New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

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

ENVIRONMENTAL AND ENERGY LAW SECTION

Environmental and Energy # 3 July 21, 2017

The Environmental and Energy Law Section of the New York State Bar Association (the "Section") is submitting these comments regarding proposed revisions ("Proposed Regulation" or "Proposed Rule") to the regulation of solid waste handling under 6 NYCRR Part 360, published on June 21, 2017. These new rules are largely a resubmission of the proposed regulations published last year on March 16, 2016, on which the Section submitted substantial comments. We are pleased that the new Proposed Rule incorporates most of the Section's prior comments, including the elimination of many unworkable elements of the new regulatory regime; however, some of the new additions to the rules present additional concerns that we hope can be addressed prior to implementation of the final rule. These comments will address, in turn, Section 360.12 (Beneficial Use), Section 360.13 (Special Requirements for Beneficial Use of Fill Material), and general comments on Part 360.

PART 360.12 (Beneficial Use)

360.12(c)(3)(viii) – Beneficial Use – Pre-Determined Beneficial Uses

360.12(c)(3). "The following cease to be waste when the material meets the technical requirements for the intended use identified in this paragraph.

...

(viii) recycled aggregate or residue which meets a specification established by the Department of Transportation for use as commercial aggregate if generated from uncontaminated, recognizable concrete and other masonry products, brick, or rock that is separated from other waste prior to processing and subsequently processed and stored in a separate area as a discrete material stream."

Comment: Please provide reference to the specific DOT specification that the changes are referring to. We believe the Department is referring to Section 304 of the New York State Department of Transportation Standard Specifications Construction and Materials, (2002) as amended from time-to-time.

Comment: The proposed changes should simply indicate that materials that meet the DOT specifications are suitable for beneficial use. The proposed changes suggest that materials that are otherwise suitable for beneficial reuse may become unsuitable simply due to the manner in which such materials were stored, processed, or originated. For example, under the proposed changes, materials that originate from the same "material stream," or are stored in the same area as native, uncontaminated soils would be considered unsuitable for reuse, despite meeting all other DOT specifications. This will significantly increase the volume of materials that are considered unsuitable for beneficial reuse, and cause substantial additional burdens on our recycling facilities, with no significant improvement in protections to human health and the environment. Accordingly, the proposed regulation should be changed to simply indicate that materials which meet the DOT specifications are suitable for beneficial use as a commercial aggregate.

360.12(d)(3)(iv) – Beneficial Use - Case-Specific Beneficial Use Determinations – General

360.12(d)(3). "The department will determine that the use constitutes a beneficial use only if the following criteria are satisfied:

...

(vi) heavy metals or other pollutants present in the waste are present at acceptable concentrations for the proposed product or use as determined by the department. For use of materials on the land as fill or cover, the material must not be used in ecologically sensitive areas and must not contain pollutants above the concentrations indicated in Table 375-6.8(b) of this Title, for Residential Use and Protection of Groundwater, unless the petitioner can demonstrate properties or characteristics unique to the material or use that are acceptable to the department. Nothing in this subparagraph will have the effect of modifying any existing Memorandum of Understanding to which the Department is a party; and"

Comment: Please verify whether the existing case-specific BUD issued to the City of New York pursuant to which the New York City Clean Soil Bank operates will not be affected by this change.

PART 360.13 (Special Requirements for Beneficial Use of Fill Material)

360.13 – General

Comment: This section should be renamed, and revised to clarify that the proposed uses described therein constitute predetermined BUDs.

Comment: This section should be revised so it does not apply to case-specific BUD petitions granted by the Department. As currently drafted, it is unclear whether the requirements apply in instances where case-specific beneficial reuse of fill materials is proposed. In a case-specific BUD petition, the Department has the ability to scrutinize all aspects of a proposed reuse, and determine, on a case-by-case basis, whether such reuse is acceptable. Imposing the restrictions of the proposed section may not be appropriate in all instances, and could significantly reduce the Department's ability to approve appropriate reuses that meet the department's goals of promoting reuse over disposal in a manner that is protective of human health and the environment.

Comment: Terms that are explicitly defined in Part 360 or any other provision of the update should be capitalized to alert readers to the presence of a definition.

360.13(a) – Applicability

360.13(a). "This section does not apply to materials that are being sent to facilities subject to regulation under Part 361 of this Title unless specifically mentioned."

Comment: This section (appropriately) does not apply to materials being sent to facilities subject to regulation under Part 361. However, the section makes no mention of materials *received from* Part 361 facilities. This may lead to duplicative testing because, under Part 361-5.4(e), many Part 361 generating facilities will already be required to analyze fill material leaving the facility for the contaminants identified in Part 360.13. This means that several receivers will bear the cost of testing material in accordance with this Part *which has already been tested by the Part 361 generating facility*. Requiring repetition of the same suite of tests prescribed in Part 360.13 for the same shipment of fill material will have little purpose. In fact, recipients of materials from Part 361 facilities will likely become reluctant to absorb such costs, which will frustrate reuse of otherwise suitable materials originating from such facilities.

Accordingly, the Department should revise this section to indicate that it does not apply to "*materials that are being sent to, or received from, facilities subject to regulation under Part 361 of this Title.*" This will clarify that if materials have already been sampled by the Part 361 generating facility, there is no need for the receiving facility to re-sample. It will also reflect the fact that ensuring compliance with Part 361 is better placed with the facility operator itself. If needed, appropriate measures should be added to Part 361 to ensure such facilities are operating in compliance.

360.13(a). "For the purpose of this section and Part 364 of this Title, Restricted-Use Fill and Limited-Use Fill cease to be solid waste once delivered to the site of reuse. General Fill generated outside of New York City ceases to be a solid waste upon being characterized as General Fill in accordance with this section. General Fill generated within New York City ceases to be solid waste once delivered to the site of reuse or a facility authorized by the department."

Comment: The proposed section attempts to enforce Part 364 trucking requirements on the BUD provisions by moving the point of solid waste cessation beyond the point at which the materials have been transported. This, in turn, requires that Restricted Use and Limited Use materials be transported solely by a Part 364 trucker, but exempts General Fill from such requirements in some circumstances. Although the provisions may be acceptable, compliance with Part 364 is more appropriately addressed in Part 364, and the burden of complying transportation requirements should be on Part 364 transporters, rather than broadly on any regulated entity that obtains a BUD. Accordingly, the language referenced above should be moved to Part 364.

Comment: This imposes a stricter requirement on fill from within New York City; it essentially treats it as Restricted-Use and Limited-Use fill by requiring that it must first arrive at the reuse site before being eligible for a Beneficial Use Determination, whereas such is not required for fill from outside of New York City. This encourages fill receivers to re-locate to abutting counties which have preferential regulatory treatment (e.g., Westchester)—and are farther away from city-based generators. Longer transport distances would impose additional costs such as higher fuel consumption, increased traffic congestion, and higher tailpipe emissions from heavy-duty vehicles. New York City already has the toughest licensing requirements in the state (which are stricter than these) and has round-the-clock enforcement, suggesting that this revision is duplicitous.

The Department should therefore provide technical support documentation demonstrating that the political boundaries of New York City and other political subdivisions mentioned in proposed regulations mark clear differences in soil and fill quality, and therefore require different regulatory treatment to protect human health and the environment. If the Department cannot provide such supporting documentation, reference to New York City, or any other political boundaries, should be deleted. We note that the New York State Brownfield Cleanup Program, Technical Support Document for the Development of Soil Cleanup Objectives (2006), ultimately utilized in the development of the SCOs found in 6 NYCRR Part 375, provided sufficient research for the Department to establish background soil and fill concentrations throughout the State. A similar approach should be provided demonstrating that the use of political boundaries in the proposed regulations are supported by scientific and technical evidence. It is our understanding that, due to the implementation of Electronic Data Deliverables for submittals to the Department, the Department may already have sufficient data on-hand to perform this analysis without collection of new data.

Comment: The Department should simply require that all truckers obtain a Part 364 permit to transport BUD materials. This would establish a bright-line rule that is readily enforceable. As currently drafted, a transporter will be responsible for determining whether materials are considered Restricted-Use and Limited-Use, or General Fill. Transporters are typically not equipped to review and analyze analytical data, which is required to make a determination of the various fill types proposed by the Department, and whether a Part 364 permit is needed. Accordingly, requiring that all truckers of fill materials simply obtain a Part 364 permit is likely more appropriate.

360.13(b) – On-Site Management of Fill Material

360.13(b). "Fill material used as backfill for the excavation from which the fill material was taken, or as fill in areas of similar physical characteristics on the project property is exempt from regulation under this Part. Limited-use fill and restricted-use fill can only be used on-site in areas of the site with similar chemical characteristics and must meet the fill end use criteria of Table 2 of this Section. This provision does not apply to sites which are subject to a department-approved or undertaken program pursuant to Part 375 of this Title."

> Comment: This definition seems to contradict the definition of "Fill Material" under 360.2(b)(109) (" . . . soil and similar material excavated for the purpose of construction or maintenance that is *excess to the needs of the project* . . . ") (emphasis added). Specifically, if one is reusing material on-site, then how can it be "excess" to the project? If it is not "excess," then it cannot be "fill material" under 360.2(b)(109) and, presumably, is unregulated.
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> Comment: The Department should provide a definition for "similar chemical characteristics." Does this mean that the limited-use and restricted-use fill can only be only be used on-site if it does not increase environmental or human health risk does not change, or is there a more precise definition?

360.13(c) – Off-Site Management of Fill Material

360.13(c)(2)(i)-(ii). "Fill material must be characterized pursuant to subdivision 360.13(d) of this section if:

(i) the fill material originates from a location within the City of New York, and:

> ***(a) the quantity of fill material exceeds 10 cubic yards from one site; or***
>
> ***(b) the quantity of fill material is less than 10 cubic yards and there is historical evidence of impacts such as reported spill events, or visual or other indication of chemical or physical contamination;***

(ii) the fill material originates from a location outside the City of New York and there is historical evidence of impacts such as reported spill events, or visual or other indication of chemical or physical contamination."

Comment: These provisions, read together, treat fill loads over 10 cubic yards from *within* New York City more stringently than the same load from *outside of* New York City. All loads from within New York City over 10 cubic yards must fulfill the testing requirements in (d)—even absent any evidence of prior environmental impact. Alternatively, loads over 10 cubic yards from outside of New York City only need to fulfill (d) if there is evidence of prior environmental impact. This will have a significant effect on both generators and receivers of fill material, since most fill material is shipped in quantities over 10 cubic yards. Specifically, fill receivers would have the incentive to move farther away from city-based generators of fill material to just outside New York City's borders (e.g., Westchester County). Aside from pushing receivers farther away from generators, this may also encourage generators to transport fill material in smaller quantities (less than 10 cubic yards to evade the requirement), increasing the number of trips needed to properly recycle fill material. This will increase transport costs, traffic congestion, and carbon emissions, among other costs—and thus discourage New York City generators from recycling fill material.

The Department should therefore provide technical support documentation demonstrating that fill material generated within the borders of New York City poses a greater risk to human health and the environment compared to material generated outside of the city, warranting more stringent regulatory treatment. If the Department cannot provide such supporting documentation, reference to New York City should be deleted.

360.13(d) – Characterization Requirements

General.

Comment: The revision does not contemplate the fact that operators typically first excavate the material for ease of sampling. Given the new requirement that all facilities who seek a Beneficial Use Determination must first sample their material, the Department should include language addressing where the material would be placed while being sampled.

360.13(e) – Beneficial Use Categories

Table 2, Fill End Use Criteria for Restricted-Use & Limited-Use Fill.

Comment: The requirement that Restricted-Use and Limited-Use Fill be placed above water table should be amended to exempt material intended for use in structural resiliency projects on the coastline. Otherwise, this rule would stifle post-Sandy coastal resiliency projects and similar climate change adaptation efforts.

Table 2, Chemical Criteria for General Fill.

Comment: The Department should clarify whether or not General Fill materials require testing. As drafted, it appears as though the Department requires that the materials meet certain Part 375-6.8(b) criteria (which would require testing to demonstrate), but then notes that "[m]aterial not requiring characterization is considered General Fill," suggesting that no testing is required.

Table 2, Chemical Criteria for Restricted-Use Fill.

Comment: The use of BaP Equivalents is a welcome approach, demonstrating that the Department is well focused on developing meaningful criteria that is directly tied to protection of human health and the environment. However, the Department should clarify in Table 2 that, when the BaP Equivalent is utilized, the criteria found in Part 375-6.8(b) for the individual PAHs that are used in the calculation are inapplicable. As currently drafted, it is unclear to a regulated individual whether or not the materials must meet BaP Equivalents, *in addition to* unmodified Part 375-6.8(b) criteria for individual PAHs.

Footnote * to Table 2. "Use of restricted or limited use fill can only occur at a project subject to a local building permit or other municipal authorization. Material must be used within 30 days of arriving at the project site."

Comment: This section should be revised to allow use of restricted-use and limited-use fill greater than 30 days after arrival at the project site subject to DEC approval (i.e., add the following to the end of the provision: "unless DEC approves of use later than 30 days after arrival at the project site"). To ensure that material is eventually used, DEC can then require the prospective user to purchase of a bond.

Footnote *** to Table 2. "If foundation or pavement is not installed within 365 days of fill placement, such placement will constitute prohibited disposal."

Comment: The Department should not prohibit foundation or pavement installed greater than 365 days of fill placement from qualifying for BUD. The section should be revised to allow for the Department to extend the time beyond 365 days if the materials are being kept in place on a continuing basis as part of a monitored geotechnical surcharge operation. Use of BUD materials for geotechnical surcharge prior to final placement is very common, and, in some instances, depending upon the geotechnical properties of underlying materials, a period of 18 months or more is needed to allow sufficient settlement before the BUD materials can be placed in their final locations at a given site.

360.13(f) – Receiving Payment

360.13(f). "A person must not receive payment or other form of consideration for allowing placement of fill material on land under that person's control."

Comment: The proposed revision should be deleted. The prohibition against receiving a fee or other consideration for BUD materials goes well beyond the Department's authority under ECL-27-0707(2-a). ECL-27-0707(2-a) only applies to sites where 'disposal' activities are being undertaken. By approving a case-specific BUD, or granting a pre-determined BUD, the Department is, *ipso-facto,* concluding that "the essential nature of the proposed use of the waste under review constitutes use *rather than disposal*" (see Proposed Part 360.12(d)(3)(ii). *See also 360.12(a)(1) (noting that "[t]his section ... does not apply to waste used in a manner that constitutes disposal.*"). The Department is given significant deference when making its technical findings, such as when a determination is made by the Department that beneficial reuse, rather than disposal, is occurring under a BUD. Because the Department has determined that no disposal is occurring, ECL-27-0707(2-a) does not apply, and there should be no restriction on receipt of a fee at BUD recipient sites. Accordingly, the proposed revision should be deleted.

Comment: The proposed revision causes no benefit to protection of human health and the environment, and places a significant economic burden on potential recipients of BUD materials. The proposed fee prohibition will cause fewer BUD material recipient sites to be opened, thereby causing a decrease in availability of BUD recipient sites, an increase in disposal activities, and degradation of our nonrenewable natural resources. ECL 27-0106(1) sets the State solid waste management priorities, and gives direction to the Department that reuse or recycling of waste is to take precedence over disposal, incineration or land filling. *See Lehigh Portland Cement Co. v. N.Y. State Dep't of Envtl. Conservation,* 614, N.Y.S.2d 674, 675 (Sup. Ct. 1994). Disallowing a fee for beneficial reuse will significantly reduce the incentives for individuals to consider BUD substitutes for conventional, quarried or manufactured products. The costs for testing, monitoring, oversight, and compliance with a Department-issued BUD are substantial, and individuals will be reluctant to incur such costs unless they can be reimbursed in some way. As a result, fewer BUD receiving sites will open, and less reuse capacity at BUD sites will be available, thereby causing an increase in disposal activities at conventional disposal sites. If the proposed regulations are passed, more individuals will simply utilize native, non-recycled materials, which will cause continued degradation of non-renewable resources, as exemplified by the numerous abandoned mines and quarries across the State. The proposed fee prohibition should be deleted.

Comment: Please explain how this regulation will be monitored and enforced by the Department. For example, the Department should explain what record keeping, if any, is needed to ensure compliance with this provision. If the Department is unable to provide the regulated community with a detailed

explanation of how it will be monitored and enforced, then such regulation should be deleted.

360.13(i) – Transport

360.13(i). "Transport of fill material that originates in New York City is subject to the requirements of Part 364 of this Title."

Comment: This sentence is confusing and inconsistent with Part 364. Part 364-1.2(e)(11) states that Part 364 applies to all "fill material generated by commercial or industrial activities" in the entire state, rather than New York City alone. Given this, the sentence in 360.13(i) is potentially misleading and leaves the reader confused as to which provision applies. Moreover, Part 364 only specifies fill material generated *by commercial or industrial activities*, whereas Part 360.13(i) makes no such specification. This could imply that fill material generated from non-commercial or industrial activities in New York City is also subject to Part 364, which is broader than what is stated in Part 364 itself. If this is the case, the Department must provide an explanation for why this requirement applies to only fill material originating in New York City.

360.13(i). "Limited-use fill or restricted-use fill generated outside of Nassau and Suffolk Counties is prohibited from being transported to any destination within Nassau or Suffolk County."

Comment: The Department should provide an explanation for excluding Nassau and Suffolk Counties from receiving Limited-Use and Restricted-Use material from other counties. Specifically, the Department should explain whether there are issues in Nassau and Suffolk Counties' water tables that are directly associated with fill material. If the Department cannot provide such an explanation, the Department should either furnish another justification or strike out the reference to Nassau and Suffolk Counties.

360.13(j) – Notification in New York City & 360.13(k) – Notification of Fill Material Reuse

Comment: Read together, these two provisions require that New York City-based generators notify the Department at least 15 days before any *transfer* (under (j)) *or delivery* (under (k)) of fill material, whereas all other generators in the state would only have to notify the Department at least 15 days before *delivery* (under (k)). This is a more stringent notification requirement on New York City generators than all other generators in the state. The Department should either provide an evidence-based explanation for this differential treatment or remove any explicit reference to New York City generators.

PART 360 (Other Provisions)

360.2(a)(3) – Definitions – Solid Waste & Related Terms

360.2(a)(3). "The following are not solid waste for the purposes of Parts 360, 361, 362, 363, 364, 365 and 366 of this Title:

...

(i) materials that are intended for reuse for their original function, without processing, such as materials at a garage sale, consignment shop, textile collection location or similar venue"

Comment: In comments submitted on the prior draft rules, the Section commented that this definition was insufficient, in that it should permit commercially valuable reuse, regardless of whether that reuse was in the form of its original function. Numerous waste products, such as certain used solvents, can be reused in a manner that, despite not serving the same original function, would not require any additional processing. As currently drafted, the rules would require any reuse of materials for a purpose other than their original function to comply with either a predetermined or case-specific beneficial use determination, which substantially increases the costs associated with this reuse. For the purposes of encouraging reuse and limiting landfill disposal, it would be advantageous to eliminate the requirement that the intended reuse be exclusively for their original function.

...

(viii) soil that has no known or suspected contaminants present due to human activity crumb rubber"

Comment: "Soil that has no known or suspected contaminants present due to human activity" should be reinstated in this provision, and thus, excluded from the definition of solid waste. By deleting this provision, the Department is significantly broadening the definition of solid waste in a manner that will adversely affect every excavation or earthwork operation in the state, no matter how small, and will require significant additional regulatory and compliance costs, with no significant benefit to human health and the environment. Suggesting that a material that, by definition, has no known or suspected contaminants, is of regulatory import, and therefore must be treated and handled as a solid waste, goes beyond the statutory mandate afforded to NYSDEC for regulation of solid wastes in New York. The revision should be struck, and the

exclusion of such materials from the definition of solid waste should be reinstated.

360.4(p) – Transition – Beneficial Use

360.4(p). "Pre-determined beneficial use determinations in effect prior to the effective date of this Part that are no longer included in section 360.12 of this Part will no longer be in effect 180 days after the effective date of this Part but may be eligible for a case-specific beneficial use determination. All beneficial use determinations in effect prior to the effective date of this Part are subject to the reporting requirements of this Part on the effective date of this Part. In addition, all beneficial use determinations in effect prior to the effective date of this Part that do not contain a condition with a specific expiration date will expire 180 days after the effective date of this Part unless renewed."

Comment: This provision does not address the consequences of having a BUD that both *is* still included in section 360.12 and *does* contain a condition with a specific expiration date. If those BUDs are similarly presumed to expire 180 days after the effective date of this Part, it would be burdensome and without benefit to require facilities which have been properly using material under a BUD for many years to re-apply for the same BUD. It would also lead to confusion, in the case of facilities which are in the middle of using material for a project on the 180th day following the effective date of this Part. It would be impractical and costly to require that such projects cease operations to obtain a permit when they already have a valid BUD.

360.7(b) – Inspection of Facilities

360.7(b). "In a hearing to revoke a permit or registration based on a refusal to consent to inspection, the hearing will be limited to the following issues:

(1) whether authorized department staff requested access to the facility or to any of the records or documents required to be maintained under this Part or under Part 361, 362, 363, 365, or Subpart 374-2 of this Title;

(2) whether the owner or operator was given sufficient warning, in clear or unequivocal language before the refusal, that the refusal could result in revocation of the registration or permit; and

(3) whether the owner or operator refused to consent to the inspection."

Comment: This procedure would implicate constitutional Due Process concerns for permittees subject to it. These provisions only allow the permittee to raise arguments regarding the three issues listed. This is problematic because it prohibits a permittee to defend based on other factors that may have influenced Department staff during the inspection and hearing process. For example, a permittee would not be able to claim that the hearing is motivated by religious or racial animus. This would be a violation of the permittee's procedural Due Process rights.

CONCLUSION

The Section recognizes the significant need for a modernized approach to solid waste management in New York State and appreciates DEC's responsiveness the comments submitted on the prior incarnation of the rule. These additional clarifications or adjustments would help further the Proposed Rule's ultimate goal of reducing waste streams and maximizing opportunities for recycling, while simultaneously providing consistent and workable standards for industrial and commerical actors.

Comments prepared by: Committee on Solid Waste