and could be driven out of business. Furthermore, this would significantly reduce storage in the City. This requirement should be narrowed for New York City.

Recommended Changes:

(3) A minimum separation distance of 50 feet must be maintained between adjacent storage piles of combustible material, and 25 feet must be maintained between adjacent storage piles of non-combustible materials. A minimum separation distance of 50 feet must be maintained between storage piles and property boundaries, unless otherwise approved by the department.

For cities with a population over 1 million, a minimum separation distance of 25 feet must be maintained between adjacent storage piles of combustible material, and 15 feet must be maintained between adjacent storage piles of non-combustible materials. A minimum separation distance of 25 feet must be maintained between storage piles and property boundaries, unless otherwise approved by the department.

Section 361-5.6(a)(2):

This Section creates a pre-determined BUD for uncontaminated asphalt pavement that is separated from other C&D debris and "may be beneficially used as an ingredient in asphalt pavement for roadways, parking lots, or other paved surfaces." This clause should be clarified as to what it means for asphalt to be "used as an ingredient" in asphalt pavement. Oftentimes, asphalt is simply ground up onsite and used as substrate for a roadway. It's not clear whether this kind of use qualifies as an "ingredient."

This section also creates a pre-determined BUD for uncontaminated asphalt pavement that is "transferred to a registered facility that is dedicated solely to the recycling of asphalt." If the asphalt is separated from other C&D debris anyway, it should not matter that it is brought to a facility that is dedicated "solely" to the recycling of asphalt. So long as the facility is properly registered or permitted, whether it processes other wastes should not matter. The definition should reflect this fact.

Recommended Changes: (2) Recycled material or residues generated from uncontaminated asphalt pavement that is separated from other C&D debris prior to processing and subsequently processed and stored in a separate area as a discrete material stream may be beneficially used as an ingredient in the construction of asphalt pavement for roadways, parking lots, or other paved surfaces, including the use of asphalt as a substrate or any other common use of asphalt in the construction of pavement. This waste may also be transferred to a registered facility ~~dedicated solely to the recycling of~~ registered or permitted to recycle asphalt pavement.

Section 361-5.7:

This requires tracking documents to be returned to the originating transfer station. While the use of a tracking document for the trucks leaving a transfer station is not a burden, the maintenance of a returned copy from the final user is a formidable requirement. The transfer station has limited control on the final user, and has no way to confirm that the data on the returned document is accurate. There is no reason for this requirement and it should be eliminated.

Recommended Changes: (b) Once the waste or material has reached its destination for disposal or use, the transporter must sign the C&D debris tracking document confirming its delivery. The receiving facility must then sign the C&D

debris tracking document and ~~return it to the generating facility within two weeks. The generating facility must maintain these C&D debris tracking documents at its facility for inspection by the department and must account for all materials leaving the facility.~~ maintain the tracking document for a minimum of 7 years.

(c) If materials are transported to other processing facilities regulated under this Subpart, the additional processing and ultimate disposal or use must be recorded on the C&D debris tracking document or on a new tracking document.

~~(d) The facility must maintain all C&D debris tracking documents for a minimum of 7 years as required by paragraph 360.19(l)(2) of this Title.~~

Section 361-7.2(b):

This section exempts scrap metal processors that store 500 cubic yards or less of material. This threshold is too low since elsewhere in the proposed rules, piles up to 750 cubic yards are allowed for C&D material. Scrap metal is presumably less objectionable than C&D material. This threshold should be changed to 2,000 cubic yards.

Recommended Change: (b) Scrap metal processors that store no more than ~~500~~ 2,000 cubic yards of metal on-site at any one time.

Section 361-7.3(b):

This section should be revised to accord with the above suggestion for 7.2(b):

Recommended Change: (b) Scrap metal processors that store more than ~~500~~ 2,000 cubic yards of metal are subject to the registration provisions of section 360.15 of this Title and the operating requirements specified in section 360.19 of this Title.

Section 364-3.1(d):

This section requires that "a transporter of commercially generated construction and demolition debris or historic fill in quantities of greater than 10 cubic yards in a single shipment" must register with DEC. (Likewise, Section 364-2(b)(6) exempts registration for transportation of C&D and historic fill in quantities less than or equal to 10 cubic yards in any single shipment). First, it is unclear what a shipment is, but for purposes of this comment, we assume it means one truckload. Second, this regulation is unrealistic. Most C&D debris is transported from sites in quantities greater than 10 cubic yards, and, as a result, a vast number of smaller transporters would be required to register upon passage of these regulations. Finally, when these are read together, it is unclear whether or not a residential transporter would be subject to registration. For example, a homeowner who transports 11 cubic yards of C&D debris to the local landfill may be subject to the registration requirement.

Recommended Changes:

364-3.1(d): A transporter of commercially generated construction and demolition debris or historic fill in quantities greater than ~~10~~ 50 cubic yards in a single shipment. For the purposes of this paragraph, commercially generated means waste that is commercially transported but which may have been generated at a residential or non-commercial location.

364-2(b)(6): C&D debris and historic fill in quantities less than or equal to ~~10~~ 50 cubic yards in any single shipment.

9) Conclusion

The Environmental Section recognizes the significant need for a modernized approach to solid waste management and resource reuse in New York State; however, we believe that the proposed regulations, without the revisions suggested here, do not consistently support the ultimate goal of reducing waste streams and maximizing opportunities for recycling.

Comments prepared by: Committee on Solid Waste

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