ENVIRONMENTAL AND ENERGY LAW SECTION OF THE NEW YORK STATE BAR ASSOCIATION

Comments on the Proposed Revisions to 6 NYCRR Part 360 Regulations

The Environmental and Energy Law Section of the New York State Bar Association ("EELS") thanks the New York State Department of Environmental Conservation ("DEC") for the opportunity to comment on its proposed revisions to the solid waste management regulations contained in 6 NYCRR Parts 360-365, 371 and 377. While these regulations show DEC's consideration of the needs of both the environment and the regulated community, we respectfully request that DEC consider these comments in promulgating its final Part 360-365 regulations. EELS is available to meet with any representatives of the Department to discuss the comments below and any potential changes prior to promulgation of the final rule.

General Comments

The proposed revisions to Parts 360-365, 371 and 377 demonstrate the Agency's balancing of the competing needs of economic production, environmental protection, and compliance with legislative mandates. EELS generally supports the goal of trying to simplify the reuse of fill material and other construction and demolition debris beneficial use determinations. However, these new draft rules appear to add layers of complexity over the existing regulatory regime.

Specifically, we are concerned that the new geographic limitations on disposal and beneficial use of generated material will result in a significant increase in vehicle miles associated with waste and fill management activities. This will, in turn, lead to greater greenhouse gas emissions associated with the transportation, reuse, and disposal of waste. This conflicts with Section 7 of the Climate Leadership and Community Protection Act of 2019, which mandates that in connection with administrative activities, "all state agencies. . . shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law."[1] The

[1] 2019 Sess. Law of N.Y. Ch. 106 at §7 (S. 6599).

Department should reconsider how the geographic limitations on the beneficial reuse of material will increase greenhouse gas emissions that could be mitigated by eliminating those strictures. Moreover, there appears to be an underlying theme that these regulations have been designed to prevent illegal dumping, but may in fact have the opposite effect by adding complexities to the reuse process and imposing new paperwork requirements on transporters

Definitions:

New Section 360.2(b)(99): "'Excavated material' means excess soil, rock or other material excavated during construction or maintenance activities." It is unclear from this definition what materials would constitute "excess" materials. As the defined term "excavated material" is utilized in relation to material that is otherwise reused on site, the word excess should be removed from the definition to avoid confusion.

New Section 360.2(b)(121): "'Food processing waste' . . . does not include sanitary waste or processes that involve the addition of a hazardous chemical to the manufacturing process." The regulations do not define "hazardous chemical" within the context of food processing. The Department should provide a definition or refer to a defined list of hazardous chemicals to allow for greater predictability.

New Section 360.2(b)(240): Regulated Medical Waste. This definition—and particularly the exceptions—do not directly address personal protective equipment used in health care or public health contexts. The Department should clarify whether masks, face shields, or gowns fall within the exceptions to this rule.

New Section 360.2(b)(252) "Scrap metal processor means a facility that receives, decommissions, processes, dismantles, stores, and recycles ferrous and/or non-ferrous metal, and discarded metal-containing products, including appliances." This definition should be revised to expressly except facilities receiving metal-containing products in connection with a product stewardship or extended producer responsibility program.

New Section 360.2(b)(299): " 'Uncontaminated' means material that is not commingled with, and does not contain the following: (i) other unauthorized waste. . ." The new definition for "uncontaminated" prohibits "unauthorized waste" in any amount from various materials subject to regulation under Part 360, including construction and demolition debris and pre-determined beneficial uses. In practice, this will prove unrealistic, as even the most meticulous screening and processing will still have trace amounts of unauthorized wastes. To allow for a more administrable approach, the Department should include a limiting factor, such as "other than de minimus" amounts of unauthorized wastes.

Beneficial Use

The revised Section 360.12 evinces the Department's concerted effort to promote the reuse of materials in construction and other commercial applications. Overall, EELS supports the goal of enabling the reuse of the maximum amount of material and avoid unnecessary landfill disposal; however, the proposed revisions add a greater degree of complexity for the regulated community. We make the following recommendations for further clarification:

New Section 360.12(a)(4): Non-Specific Facility Permits instead of BUD: EELS appreciates the clarification provided in new Section 360.12(a)(4), as the prior iteration of the rule provided little guidance when additional permitting would be necessary, particularly with respect to facilities receiving non-conforming materials or receipt of materials over a period exceeding one year. However, we question whether certain of the other conditions warrant full permitting.

- Subdivision (i) allows the department to require a permit where a facility receives consideration for acceptance of any quantity of material; however, the fill provisions, discussed below, contemplate that sites *can* receive a fee for F1 or F2 fill. The Department should address this inconsistency.

- Subdivision (iii) provides that sites receiving more than 100,000 cubic yards of material may require a permit. As the materials being used pursuant to a pre-determined BUD no longer constitute waste when meeting the outlined specification, it does not follow that mere volume increases the need for additional oversight.

- Subdivision (iv) provides that sites receiving pre-determined BUD materials from more than one source may require a permit. Given that many of the other predetermined beneficial use provisions—which indicate that a given material is no longer considered waste when meeting the outlined specifications—it does not follow that the fundamental nature of that material changes merely by virtue of coming from multiple sources.

Given the State Environmental Quality Review Act ("SEQR") implications and expense associated with obtaining a Section 360.17 non-specific facilities permit, these contradictions could affect similarly situated projects differently, without any environmental justification for doing so. To permit the Department oversight for these types of facilities, EELS would recommend the creation of an additional registration category to address these types of BUD sites. This would eliminate the SEQR trigger and significantly reduce costs while still providing the Department with the oversight it appears to believe is required based on volume and non-exclusive sources.

New Section 360.12(c)(1)(iv)*:* The new grade adjustment predetermined BUD provides significantly more flexibility for the use of fill material on-site and is a welcome addition to the regulatory program, but recommend the following changes:

- The disqualification of "illegally disposed" on-site materials should be further clarified. It will be difficult, if not impossible, for most property owners to assess whether historic fill was legally or illegal disposed of. As such, EELS recommends limiting this to "fill previously identified by the Department as illegal."

- The current provision does not define "site of generation," which could present significant questions. For example, in linear construction projects (like sewer line replacement, road construction etc.) "site of generation" should include the entire project area. Further, individual owners of numerous adjacent parcels should be permitted to use fill material on those adjacent lots. As such, EELS requests further definition of what constitutes the "site of generation."

- ***New Section 360.12(c)(1)(iv)(a):*** This provision does not define the term "same property," which appears to align with the term "site of generation" used elsewhere in this section. The Department should clarify whether this definition is intended to have a different scope.

- ***New Section 360.12(c)(1)(iv)(b):*** This provision does not provide a definition for "on-site structures," which appears to align with the earlier undefined terms "site of generation" and "same property." For the sake of clarity, the Department should conform the definitions used in this section.

New Section 360.12(c)(2)(iii)(c): The pre-determined BUD to permit the use of street sweepings in "locations subject to commercial or industrial land use" should be further clarified to permit greater workability. While determining if an area's permitted uses include industrial or commercial uses is straightforward under most zoning codes, it can be difficult to assess whether, in practice, individual uses in an area are non-commercial or non-industrial. To allow for greater predictability, the Department should revise this definition to "areas zoned for commercial or industrial use."

New Section 360.12(c)(2)(ix): "except in Nassau County, Suffolk County, Westchester County and the New York City Watershed, material consisting only of recognizable, uncontaminated concrete or concrete products (including those that have embedded reinforcement), asphalt pavement or millings, brick, rock, Fill Type 1, Fill Type 2, Fill Type 3 or mixtures of these materials." EELS appreciates the reincorporation of the pre-determined BUD for RUCARB materials, including mixtures of these materials, which helps provide additional options for material reuse. However, the limitation on the use of this BUD within nearly all New York City metropolitan area counties and the entire New York City Watershed area severely restricts the potential applicability of this BUD in over 10% of the area of the state nearest to New York City. Given the higher cost of materials transportation, this restriction will lead to less reuse of RUCARB materials, increasing both the needed capacity for construction and demolition debris and potentially increase illegal dumping of these materials. It will also lead to an increase in greenhouse gas emissions associated with transportation of these materials, contrary to the goals of the CLCPA.

New Section 360.12(c)(2)(ix)(b)(1): ". . . Materials are prohibited from use pursuant to this subparagraph at any site that is subject to regulation under title 23 of article 27 of the ECL unless that activity is authorized in an approved Mined Land Use Plan that is incorporated in a Mined Land Reclamation Permit issued by the department." This provision appears to invert the current practice regarding the intake of materials for reclamation. Under current practice for Mined

Land reclamation, permittees are allowed to import materials for reclamation unless specifically prohibited from doing so. Requiring affirmative authorization for material reuse would require amendment to many, if not most, current Mined Land Reclamation permits. The Department should clarify that amendment of a Mined Land Use Plan or Mined Land Reclamation Permit would only be required if the use of this material would otherwise be prohibited by Part 360 or other applicable law.

New Section 360.12(c)(2)(ix)(b)(2): ". . . Any fee or other form of consideration for receipt of the material is prohibited." The prohibition on the acceptance of consideration in exchange for material under this BUD does not relate to the potential environmental suitability of the material in question. If the material meets each of the required physical, geographic, and use restrictions, those characteristics do not change by virtue or receipt of payment for the material. To better encourage reuse of this material, the restriction on fees for receipt should be eliminated.

New Section 360.12(c)(2)(ix)(b)(5): "the material must not include residues from C&D debris handling and recovery facilities. De minimis amounts of wood included with these materials are acceptable under this determination." The term "residues" is not clear. As the section currently reads, it could be interpreted to prohibit receipt of otherwise exempt RUCARB from C&D debris handling and recovery facilities. Also, the provision allowing "De minimis amounts of wood included with these materials" as "acceptable under this determination" should be moved from this subsection to the beginning of Section 360.12(c)(2)(ix), between the first and second sentence. That way the "de minimis" exception applies to the entire Section.

***New 360.12(c)(2)(x)*:** The predetermined BUD for recycled brick, concrete, and asphalt aggregate under cover should remove the "separated and stored" requirement; the receiving facility should be able to rely on the facility's Section 361-5 status and other visual and olfactory indications to determine appropriateness without having to verify the full internal operations of the distributing facility.

<u>Financial Assurance Mechanism</u>

Revised Section 360.22(c)(2): "The department may reduce, to zero if appropriate, the amount of financial assurance required under this section by the amount of financial assurance

obtained by a facility for the benefit of the municipality. . .” The new additions to this section appropriately recognize and attempt to address the “double bonding” issue, granting the Department the discretion to eliminate the required financial assurance mechanism where alternate mechanisms are provided under municipal law. Since the City of New York maintains a robust bonding requirement for solid waste transfer and processing facilities, individualized consideration of the sufficiency of those financial assurance mechanisms would be superfluous. To reduce the Department’s administrative burden in reviewing applications for facilities in New York City, EELS recommends incorporating an additional exception, providing that “Financial assurance mechanisms authorized and accepted by the New York City Department of Sanitation or other municipalities in the State shall satisfy the requirements of this section.”

Fill Material

The new fill material definitions are a dramatic improvement over the prior approach taken by the agency, providing significantly greater certainty for the regulated community. The “F” series BUD, embodied in the new section 360.13, delineates reachable and cognizable standards for fill material, a substantial improvement over the prior “general” and “restricted use” definitions. EELS supports the adoption of the more nuanced approach to fill material; however, the new geographic exclusions and other complexities that have been layered over the new five fill categories undercuts the overall functionality of the new proposed regulatory scheme:

New Section 360.13(b)(1)(iii): “Fill Type 1 cannot be generated within the City of New York.” A geographic limitation on Fill Type 1 that broadly excludes New York City fails to recognize that there are certain sites within the five boroughs where clean fill is generated. For example, projects in the Far Rockaways, Alley Pond Park in northeastern Queens, and soils stockpiled at the City’s Office of Environmental Remediation’s Forbell Street Clean Soil Bank, each generate or store fill material that meet or exceed the current Part 360 standards. As such, EELS would recommend permitting tested fill meeting applicable standards to be used as Fill Type 1.

New Section 360.13(e)(2)(iv): “volatile organic compounds listed in section 375-6.8(b) of this Title, if their presence is possible based on site events such as an historic petroleum spill, odors, photoionization detector meter or other field instrument readings.” As drafted, this provision does not provide sufficient limitation on when VOC sampling would be required. The “presence

is possible" standard can be interpreted over-broadly to incorporate any number of otherwise minor environmental conditions. EELS would recommend altering this language from "possible" to "reasonably likely," allowing for the avoidance of superfluous testing.

New Section 360.13(f) (Table 2): This table does a good job clarifying specific available uses for each class of fill. However, there has been some confusion with some within the Department interpreting the provision that Fill Type 4 "[m]ay also be used in the same manner as Fill Type 5" as prohibiting the use of Fill Type 4 in Nassau and Suffolk County because proposed Section 360.13(g)(2) prohibits "[p]lacement of Fill Type 5…[in] Nassau County or Suffolk County." The regulations should clarify that this is not the intent, and that Fill Type 4 can be used in Nassau and Suffolk County, Westchester County and the New York City Watershed for the uses and in the manner that Table 2 allows (we comment on the "locality" restriction in Section 360.13(g)(1) below).

New Section 360.13(g): "(1) Placement of Fill Type 4 is prohibited within the following localities, with the exception that Fill Type 4 can be reused within the same locality in which it was generated: the New York City Watershed, Westchester County, Nassau County and Suffolk County. . . (2) Placement of Fill Type 5 is prohibited in the New York City Watershed, Westchester County, Nassau County or Suffolk County." The categorical geographic limitations on the use of Fill Types F4 and F5 will create numerous practical impediments to the reuse of this material in a large portion of the state, severely restricting potential end users for generated fill. Any excess material generated outside of a "locality" where it can be reused would therefore need to be appropriately treated and disposed of, and few facilities exist in the close suburban counties and most parts of the watershed to address the additional F4 and F5 soil generated. Given the paucity of facilities to handle this new influx of unusable fill material, these geographic restrictions will increase the soil disposal costs of any project in the watershed—requiring significant additional truck mileage to reach disposal facilities—and will potentially encourage additional illegal dumping. Additionally, these geographic restrictions will increase the amount of material being transported, thereby increasing the associated greenhouse gas emissions for such activities, in contravention of the goals of the CLCPA.

New Section 360.13(g)(3): "Use of Fill Type 4 or Fill Type 5 can only occur at a project that is authorized by an approved local building permit or other municipal authorization, if required. The material must be used within 30 days of arriving at the project site." The restriction on storage of Fill Types 4 and 5 to 30 days will prove impracticable for many construction projects, as the time necessary for groundworks can exceed the thirty-day limit. For F5 soils, which can only be used under cover, the thirty-day limit would be nearly impossible to achieve on most sites. Given the significant use limitations of F4 fill to use on sites where *in situ* contaminants exceed the applicable contaminant levels for F4 or F5 criteria, there is little risk of increased environmental contamination through stockpiling of soils. Moreover, as identified in footnote 3 of Table 2, F5 fill cover must be installed within 365 days of fill placement, thereby limiting its potential impact. EELS would therefore recommend eliminating the thirty-day limit of on-site storage prior to use.

New Section 360.13(g)(4): "Payment. A person must not receive payment or other form of consideration for allowing beneficial use of Fill Type 3, Fill Type 4 or Fill Type 5 on land under that person's control." EELS supports the recognition that individuals may receive compensation for disposing of F1 and F2 fill but questions the additional limitations on receiving fees for the disposal of F3, F4, or F5 fill on land owned by the individual. While the Department's interest in prohibiting unpermitted landfills is understandable, those concerns should be mitigated by the broader restrictions on reuse of fill material. If the material is being used for a permitted purpose under the Series F standards, there is no risk of illegal land filling. To better encourage sites to reuse fill in accordance with the promulgated standards, the restriction on receipt of payment for use of all fill types should be eliminated.

Construction and Demolition Debris Handling and Recovery Facilities

New Section 361-5.2: Exempt Facilities: The new provision allowing for on-site storage of certain types of materials anticipated to be reused under a beneficial use determination clarifies the responsibilities of generators of construction and demolition debris. However, the disparity in treatment between sites within the New York City Metropolitan Waste Impact Zone and other areas of the state requires greater justification. No explanation is offered as to why the storage limits within this zone are capped at $1/20^{th}$ of other areas of the state. For rural areas within the New York City Watershed, this could significantly hamper construction and development efforts.

The Department should revise its rulemaking documentation to explain this disparity of treatment, particularly with respect to its impact on rural areas of the state. The reduced storage capacity for construction and demolition debris within the New York City Metropolitan Waste Impact Zone will also increase the amount of excavated material transported off-site, thereby increasing greenhouse gas emissions associated with such activities in contravention of the goals of the CLCPA or encouraging unnecessary landfilling of this material in the state's few remaining landfills.

New 361-5.3(a)(5): "Facilities that receive a combination of soil, sand, gravel, or rock directly from the site of excavation. The soil must have no visual or other indicators (odors, etc.) of chemical or physical contamination such as impacts from spill events, and must not originate from any location within the five boroughs of New York unless the facility is owned or controlled by the City of New York." This provision, which appears to refer to fill material handling facilities, should make reference to the fill classifications contained in Part 360.13(f) or the "excavated material" defined term for consistency purposes. The restriction on registrations for facilities that receive waste from the five boroughs will also create a monopoly for the City's Clean Fill Bank, eliminating other clean fill registration facilities. This reduction in possible destinations will further increase the quantity of excavated material being transported out of the City, inducing additional greenhouse gas emissions in contravention of the goals of the CLCPA.

New 351-5.3(a)(7): This provision should be renumbered.