



**Department of
Environmental
Conservation**

Revised Part 360 Series Beneficial Use Determinations and Fill Material

NYS Bar Association
Albany, NY
December 5, 2018

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Office of General Counsel
NYSDEC

The Problem: Illegal Disposal of Fill Material

- Roberto Clemente Park – Islip Town
 - Unlawful disposal of contaminated fill from May 2013 – April 2014
 - Contaminants included organic compounds, metals and pesticides/PCBs
 - Park closed March 2014
 - Participants in illegal disposal criminally charged and 2 convicted
- DEC creates operation TrashNet and considers revisions to Part 360 to deter illegal disposal of C & D debris, including fill material

Operation TrashNet – Actions Taken on Long Island and in the Mid-Hudson Valley

- Over 550 total tickets issued and charges filed for various misdemeanors and other serious safety violations
- More than 170 tickets issued for alleged unlawful disposal of solid waste
- More than 40 trucking companies allegedly identified
- 81 new illegal dumping sites uncovered
- 26 trucks seized and impounded
- 53 search warrants executed



Section 360.12

Beneficial Use



Part 360 – BUD Program Structure

- Pre-determined BUDs

- Established in regulation
- No additional approval from DEC
- Report to DEC if >10,000 tons distributed

- Case-specific BUDs

- Decision based on petition submitted to DEC
- Effective substitute for raw material or product
- Use does not constitute disposal

360.12(a) – Applicability

- Beneficial use = wastes as effective substitutes for commercial products or raw materials, as determined by the Department
- 360.12 does not apply to materials being sent to Part 361 facilities
- 360.12 does not authorize waste to be used in a manner that constitutes disposal
- The Department reserves the right to require a permit for land placement to protect public health or the environment
- **Default storage time limit of 365 days for beneficially-used materials without specific approval**

360.12(c) – Pre-Determined Beneficial Uses

- (1)(ii) fill material generated outside of New York City with no evidence of historical impacts such as reported spill events, or visual or other indication (odors, etc.) of chemical or physical contamination;
- (3)(viii) recycled aggregate or residue which meets a municipal or State specification or standard for use as commercial aggregate if generated from uncontaminated, recognizable **concrete and other masonry products, brick, or rock...**;
- (3)(ix) recycled material or residue generated from uncontaminated **asphalt pavement and asphalt millings** which meets a municipal or State specification or standard for use as an ingredient in asphalt pavement or other paved surface construction and maintenance uses ...
- (3)(x) **asphalt pavement and asphalt millings** received at an asphalt manufacturing plant for incorporation into an asphalt product;

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

- Review criteria (“essential nature is use not disposal,” “managed as a commodity,” “will not adversely affect health and the environment,” etc.)
- Lower of 6 NYCRR 375-6.8(b) Residential Use and Protection of Groundwater Soil Cleanup Objectives for soil-like materials placed on the land
- All case-specific BUDs expire no more than 5 years from effective date
- Annual reporting for all case-specific BUDs
- Right to hearing for revocation

Section 360.13

Special Requirements for Pre-Determined Beneficial Use of Fill Material

360.13(a) – Applicability

Section 360.13 allows for the self-assessment of fill materials for appropriate use within 360.13 criteria

Section 360.13 DOES NOT:

- Require sampling of material sent to CDDHRFs
- Require all excavated soil or fill to be sampled
- Prevent anyone from petitioning for a case-specific BUD pursuant to 360.12(d) for fill material

360.13(b) – Waste Cessation

Fill Material ceases to be solid waste:

- General fill generated outside of NYC:
 - Once determined to be general fill by knowledge or (if necessary) sampling and analysis

- General fill generated within NYC:
 - Once delivered to the site of reuse

- Restricted-use and Limited-use fill anywhere in NYS:
 - Once delivered to the site of reuse

360.13(c) – Exemption of On-Site Reuse of Fill Material

- Materials excavated at a site can be used anywhere on the site in areas of similar **physical** characteristics
- If contaminated material will be used on a site with public access, minimum of 1 foot of clean soil cover must be placed
- Not applicable to Part 375 program sites

360.13(d) – Testing requirements for Fill Material

- All fill material generated in NYC unless:
 - The quantity is less than 10 cubic yards from one site,
and
 - Does not contain historical evidence of impacts from contamination
- Any fill material outside of NYC that:
 - Exhibits visual or historical evidence of contamination
 - Originates from a site subject to industrial land use
 - If signs of contamination are discovered during excavation

360.13(e) – Sampling and Analysis Requirements for Fill Material

- Sampling by qualified environmental professional
- Minimum soil sampling frequency
- Analysis parameters: SVOCs, pesticides, PCBs, metals
- VOCs and asbestos contingent on likelihood of presence
- Percentage of non-soil constituents (“physical contaminants”) should be estimated based on visual observation

360.13(g) – Other Fill Material Use Criteria

- No payment for receiving Restricted-use or Limited-use fill material
- Notification to DEC at least 5 days in advance of first movement for fill material generated in, transferred in, or imported to NYC in quantities greater than 10 CY
- Notification to DEC at least 5 days in advance, statewide, of placement of Restricted-use and Limited-use fill material
- Transport must be in accordance with Part 364 requirements

360.13(f) – Acceptable Fill Material Uses

- Use of Restricted-use or Limited-use fill material can only occur at a project in accordance with an **approved local building permit or other municipal authorization** that includes the need for the fill material
- Inert, non-putrescible **excludes** plastic, gypsum wallboard, wood, paper, or other material that may readily degrade or produce odors
- Use of Restricted-use or Limited-use fill material must take place **within 30 days of delivery to site**. Foundation or pavement must be installed **within 365 days of material placement**.

Thank You



**Department of
Environmental
Conservation**

SOIL MANAGEMENT IN NEW YORK

The Strategy to Promote Soil Reuse

March 2018



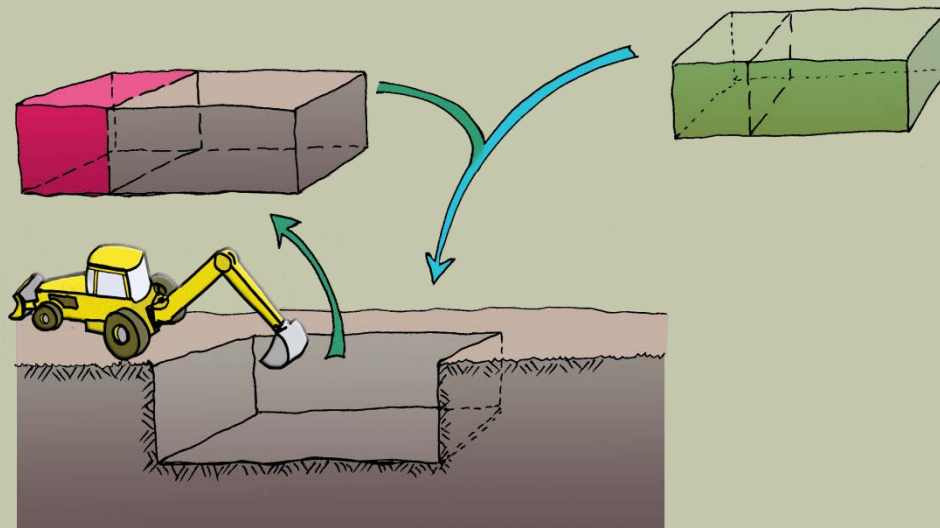
BACKGROUND

- First major revision to NY Solid Waste Regulations in nearly 25 years
- **Regulations effective on 11/4/17**
- Major changes to beneficial use options:
 - Nav. Dredge Material
 - Gas Storage Brine
 - Upland Material Reuse**

- How Regulations Expand the Process that Maximizes Fill Reuse and Minimizes Disposal

EXCESS FILL

IMPORTED FILL



NON-LANDFILL OPTIONS FOR MANAGING EXCESS MATERIAL

Onsite Management	vs.	Offsite Disposal
Redistribute into landscape plan		Beneficial use (BUD) at another project
Allow for reuse as backfill for excavations		Solid waste landfill (petroleum, contaminated, industrial)
Waterfront property can use fill to raise elevations		Registered recycling facilities

PART 360 – BUD PROGRAM STRUCTURE

- **Pre-determined BUDs**

- Established in regulation
- No additional approval from DEC
- Report to DEC if >10,000 tons distributed

-

- **Case-specific BUDs**

- Decision based on petition submitted to DEC
- Effective substitute for raw material or product
- Use does not constitute disposal

360.12(C) – PRE-DETERMINED BENEFICIAL USES

- Fill material generated outside of NYC with no evidence of historical impacts such as reported spill events, or visual or other indication of chemical or physical contamination
- Concrete, brick, and rock as aggregate
- Tire and glass aggregates (with specifications)
- Asphalt pavement and asphalt millings received at an asphalt manufacturing plant for incorporation into an asphalt product

360.12(D) – CASE-SPECIFIC BENEFICIAL USE DETERMINATIONS - GENERAL

- Review criteria (“essential nature is use not disposal,” “managed as a commodity,” “will not adversely affect health and the environment,” etc.)
- Lower of 6 NYCRR 375-6.8(b) Residential Use and Protection of Groundwater Soil Cleanup Objectives for soil-like materials placed on the land
- All case-specific BUDs expire no more than 5 years from effective date
- Annual reporting for all case-specific BUDs
- Right to hearing for revocation

360.13(B) – WASTE CESSATION

- **Fill Material ceases to be solid waste:**
- **General fill generated outside of NYC:**
 - Once determined to be general fill by knowledge or (if necessary) sampling and analysis
- **General fill generated within NYC:**
 - Once delivered to the site of reuse
- **Restricted-use and Limited-use fill anywhere in NYS:**
 - Once delivered to the site of reuse

360.13(F) – ACCEPTABLE FILL MATERIAL USES

Fill Material Type	Fill Material End Use	Physical Criteria	Maximum Concentration Levels
General Fill	<p>Any setting where the fill material meets the engineering criteria, for use, except:</p> <ol style="list-style-type: none">1. Undeveloped land; and2. Agricultural crop land.	Only soil, sand, gravel or rock; no non-soil constituents.	Lower of Protection of Public Health-Residential Land Use and Protection of Groundwater in Table 375-6.8(b) of this Title.

360.13(F) – ACCEPTABLE FILL MATERIAL USES

Fill Material Type	Fill Material End Use	Physical Criteria	Maximum Concentration Levels
Restricted-Use Fill	<p>1) For embankments or subgrade in transportation corridors, or</p> <p>2) On sites where in-situ materials exceed Restricted-Use Fill or Limited-Use Fill criteria.</p> <p>Must be placed above the seasonal high water table.</p>	Up to 40 percent by volume inert, non-putrescible non-soil constituents.	<p>General Fill criteria except that up to 3 mg/kg total benzo (a)pyrene (BAP) equivalent.</p> <p>No detectable asbestos.</p>

360.13(F) – ACCEPTABLE FILL MATERIAL USES

Fill Material Type	Fill Material End Use	Physical Criteria	Maximum Concentration Levels
Limited-Use Fill	Under foundations and pavements above the seasonal high water table	No volume limit for inert, non-putrescible non-soil constituents.	General Fill criteria, except up to Protection of Public Health-Commercial SCOs for metals; up to 3 mg/kg benzo(a)pyrene equivalent is allowed. No detectable asbestos.

COMMON HANDLING & COST

- NYSDEC Registered Recycling Facility (most common-historically \$ but expect increase)
- Permitted Waste Management Facility (Landfill-\$\$\$)
- Permitted C&D Beneficial Reuse Site (\$\$)
- Reused on Site it was Generated (few restrictions-\$)
- Reuse under approved BUD (\$)

LIABILITY COMPARISON

- NYSDEC Registered Recycling Facility (low but potential increase)
- Permitted Solid Waste Management Facility (Landfill-low)
- Permitted C&D Beneficial Reuse Site (Low but Potential Exists)
- Reused on Site it was Generated (none)
- Reuse under approved BUD (very low)

VISUAL REUSE OPPORTUNITIES

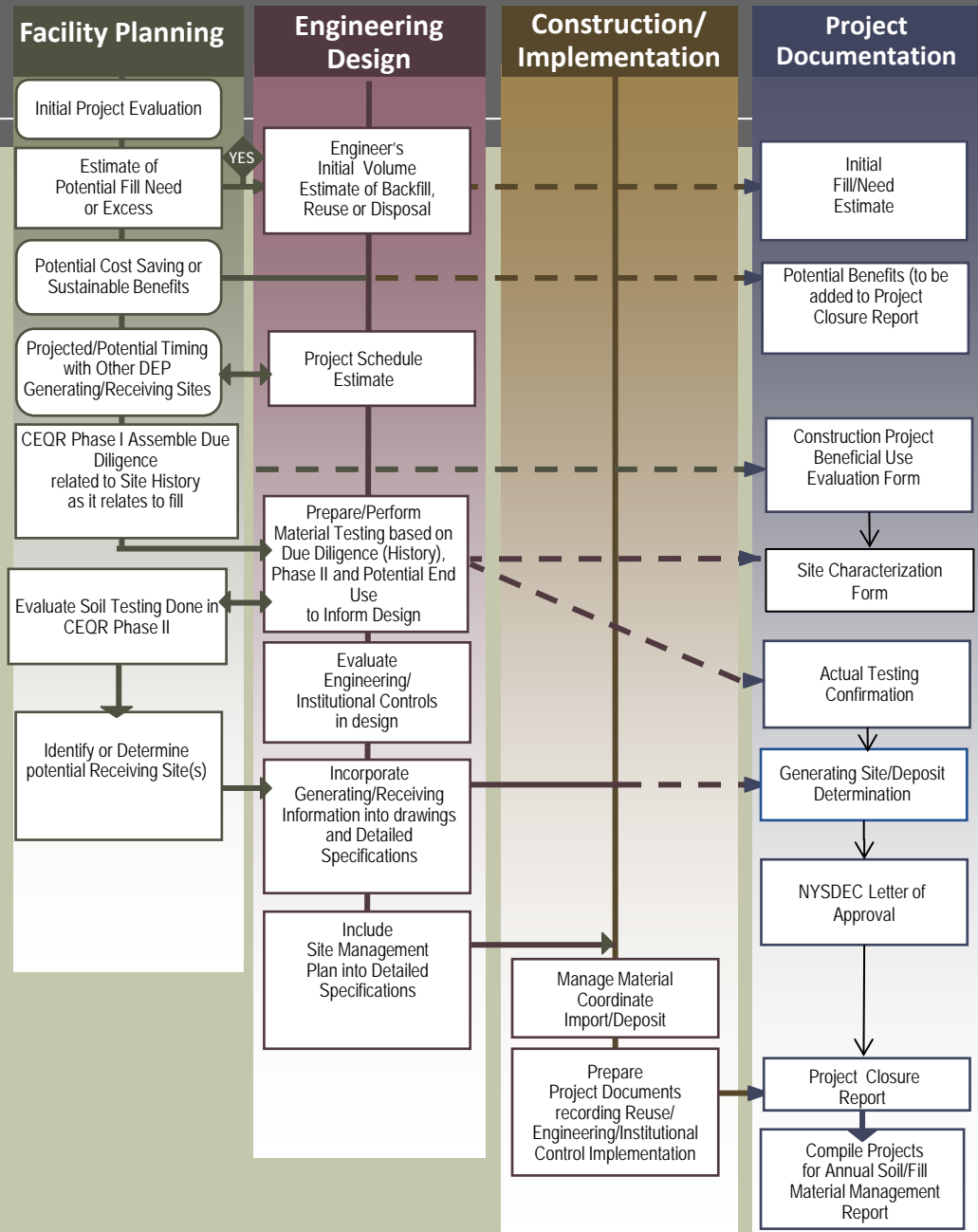


WHAT REALLY IS C&D?

- Soil
- Rock
- Brick
- Concrete
- Concrete Products
- Asphalt Pavement
- Land Clearing Debris
- Wood (painted and treated)
- Electrical Wiring
- General Use Fill
- Restricted Use Fill
- Limited Use Fill



HOW TO BENEFIT FROM THE NEW REGULATION CHANGES



STEPS TO BENEFIT FROM REGULATIONS

- Construction Project Cut and Fill Evaluation
- Identify Project Areas for Reuse Potential
- Early Evaluation of Excavation Physical Characteristics
- Identify What material Stays in the Project
- Chemical/Physical Evaluation of Excess Material
- Work to Identify Projects Needing Excess Material
- Write Project Specifications Incorporating Strategy

SIVE, PAGET & RIESEL P.C.

Revised Part 360 Series – Industry Perspective

Maggie Macdonald

NYSBA December 5, 2018

Public Review & Comment on First Round of Part 360 Proposed Regulations

- NYSDEC Issued Proposed Revisions to Part 360 Regulations in March 2016
 - Public comments were accepted through September 2016 (350 comments received)
 - Public hearings were held in June 2016
- Responses to comments were published in June 2017 (468 pages)

Round 1 – Historic Fill & BUDs

- Historic Fill
 - Restricted acceptance of historic fill at C&D processing facilities
 - Imposed new requirements for excavation & management of historic fill
 - NYC-specific concerns
- BUDs
 - Prohibition on using BUDs in a manner that constitutes disposal
 - Changes to pre-determined BUDs
 - Clarifications to case-specific BUD process

Public Review & Comment on Second Round of Part 360 Proposed Regs

- Notice of revised rulemaking published on June 21, 2017
 - 30-day public comment period
 - 90 comments received
 - One public hearing on July 13, 2017
- Response to Comments published August 2017 (204 pages)

Round 2 – Historic Fill & BUDs

- Majority of comments related to historic fill and BUDs
- NYC-specific concerns
- Stockpiling/characterization concerns
- BUDs & interaction with Part 361
- Discarded material v. material for reuse

Part 360 Revisions Finalized

- “[T]he proposed rules were adjusted to clarify the Department’s original intent, because members of the regulated community presented genuine and verifiable questions about the feasibility of achieving compliance with the revised rules.”

September 20, 2017 –
NYSDEC adopted proposed rule

November 4, 2017 –
Rule went into effect

Regulated Community Concerns Persisted

- Confusion regarding BUDs & Part 361
- Limitation on tonnage for RUCARBs
- Limitation on storage
- Specification requirements for RUCARB BUD
- Part 364 requirements for RUCARBs & C&D

Part 360 Litigation

NYCMA, Inc. et al. v. NYSDEC, et al., No. 00514-18 (filed Jan. 22, 2018)

Petitioners

- New York Construction Materials Association, Inc., Callanan Industries, Inc., Suit-Kote Corp., Hanson Aggregates NY, LLC, Dolomite Products Co. Inc., Gernatt Asphalt Products, Inc. & Peckham Materials Corp.
 - Trade association & businesses engaged in supplying construction aggregates & asphalt pavement for NYSDOT, NYS Thruway, county & municipal paving projects

Respondents

- NYSDEC, Basil Seggos as NYSDEC Commissioner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of:

NEW YORK CONSTRUCTION MATERIALS
ASSOCIATION, INC., CALLANAN INDUSTRIES,
INC., SUIT-KOTE CORPORATION, HANSON
AGGREGATES NEW YORK, LLC, DOLOMITE
PRODUCTS COMPANY, INC., GERNATT ASPHALT
PRODUCTS, INC., and PECKHAM MATERIALS
CORPORATION,

Plaintiffs-Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, and BASIL
SEGGOs as COMMISSIONER OF THE NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Defendants-Respondents.

Plaintiffs-Petitioners New York Construction Materials Association, Inc., Callanan Industries, Inc., Suit-Kote Corporation, Hanson Aggregates New York, LLC, Dolomite Products Company, Inc., Gernatt Asphalt Products, Inc., and Peckham Materials Corporation, and through their attorneys Couch White, LLP, as and for their Verified Complaint and Petitioners allege that:

1. The Plaintiffs-Petitioners in this proceeding are family and corporate businesses from across the State of New York who are currently engaged in supplying construction aggregates and asphalt pavement for New York State Department of Transportation, New York State Thruway, and county and municipal paving projects; together with the trade association that

VERIFIED COMPLAINT-PETITION
Index No.: 00514-18
RJ No.: _____
Oral Argument is Requested

RECEIVED
JAN 23 2018
CLERK

Part 360 Litigation Claims

- Usurping Legislative Function
 - Solid Waste
 - Part 364
- Declaratory Judgment - Solid Waste
- *Ultra Vires* - Solid Waste Hierarchy
- Arbitrary & Capricious –
 - 500 Tons Per Day
 - Storage Limitations
 - Inconsistent BUD & 361-5 Provisions
 - Disparate Treatment of Material
 - Specification Requirement
 - SEQRA
 - Part 364
 - SAPA Violations

Part 360 Litigation

What is “solid waste”?

ECL 27-0701(1)

“Solid waste means all putrescible and non-putrescible materials or substances discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, except* including but not limited to garbage, refuse, industrial and commercial waste, sludges from air or water control facilities, rubbish, ashes, contained gaseous materials, incinerator residue, demolition and construction debris, discarded automobiles and offal but not including sewage and other highly diluted water carried materials or substances in gaseous form.”

Part 360 Litigation

What is “solid waste”?

6 NYCRR 360.2(a)

- (1) *Solid waste* or *waste* means, except as described in paragraph (3) of this subdivision, discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, municipal, commercial, institutional, mining or agricultural operations or from residential activities including materials that are recycled or may have value.
- (2) A material is considered discarded if it is spent, worthless, or in excess to the generator, and is:
 - i. Thermally, physically or biologically processed;
 - ii. Disposed through discharge, deposit, injection, dumping, spilling, leaking or placement into or on 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 groundwater or surface water; or
 - iii. Accumulated or transferred instead of or before being processed or disposed.

Part 360 Litigation

Limitation on RUCARBS – 500 Tons Per Day

- Concern regarding permitting requirements
- Concern that materials would be unnecessarily landfilled
- Extensive comments on the beneficial reuse of RUCARBs in various projects

Storage Limitations – RUCARBs/BUDs

- 360.12(a)(2) – 365-day storage limitation for BUD materials (including RUCARBs qualifying as BUDs)
- 360-5.4(f)(1)(iv) – “source-separated or processed and separated materials that meets a beneficial use determination as specified in section 360.12 or 360.13 of this Title can be stored without time restriction so long as storage volume conforms with the declared storage volume identified in the application or registration documents.”

NYSDEC Response

- March 12, 2018 Enforcement Discretion Letter
 - *Materials used in cement, concrete & asphalt pavement*
 - *C&D facility fill material sampling requirements*
 - Waste tires to secure tarpaulins
 - Storage requirements for regulated medical wastes
- Clarifications
- October 12, 2018 Enforcement Discretion Letter

Enforcement Discretion – March 1, 2018

Residue and fill material sampling:

Section 361-5.4(e) requires that all permitted construction and demolition facilities are required to perform certain sampling on any fill material or residue leaving the facility for reuse.

For existing facilities, the provision takes effect upon permit renewal or modification

The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement until May 3, 2019 regardless of the timing of the permit issuance to the facility.

Potential Revisions under consideration – Fill Material/C&D Specific

- 360.2

Remove the default 365 day limit on storage for pre-determined BUD material

Add definition for ‘contaminated fill’ based on language in Clarifications

Add definition for ‘unrestricted fill’ to describe pre-determined BUD in 360.12(c)(1)(ii): *Unrestricted fill* means fill material consisting of soil, sand, gravel, or rock generated outside of New York City with no evidence of historical impacts such as reported spill events, or visual or other indication (odors, etc.) of chemical or physical contamination

Potential Revisions under consideration – Fill Material/C&D Specific

- 360.12

New pre-determined BUD: Concrete, asphalt pavement, brick, glass, rock, unrestricted fill or general fill when used for grade adjustment:

- Local building permit or other municipal authorization
- No residues from CDDHRF
- Used above seasonal high GW table, surface water, wetlands

New pre-determined BUD: Combination of bricks, concrete with asphalt overlay used in or under asphalt pavement or other paved surface.

360.12(c)(3)(viii) Remove “municipal or state specification or standard” requirement for reuse of concrete, brick, or rock as commercial aggregate.

Potential Revisions under consideration – Fill Material/C&D Specific

- 360.13

360.13(g) Remove restriction on payment or other form of consideration for reuse of restricted-use fill or limited use fill

360.13(d) Remove automatic trigger for testing of fill material originating at industrial land use sites