BUD REGULATORY PROVISIONS

CRA. If the department declares that the CRA is revoked, a municipality may request a hearing within 30 days of receipt of the declaration.

(d) CRA Reporting

An annual report must be submitted, on forms acceptable to the department, no later than May 1 of each year, providing waste recovery data and implementation schedule progress.

Section 360.12 Beneficial use

(a) Applicability.

(1) This section applies to the use of certain wastes as effective substitutes for commercial products or raw materials as determined by the department. The materials cease to be solid waste when used according to this section. This section does not apply to materials that are being sent to facilities subject to regulation under Part 361 of this Title. This section also does not apply to waste used in a manner that constitutes disposal. Specific requirements for the beneficial use of navigational dredge material (NDM), brine, and fill material are found in subdivisions 360.12(e) and 360.12(f), and section 360.13 of this Part.

(2) The department reserves the right to require a permit pursuant to section 360.17 of this Part for land placement, including mine reclamation or subsurface mine filling, in place of a beneficial use determination, if deemed necessary by the department to prevent adverse impacts to public health and the environment.

(3) Materials must not be stored for more than 365 days prior to beneficial use unless otherwise approved through a registration, permit condition or case-specific beneficial use determination.

(b) Unacceptable uses. Wastes used in the following manner are not eligible for a beneficial use determination.

(1) The use of flowable fill for mined land reclamation.

(2) The encasement of waste tires in concrete.

(3) The use of waste tires as fences or screening.

(c) Pre-determined beneficial uses.

(1) The following cease to be waste when used as described in this paragraph.

(i) materials identified in subparagraphs 371.1(e)(1)(vi) through (viii) of this Title that cease to be solid waste as defined in section 371.1 of this Title;

(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.

(iii) fill material when used in accordance with section 360.13 of this Part; and

(iv) NDM used outside ecologically sensitive areas, as commercial aggregate in place of sand or gravel if the NDM contains at least 90 percent sand and gravel, as determined by a standard grain size analysis method approved by the department and performed by an independent laboratory, and if the NDM contains less than 0.5 percent total organic carbon;

(2) The following cease to be waste when received at the location of use as described in this paragraph:

(i) uncontaminated newsprint used as animal bedding;

(ii) uncontaminated used wood pallets that are

used to produce reconditioned or remanufactured wood pallets;

(iii) street sweepings, car wash grit, and water system catch basin materials that consist of sand and gravel and are free from litter and objectionable odors, when used in the following applications:

(*a*) as a substitute for commercial aggregate for the construction of roads or parking areas;

(*b*) as backfill for utilities within transportation corridors other than potable water utility lines;

(*c*) or in commercial or industrial land use locations as defined by subparagraphs 375-1.8(g)(2)(iii) and (iv) of this Title;

(iv) waste tires required to secure tarpaulins in common weather protection practices such as agricultural storage covers and salt pile protection, provided the number of passenger tire equivalents used does not exceed 0.25 passenger tire equivalents per square foot of cover or bunker area, and whole tires are cut in half or have sufficient number of holes drilled in them to prevent retention of water;

(v) 150 or fewer waste tires or tire equivalents at a single site for purposes such as retaining walls, decoration, playground components, bumper guards, manufactured products feedstock, and similar purposes; and

(vi) bread and other similar grain products (spent brewery grains, etc.) used for animal feed or pet food, provided all packaging is removed prior to use.

(vii) source-separated recyclables that are typically managed at a recyclables handling and recovery facility but instead are received directly by a manufacturing plant for use as an ingredient in the manufacturing of a product;

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

(i) ground granulated blast-furnace slag for use as a raw feed in the manufacture of cement and in concrete which meets an industry standard acceptable to the department.

(ii) unadulterated wood combustion ash for use as a soil amendment, provided the application rate is limited to the soil pH requirement of the crops grown;

(iii) industrial wastes historically used as an ingredient in a manufacturing process;

(iv) fats, oil, grease, and rendered animal parts, except for use as or in production of fuels;

(v) coal combustion fly ash which meets an industry standard acceptable to the department for use in concrete, concrete products, light-weight block, light-weight aggregate and flowable fill;

(vi) flue gas desulfurization or other gas-scrubbing byproducts when used to replace manufactured gypsum or manufactured calcium chloride, except for land application;

(vii) coal combustion bottom ash for use as an aggregate in portland cement, concrete, asphalt pavement, or roofing materials;

(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 that is separated from other waste prior to processing and subsequently processed and stored in a separate area as a discrete material stream;

(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 if separated from other waste prior to processing and subsequently processed and stored in a separate area as a discrete material stream;

(x) asphalt pavement and asphalt millings received at an asphalt manufacturing plant for incorporation into an asphalt product;

(xi) clay, till, or rock excavated as part of navigational dredging, which is separated from overlying navigational dredged material and used as fill or aggregate.

(4) The following cease to be waste when the material leaves a facility subject to exemption or regulation under Part 361 or 362 of this Title, provided the material is ultimately recycled or reused. If the material is taken to another facility regulated under this Part or Parts 361, 362, 363, or 365 of this Title, these provisions do not apply:

(i) materials produced by a recyclables handling and recovery facility for use as an ingredient in a manufacturing process or other acceptable end use. For glass, this includes uncontaminated glass-derived aggregate that meets a governmental or industrial organization specification acceptable to the department. The glass aggregate must not exceed the following measure of non-glass material content:

(*a*) five percent by volume; or

(*b*) 0.05 percent by mass of paper and one percent by mass of other non-glass materials;

(ii) compost and other soil conditioning products produced from facilities regulated under Subpart 361-3 of this Title provided the use restrictions are followed;

(iii) ground tree debris, wood debris, and yard trimmings used for mulch and other common uses;

(iv) tire-derived aggregate for use as:

(*a*) residential on-site septic system drainage media, provided the tire-derived aggregate meets the specification found in 10 NYCRR Appendix 75-A,

(*b*) mulch provided the tire-derived aggregate has a nominal size of less than one inch in any direction, is at least 99.9 percent wire free, and has no protruding wire, or

(*c*) playground surface and athletic field material, provided the tire-derived aggregate has a nominal size of less than 3/8 inches in any direction, is at least 99.9 percent wire free, and has no protruding wire;

(v) scrap metal;

(vi) used cooking oil and yellow grease processed in accordance with subpart 361-8 of this Title, for use in animal feed, soap or other products, provided an applicable industry and/or government standard is met.

(vii) By March 1 following each calendar year of operation, any person that distributes 10,000 tons or more of any pre-determined beneficial use material must submit a report to the department on a form acceptable to the department identifying the type and quantity of material beneficially used during the previous calendar year.

(d) Case-specific beneficial use determinations – general.

(1) For a determination that a specific waste may be beneficially used either in a manufacturing process to make a product, or as an effective substitute for a commercial product or raw material, a written petition must be submitted to the department.

(2) A petition must contain the following information:

(i) a detailed description of the waste and the proposed use of the waste;

(ii) a description of the annual quantity, by weight and volume, of the waste proposed for beneficial use;

(iii) a detailed description of the source, process, or treatment systems from which the waste originated, including a list of all chemicals and the quantity of all chemicals added during these processes;

(iv) analytical data concerning the chemical and physical characteristics of the waste and of each type of proposed product, and the chemical and physical characteristics of any analogous raw material or commercial product for which the waste is proposed to be an effective substitute.

(v) justification that the waste functions as an effective substitute for the commercial product or raw material and that the use meets or exceeds governmental or industry standards or specifications;

(vi) demonstration that there is a known or reasonably probable market for the intended use of the quantity and type of waste and of all proposed products by providing one or more of the following:

(*a*) a contract or agreement to purchase the proposed product or to have the waste used in the manner proposed; or

(*b*) other documentation that a market for the proposed product or use exists; and

(vii) demonstration that the management of the waste when used in accordance with the beneficial use will not adversely affect public health and the environment by providing, at a minimum:

(*a*) a waste control plan that describes the following:

(*1*) procedures for periodic testing of the waste, and as necessary, the product;

(*2*) the type of storage and the maximum anticipated volume of the waste to be stored before beneficial use. Storage before beneficial use must not exceed 365 days, unless a different time period for storage is approved by the department;

(*3*) procedures for run-on and run-off control at the storage areas for the waste; and

(*4*) a program and implementation schedule of best management practices designed to minimize uncontrolled dispersion of the waste before and during all aspects of its storage as inventory and during beneficial use;

(*b*) a comparison of the chemical and physical characteristics of the waste to applicable or relevant and appropriate criteria for the proposed beneficial use; and

(*c*) other information as the department determines to be appropriate to demonstrate that the proposed use will not adversely affect public health and the environment.

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

(i) the petition contains all necessary technical information as required under paragraph (2) of this subdivision;

(ii) the essential nature of the proposed use of the waste constitutes use rather than disposal;

(iii) the waste will be managed as a commodity and intended to function or serve as an

effective substitute for an analogous commercial product or raw material;

(iv) at the point of beneficial use, the waste will not require decontamination or other processing;

(v) a market exists or is reasonably certain to be developed for the proposed quantity and use of the waste or the product into which the waste is proposed to be incorporated;

(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

(vii) the proposed use will not significantly adversely affect public health and the environment.

(4) Approved petitions will be subject to conditions the department deems necessary to prevent adverse environmental impacts. When granting a beneficial use determination, the department will determine the precise point at which the waste ceases to be waste. Unless otherwise determined by the department, that point occurs when it is received for use in a manufacturing process, or for use as an effective substitute for a commercial product or raw material.

(5) The department will modify, suspend, or revoke any determination made under this section, upon notice and an opportunity to be heard, if it finds that one or more of the factors serving as the basis for the department's determination were incorrect or are no longer valid, that there has been noncompliance with any condition attached to the determination, or if necessary to prevent adverse impacts to public health and the environment, or control nuisances.

(6) Processing and review of a petition will be suspended if an enforcement action has been commenced against the petitioner for alleged violations of the ECL or other environmental laws administered by the department at the facility or site that is the subject of the petition.

(7) An approved case-specific beneficial use determination is valid for no more than 5 years from the date of approval. Case-specific beneficial use determinations may be renewed upon review and approval of the department.

(8) By March 1 following each calendar year of approval, the petitioners of an approved case-specific beneficial use determinations must submit a report to the department, on a form acceptable to the department that includes the quantity of waste beneficially used during the previous calendar year of operation and any analytical data or other information required in the approved case-specific beneficial use determination. The report must also contain a signed statement by a responsible official of the petitioner's organization that the organization has been in compliance with the terms and conditions of the approved case-specific beneficial use determination during the reporting period.

(e) Case-specific beneficial use determinations - navigational dredged materials (NDM).

(1) Applicability. This subdivision applies to the upland management of NDM in a beneficial manner. This subdivision does not apply to NDM management in surface water, or in the riparian zone, or to the upland management of NDM if it is included under a dredging permit or other applicable permits specified in subparagraph 360.2(a)(4)(xi) of this

Part.

(2) Case-specific NDM beneficial use determination petition. A written petition must be submitted to the department, containing the following information:

(i) the source of the NDM, estimated quantity for use, and the proposed schedule of use;

(ii) a sampling plan that describes how representative samples of the NDM will be obtained and the analytical methods that will be used to assess the samples;

(iii) analytical results of the untreated, unamended NDM and of the treated or amended NDM in compliance with subdivision (d) of this section;

(iv) a description of known or probable markets for the intended use of the NDM or end product, including one or more of the following:

(*a*) the location and description of the placement site and a description of the intended end use of the NDM or end product at that site;

(*b*) a contract to purchase the NDM or end product after processing, or to use the NDM in the manner proposed;

(*c*) a demonstration that the NDM or end product after processing complies with industry standards and specifications for that product; or

(*d*) other documentation that a legitimate market for the NDM or end product exists;

(v) a material management plan that describes the following:

(*a*) the disposition of any waste (e.g., separated debris) which may result from processing of the NDM;

(*b*) a description of the type of storage and maximum anticipated inventory of NDM before being used;

(*c*) procedures for run-on and run-off control at the storage areas for the NDM and end product after processing;

(*d*) a program and implementation schedule of best management practices designed to minimize uncontrolled dispersion of the NDM before and during all aspects of its processing, transportation, and storage as inventory and during beneficial use;

(*e*) if applicable, a description of how unamended or amended NDM that will be used as structural fill will attain project-specific fill geotechnical or engineering specifications when received at the site of placement; and

(vi) a detailed description of all amendment or treatment that will occur before NDM use. The description must include the type and quantity of amendment or treatment procedures, and location of all processing operations.

(3) General provisions.

(i) The department will determine in writing, on a case-specific basis, whether the proposal constitutes a beneficial use, based on requirements described in this section and paragraph 360.12(d)(3) of this Part. For use of NDM as general fill or cover, the requirements of 360.12(d)(3)(vi) must be met, except where NDM will meet criteria for and will be used in the same manner as Restricted-Use or Limited-Use Fill Material as described in section 360.13 of this Part.

(ii) NDM approved for beneficial use under this section ceases to be a waste when it meets the technical requirements or specifications for the intended end use, provided it is not stored for longer than 365 days after meeting the technical

requirements or specifications, unless otherwise approved by the department.

(4) Sampling protocol and analytical methods. In support of a petition for a beneficial use determination, the petitioner may submit analytical results generated for another purpose, including 'in-situ' sediment sampling performed in support of a state or federal permit to dredge, which may not conform to the sampling described in this paragraph.

(i) Untreated, unamended NDM and treated or amended NDM must be analyzed for the following parameters, unless otherwise approved by the department, using department-approved analytical methods: volatile organic compounds; semi-volatile organic compounds; pesticides; polychlorinated biphenyls; metals; sulfides; salt content; grain-size distribution; chlorinated dioxins/furans; carbazole; mirex; hexavalent chromium and cyanides. In addition, the department may require the submission of Synthetic Precipitation Leaching Procedure (EPA SW-846 Method 1312) or Toxicity Characteristic Leaching Procedure (EPA SW-846 Method 1311) results, as incorporated by reference in section 360.3 of this Part, and other data needed to justify the proposed end use (e.g., nutrient content, geotechnical testing, etc.).

(ii) The NDM must be analyzed as prescribed in the following table unless otherwise approved by the department. If the source of the NDM has a history of significant contamination or highly variable contamination, additional sampling will be required. The sampling plan must be submitted and approved by the department prior to sampling the NDM.

TABLE: Analyses Required for NDM	
Cubic Yards of NDM	Minimum Number of Analyses
Under 5,000	1 for each 1,000 Cubic Yards
5,000-10,000	6
10,000-20,000	7
20,000-30,000	8
Over 30,000	*

*The department will require a project-specific approved sampling frequency.

(iii) All samples taken must be representative of the NDM that will be used. A written record of all sampling details must be submitted to the department and must include the date, location, and protocol used to obtain representative samples.

(iv) Statistical analysis in accordance with USEPA SW-846, as incorporated by reference in section 360.3 of this Part, may be used to justify compliance of NDM with contaminant limits where results show an exceedance. If the pollutant limit for beneficial use is lower than the required detection limit, an analytical result less than the required detection limit will be considered to comply with the pollutant limit.

(f) Case-specific beneficial use determinations – gas storage brine or production brine (brine).

(1) Applicability. In addition to the criteria outlined in subdivision 360.12(d) of this section, this subdivision applies to the use of gas storage brine or production brine on roads to control dust, stabilize unpaved road surfaces, reduce ice, or reduce snow.

(2) Case-specific brine beneficial use determination petition. The department will determine in writing, on a case-specific basis, whether the petition constitutes a beneficial use, based on requirements described in this section and subdivision 360.12(d) of this Part. A written petition must be submitted to the department, containing the following information:

(i) the name, address and telephone number of the person or entity that is road spreading the brine;

(ii) a map or a listing of roads where brine will be applied;

(iii) an original, signed, and dated brine spreading authorization letter from the government agency or other property owner of the road(s);

(iv) the physical address of the brine storage location(s) or wells from which the brine is transported;

(v) a description of any system used at the well location(s) to separate brine and minimize any oil or gas in brine;

(vi) an analysis of a representative sample of the brine, obtained at a proposed point of use, for the parameters found in subparagraph 360.12(f)(3)(iii) of the section. All analyses must be performed by a laboratory certified by the New York State Department of Health using methods specified in this subdivision or otherwise acceptable to the department;

(vii) a road spreading plan that includes a description of the procedures to prevent the brine from flowing or running off into streams, creeks, lakes and other bodies of water. The plan should include, at a minimum:

(*a*) the type of use: dust control, road stabilization, or ice and snow control;

(*b*) a description of how the brine will be applied, including the equipment to be used and the method for controlling the rate of application;

(*c*) the proposed rate and frequency of application; and

(*d*) if the proposed use is ice or snow control, a description of how the operation complies with Department of Transportation guidelines for snow and ice control.

(3) Conditions for brine use. The conditions set forth below apply to all case specific beneficial use determinations for gas storage brine and production brine on all roads.

(i) Only gas storage brine and production brine from wells producing from formations other than the Marcellus Shale are approvable for road spreading.

(ii) Road spreading of drilling fluids and flowback water is prohibited.

(iii) Brine must comply with the following standards (test methods are incorporated by reference in section 360.3 of this Title):

BUD Criteria for the Use of Oil/Gas Brine for Road Uses

Parameter	Criteria, mg/L	Test Method
Total Dissolved Solids	>170,000*	Method approved by Department
Chloride	>80,000*	EPA Method 300.00
Sodium	>40,000*	SW-846 6010C
Calcium	>20,000*	SW-846 6010C
Iron	< 250	SW-846 6010C
Barium	< 1.0	SW-846 6010C
Lead	< 2.5	SW-846 6010C
Sulfate	< 2500	EPA Method 300.0
Oil/Grease	< 15	EPA Method 1664
Benzene	<0.5	SW-846 8260
Ethylbenzene	<0.5	SW-846 8260
Toluene	<0.5	SW-846 8260
Xylene	<0.5	SW-846 8260

* lower levels may be considered when brine is used for dust control

(iv) Methods must be employed at the well site to minimize the amount of hydrocarbons present in the brine.

(v) Brine application within 50 feet of a stream, creek, lake, or other body of water is prohibited.

(vi) Brine application measurement methods must be used to ensure that brine application rates are within limits.

(vii) The vehicle used for brine application must be dedicated for that use or must be cleaned to remove any waste material prior to loading with brine.

(viii) Personnel that will be applying brine must be properly trained and educated on the equipment that will be used for brine application, the allowable application rates, and the use restrictions.

(ix) One representative analysis of the brine prior to use for the constituents in subparagraph 360.12(f)(3)(iii) of this section must be submitted annually to the department. All analyses must be performed by a laboratory certified by the New York State Department of Health using methods acceptable to the department.

(x) In lieu of paragraph 360.12(d)(8) of this section an annual report must be submitted to the department by March 31 of each year containing data for the previous calendar year. The report must include:

(*a*) the source of the brine;

(*b*) analytical data;

(*c*) total amount of brine applied;

(*d*) dates of brine application;

(*e*) name of roads where applied, distance applied, and gallons applied; and

(*f*) effectiveness of brine application (excellent, good, fair, poor), etc.

(xi) Brine approved for beneficial use under this section ceases to be a waste when it meets the technical requirements or specifications for the intended end use.

(4) The following additional conditions set forth below apply to case specific beneficial use determinations for gas storage brine and production brine on unpaved roads for dust control and road stabilization.

(i) Brine application is prohibited between sundown and sunrise.

(ii) Brine application is prohibited on sections of road with a grade exceeding ten percent.

(iii) Brine application is prohibited on wet or frozen roads, during rain, or when rain is imminent.

(iv) Brine application for dust control must occur only on unpaved roads.

(v) A spreader bar or similar device designed to deliver a uniform application of brine must be used.

(vi) The application vehicle must have brine shut-off controls in the cab.

(vii) Brine cannot be applied directly to vegetation near the surface that is being treated.

(viii) Application of brine within 12 feet of structures crossing bodies of water or crossing drainage ditches is prohibited.

(ix) When the application vehicle stops, the discharge of brine must stop.

(x) The vehicle must be moving at least five miles per hour when brine is being applied.

(5) The following additional conditions set forth below apply to case specific beneficial use determinations for gas storage brine and production brine on roads for ice and snow reduction.

(i) The brine application must not be used at a rate greater than needed for snow and ice control.

Section 360.13 Special requirements for pre-determined beneficial use of fill material

(a) Applicability. This section applies to the direct use of fill material under a pre-determined beneficial use. This section does not apply to:

(1) fill material sent to facilities subject to regulation under Subpart 361-5 of this Title, and

(2) 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 as identified in subparagraph 360.12(c)(1)(ii) of this Part.

(b) Waste cessation. Fill material ceases to be solid waste in accordance with the following:

(1) Restricted-use fill and limited-use fill - once delivered to the site of reuse;

(2) General fill generated outside of the City of New York – once a determination that it is general fill has been made;

(3) General fill generated within the City of New York - once delivered to the site of reuse.

(c) Exemption for on-site reuse of fill material. 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. If fill material exhibits historical or visual evidence of contamination (including odors), and will be used in an area with public access, the relocated fill material must be covered with a minimum of 12 inches of soil or fill material that meets the criteria for general fill, as defined in this Part. This provision does not apply to sites which are subject to a department-approved or undertaken program pursuant to Part 375 of this Title.

(d) Testing requirements for fill material. Fill material that is not otherwise excluded or exempt from regulation under this section must sampled and analyzed pursuant to subdivision 360.13(e)

of this section if:

(1) the fill material originates from a location within the City of New York unless the quantity of fill material does not exceed ten cubic yards from one site and the ten cubic yards or less of material does not contain historical evidence of impacts such as reported spill events, or visual or other indication (odors, etc.) of chemical or physical contamination;

(2) the fill material originates from a location outside the City of New York if:

(i) there is historical evidence of impacts such as reported spill events, or visual or other indication (odors, etc.) of chemical or physical contamination;

(ii) the fill material originates from a site with industrial land use as defined in subparagraph 375-1.8(g)(2)(iv) of this Title; or

(iii) if, during excavation, visual indication of chemical or physical contamination is discovered.

(e) Sampling and analysis requirements for fill material.

(1) Sample method and frequency. Samples must be representative of the fill material. The sampling program must be designed and implemented by or under the direction of a qualified environmental professional (QEP), using the table below as a minimum sampling frequency. Written documentation of the sampling program with certification from the QEP that samples were representative of the fill material must be retained for three years after the sampling occurs and must be provided to the department upon request.

(2) Analytical parameters. Fill material samples must be analyzed for:

(i) the Metals, PCBs/Pesticides, and Semi-volatile organic compounds listed in subdivision 375-6.8(b) of this Title;

(ii) asbestos if demolition of structures has occurred on the site;

(iii) volume of physical contaminants, if present, based on visual observation; and

(iv) Volatile Organic Compounds listed in subdivision 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.

(3) Laboratory and analytical requirements. Laboratory analyses must be performed by a laboratory currently certified by the New York State Department of Health's Environmental Laboratory Approval Program (ELAP).

(f) Acceptable fill material uses. Fill material can be beneficially used in accordance with Table 2 below.

TABLE 1: Minimum Analysis Frequency for Fill Material

Fill Material Quantity (cubic yards)	Minimum Number of Analyses for Volatile Organic Compounds, if Required	Minimum Number of Analyses for all other parameters
0-300	2	1
301-1000	4	2
1001-10,000	6	3
10,001+	Two for every additional 10,000 cubic yards or fraction thereof	One per every additional 10,000 cubic yards or fraction thereof

TABLE 2: Fill Material Beneficial Use

Fill Material Type	Fill Material End Use	Physical Criteria	Maximum Concentration Levels
General Fill	Any setting where the fill material meets the engineering criteria, for use, except: 1. Undeveloped land; and 2. Agricultural crop land. General Fill may also be used in the same manner as Restricted-Use Fill and Limited-Use Fill.	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.
Restricted-Use Fill[1]	Engineered use for embankments or subgrade in transportation corridors, or on sites where in-situ materials exceed Restricted-Use Fill or Limited-Use Fill criteria. Must be placed above the seasonal high water table. May also be used in the same manner as Limited-Use Fill.	Up to 40 percent by volume inert, non-putrescible non-soil constituents.[2]	General Fill criteria except that up to 3 mg/kg (dry weight) total benzo(a)pyrene (BAP) equivalent.[3] No detectable asbestos. In Nassau or Suffolk County – BAP equivalent does not apply. Polycyclic aromatic hydrocarbons must not exceed Protection of Groundwater Soil Cleanup Objectives in Table 375-6.8(b) of this Title.
Limited-Use Fill[1]	Engineered use under foundations and pavements above the seasonal high water table.[4] Placement in Nassau and Suffolk Counties is prohibited.	No volume limit for inert, non-putrescible non-soil constituents.[2]	General Fill criteria, except up to Protection of Public Health-Commercial SCOs for metals; up to 3 mg/kg (dry weight) benzo(a)pyrene equivalent is allowed.[3] No detectable asbestos.

[1] Use of restricted 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. Fill material must be used within 30 days of arriving at the project site.

[2] Inert, non-putrescible materials excludes plastic, gypsum wallboard, wood, paper, or other material that may readily degrade or produce odors.

[3] Benzo(a)pyrene (BAP) equivalent is calculated using the following formula: BAPE= 1 x conc. Benzo(a)pyrene + 0.1 x [conc. Benz(a)anthracene + conc. Benzo(b)fluoranthene + conc. Benzo(k)fluoranthene + conc. Dibenz(a,h)anthracene + conc. Indeno(1,2,3-c,d)pyrene] + 0.01 x conc.

Chrysene (All concentrations in mg/kg or ppm, dry weight.)

[4] If foundation or pavement is not installed within 365 days of fill material placement, it placement will constitute prohibited disposal.

(g) Other fill material use criteria.

(1) Payment. A person must not receive payment or other form of consideration for allowing beneficial use of restricted-use fill or limited-use fill material on land under that person's control.

(2) Notification in the City of New York. The department must be notified at least five days in advance of transfers of general fill, restricted-use fill and limited-use fill material generated in, imported to, or relocated within the City of New York in amounts greater than ten cubic yards. Notifications must be made on forms or in a manner acceptable to the department and must include any analytical data required by this section. The department reserves the right to inspect any site of generation or placement of fill material.

(3) Notification of fill material placement. For restricted-use fill and limited-use fill material, the department must be notified at least five days before delivery of greater than ten cubic yards of fill material. Notification must be made on forms or in a manner acceptable to the department and must include any analytical data required by this section. The department reserves the right to inspect any site receiving fill material.

(4) Recordkeeping. The generator, processor, and receiver of fill material subject to sampling under this section must retain records of fill material quantities, with analytical data, for a minimum of three years after the fill material is removed or received, as applicable. These records must be made available to the department upon request.

(5) Transport.

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

(ii) Transport of limited-use fill and restricted-use fill generated outside of New York City, is subject to the requirements of Part 364 of this Title.

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

(6) Fill material not used in accordance with this section is a solid waste and must be managed at a facility authorized to receive it, or used pursuant to a case-specific beneficial use determination in accordance with subdivision 360.12(d) of this Part.

Section 360.14 Exempt facilities

(a) While this Part or Parts 361 through 365 may exempt solid waste management activities from regulation by the department, other activities, unrelated to solid waste management, occurring at the facility identified as an exempt facility may be subject to other regulations promulgated by the department.

(b) General exemptions. In addition to exemptions provided in Parts 361 to 365 of this Title, the following facilities or person(s) are exempt from this Part:

(1) A transfer, storage, treatment, processing, or combustion facility located at the site of waste generation or at a location in the state under the same ownership or control as the site of waste generation. For the purposes of this Part, all locations under the ownership or control of municipal agencies and departments are

PART 360 PUBLIC COMMENTS AND NYSDEC RESPONSES REGARDING BUD PROVISIONS

REVISED DGEIS

Comment: The discussion of reuse of contaminated fill in the Revised DGEIS is insufficient. It fails to comply with SEQRA, which requires DEC to take a "hard look" at the relevant areas of concern. Moreover, it does not consider reasonable alternatives to the BUD program, such as excluding the New York City drinking water watersheds or limiting the program to already contaminated areas. Finally, DEC has not identified mitigation measures to minimize impacts to the maximum extent practicable, such as best management practices for erosion control and prevention of migration of contaminants.

Response: The commenter is correct that SEQRA requires a hard look at relevant areas of concern and the Department has fully met its SEQRA obligations. Throughout the rulemaking process, the Department had two public comment periods, held multiple hearings and met individually with numerous stakeholders, including the commenter. Evidence of the hard look taken by Department staff can be found, not only in the draft EIS, but the various iterations of the express terms, the supporting documents and in the two assessments of public comment. Among the alternatives evaluated by the Department is the no action alternative. In the context of the fill provisions, the no action alternative is to leave the reuse of fill material largely unregulated. Under the current regulations, Part 360 provided a pre-determined beneficial use determination for clean soils and provides that fill uses in place of similar soils could be used without confirmatory sampling. With no confirmatory sampling available, judgements about the suitability of soil substitutes is left to the generator or the receiver.

Under the regulations proposed in June of 2016, the Department sought to regulate the use of historic fill. That alternative would have focused on the reuse of soils from urban areas and was limited to only addressing historic fill by allowing use on the site of generation under certain conditions and under building foundations and paved surfaces or where covered by two feet of soil. This proposal did not address the broader categories of fill materials throughout the State including urban areas. That alternative was rejected in place of the pre-determined BUD provided in the revised 360.13 because the current proposal more specifically proscribes how waste should be characterized and the ultimate types of reuse that are appropriate based on site-specific sampling. Compared to the existing regulations, the present proposal more comprehensively addresses the potential impacts posed by improper placement of fill material while at the same time provides the regulated community with a clear path to reuse of fill material from construction sites.

Furthermore, in response to public comment received on the revised proposal, the Department did consider excluding the New York City drinking watersheds from areas where certain fill can be used pursuant to a pre-determined BUD. However, considering how low the thresholds are for the three fill types, and the limitations on use for restricted and limited-use fill, these prohibitions would not be warranted. For example, if a generator wanted to reuse restricted fill, Table 2 in the revised 360.13 would restrict

its use to engineered systems such as subgrade in a transportation corridor. Since the associated impacts of road construction are not prohibited within the geographic boundaries of the NYC watershed, preventing the beneficial use of excavated soils coincident with construction of a transportation corridor would serve no environmental benefit. To be clear, the end uses proscribed in Table 2 provide a range of uses depending on the compatibility of tested material to its location of use and does not provide relief from any other federal, state or local regulation that may also restrict the location where fill material may be placed.

Comment: There are significant direct, indirect, and cumulative environmental impacts associated with the proposed revision to 360.13, but the Department's revised Draft Generic Environmental Impact Statement (DGEIS) one-page discussion of 360.13 does not identify or even address these real impacts. The revised DGEIS suggests that the provision will "protect neighboring areas, particularly in communities of disproportionate impact." The commenter believes that the existing practice of removing fill promptly from an excavation limits the impact of a construction project on "neighboring areas". The unintended consequences of the Department's proposal - the necessity to leave soil in place for up to two weeks -- would exacerbate those impacts on New York City's neighborhoods. The Company appreciates that one of the purposes of the proposed revisions to 360.13 was to eliminate "problem disposal sites, especially in Long Island and the Lower Hudson Valley." However, there are a significant number of "communities of disproportionate impact" in New York City that could be adversely impacted by the unintended consequences of the Department's proposed revisions and those impacts need to be balanced with the consideration of similar communities on Long Island and in the Lower Hudson Valley. At the very least, if the Department proceeds as planned, the DGEIS should be supplemented and re-issued for public comment to consider the previously unidentified environmental consequences, a reasonable range of alternatives, and required mitigation measures. However, the need for a supplemental DGEIS could be avoided if the proposed rulemaking were refined to take into account and accept existing utility fill characterization and management procedures that already safely manage contaminated soils without creating new adverse impacts associated with stockpiling soils for days or weeks on City streets.

Response: The final regulations have added language to clarify that the majority of fill material, which is sent to regulated processing facilities, is not required to follow the criteria in section 360.13. Given this clarification, the limited impact of the regulations is sufficiently addressed in the DGEIS. The Department also must disagree that 360.13, as revised, would have any direct, indirect and cumulative impacts. Compared to the no action alternative, the final regulations would include new mitigation measures on an activity that is already occurring; the stockpiling of material at construction sites and the reuse of fill material. In areas, like New York City, where stockpiling is impractical, it is typical for material to be taken to facilities regulated under Part 361. That practice would be unchanged with 360.13 in effect. In other places, it is typical to see stockpiles at construction sites and sampling can be built into the construction schedule. Therefore, the regulations would not cause a generator to hold onto fill material longer

than they do under the existing regulations. Further, even if the testing requirements cause a generator to hold onto material at the site of generation - -which is not required by the proposed regulations - - the benefit of conducting confirmatory sampling of the material outweighs the temporary nature of a construction activity. Finally, construction of houses, building and roads throughout the state would happen whether the Department's regulations were implemented or not. The proposed regulations simply provide a means for fill material to be reused in a manner appropriate with the receiving environment and end use. If the generator of fill wishes to send material to a regulated 361 facility instead of beneficial use, then the impacts suggested in the comment are avoidable altogether. The regulations for fill material therefore do not have the potential for a significant adverse environmental impact.

Comment: The proposed BUD does not enhance the recycling opportunities as asserted in the GEIS. It in fact, it reduces the potential reuse of asphalt millings and concrete by raising the bar of what qualifies.
The current BUD includes: "...recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock placed in commerce for service as a substitute for conventional aggregate" (current Part 360-1.15(b)(11)). The proposed BUD requires the product to meet a NYSDOT specification, which a good portion of millings and concrete from non-DOT sources will not meet.

Response: The final regulations have been clarified to recognize other governmental standards and uses for concrete and asphalt.

Comment: The revised draft GEIS for Part 360 still does not take a "hard look" at environmental concerns and alternatives, in particular missing the chilling effect of its proposal on reuse and recycling operations in New York State. This effect comes especially to industries which generate byproducts from the recycling of materials such as metal or paper – the beneficial use, versus forced disposal, of residues or byproducts from these recycling processes is vital to the economic viability of recycling.

Response: The Department supports the appropriate recycling of byproducts through BUDs, either pre-determined or case-specific. As outlined in the DGEIS, the BUD process for these byproducts is not significantly different than the current regulations.

Comment: The Department relies in the EIS on recommendations made in the State Solid Waste Management Plan but several emerging issues have arisen since its publication. The rules should also address emerging contaminants, such as perfluorooctanoic acid.

Response: Recent environmental issues were considered during the rulemaking process, including perfluorooctanoic acid, which is included in leachate monitoring parameters for landfills.

RESPONSIVENESS SUMMARY

Page 20
Comment: The reference to DOT on page 20 of the RS as it relates to 360.2(b)(63) and (64) is not clear. Should this be USDOT?

Response: The reference is NYSDOT.

Page 20
Comment: "The historic fill definition is no longer used in the regulation and has been replaced by the term "fill material….." Is "fill material" the same as "historic fill?" That is, does it include soil, rock from an excavation that is not located in a potential historic fill area?

Response: Fill material is defined in the regulations and goes beyond material that would be considered historic fill.

Page 90
Comment: Response says "The predetermined BUD is only intended to provide waste cessation for C&D debris products leaving a processing facility; these concerns can only be considered in context of relevant proposed terms in Part 361." This appears to be contradictory to the Response on Pg. 88 which says, "Subdivision 360.12(c) has been revised to allow for direct haul of materials meeting this pre-determined BUD." Additional clarification is needed here.

Response: These two statements are referring to two different items and are taken out of context from the comments from which they were responding. The first is referring to a question related to a BUD related to materials leaving a processing facility and the second statement is a generic reference to the general BUD subdivision identifying a revision that was made. These statements need to be read independently and in context.

Page 198
Comment: Response says threshold has been changed to 500 tons per day based on a monthly average. The revised regulations (361-5.2) state "weekly" average. Which is it?

Response: The 500 tons per day limit is based on a weekly average.

Pages 200, 204
Comment: Response to a comment about limiting storage of asphalt millings to 180 days says, "The 180 [day] storage limit has been removed from the revised proposal." Comment: Does this mean there is NO time limit for storage of asphalt millings (which appears to conflict with 361-5.2(a)(2)] or is it 365 days as specified in 360.12?

Response: The final regulations have been clarified for both Parts 360 and 361, to allow storage of asphalt millings up to 365 days.

Page 200
Comment: Response to a comment suggesting that mines with C&D Processing Registrations are exempt from storage time limits, pile size limits, etc. The response also goes on to state, "Part 360 requirements for solid waste management facilities are appropriate for facilities that are located at a mine and any overlap with an operator's mined land use or reclamation plan should be addressed during permit review. The operating requirements associated with solid waste management facilities would be implemented to restrict any environmental impacts." What specific "operating requirements associated with solid waste management facilities" is DEC referring to? This seems to imply a full Part 360 permit is required for mine sites, in which case many (if not all) mines will cease processing of RUCARBS and importing clean fill causing thousands of tons of these materials to be disposed of in landfills.

Response: The final regulations for C&D debris handling and recovery facilities are found in Subpart 361-5 and do not prohibit processing in mines. Whether the facility requires registration or permitting will depend on the type and quantity of material managed, as outlined in the regulations.

Page 213
Comment: Response to comment states that the BUD in 360.12 allows for RUCARBS to be used as reclamation backfill at mine sites. Comment: This is not explicitly made clear in 360.12. Specific language needs to be included regarding a BUD for mine reclamation using RUCARBS and clean fill.

Response: The final regulations specify that uncontaminated, recognizable concrete and other masonry products, brick, or rock can be used as aggregate if a recognized specification has been met. Asphalt is limited to road construction uses. Use of aggregate in a mine is not prohibited unless it is not allowed by the mining permit.

REGULATORY IMPACT STATEMENT

Page 19
Comment: The RIS says that the removal of the exclusion of case-specific BUDs from UPA and SEQR requirements (Parts 617, 622, 624) will give BUD holders due process when BUDs expire, but this is not true based on the scope and applicability of Parts 617, 622, and 624. In particular, Part 624 should apply also to renewals of existing BUDs.

Response: To clarify, the RIS does not indicate that due process will be available when case-specific BUDs expire. If a case-specific BUD expires without renewal, there is no further action required by the Department. What the RIS indicates is that beneficial use determinations are not exempt from review under the State Environmental Quality

Review Act and the Department's hearing regulations. This means that a proposed revocation, denial or the imposition of conditions of a BUD can be addressed in a hearing, if one in requested. In addition, there was some ambiguity in the existing regulatory program over whether SEQRA was applied to these determinations and the statement in the RIS was intended to eliminate that ambiguity. The comment indicates that Part 624 should apply to renewals. The applicability of Part 624 is not within the scope of this rulemaking, however, referrals for a hearing related to a permit, license or entitlement are generally governed by Part 624.

PART 360 GENERAL REQUIREMENTS

General Comments

Comment: The revised "tracked changes" versions of the proposed regulations is difficult to analyze in the shortened 30-day timeframe offered for review and comment. In some cases, sections which were completely rearranged registered as one change, with no way to determine whether the content of the sections changed significantly without thorough review of the documents. Given the number of sections that were affected by this, the 30-day comment period is insufficient to perform a thorough review. In addition, there can be little confidence in the tracked changes, as many errors have been found. Many are minor typos, but some are significant. For instance, the entire section on the environmental monitoring plan is referenced incorrectly. The Part 363 table of contents lists the section as 363-4.7, a subsection of permit application requirements. However, within the text of this section, the environmental monitoring plan regulations are listed as item (f) under 363-4.6 Facility manual, and all items under item (f) are affected. Similarly, the site analytical plan and water quality analysis tables are included as items (g) and (h), respectively, under the Facility manual and it is not clear what references to use when citing sections for comments. The section on hydrogeologic investigations underwent a similar restructuring, with no way to determine changes made from the previous draft and very little time for a thorough review. Subpart 361-3 was similarly rearranged to clarify the regulations, but with no ability by interested parties to thoroughly review these sections in the given timeframe. Another example of this is Part 365, which appears to be completely rewritten.
The "tracked changes" document does not appear as any changes to be tracked, rather sections of this revamped Part are simply highlighted with no indication of the implications or whether the content has been significantly revised outside what is addressed directly in the comment response document. The comment response document simply states that the section has been "substantially revised."

Response: To ease with public review, the regulations were provided in both "track change" and in a copy with all changes included. Comments to the Department could be provided in any format. The typographical error noted has been adjusted in the final regulations.

materials can be recycled through a case-specific BUD. The Department is developing new forms and other means to expedite the review of case-specific BUD petitions.

360.2(a)(3)(viii)
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.

Response: This provision was replaced by the criteria in section 360.13 that govern all types of soil use. Under the final regulations, soil that is excavated outside of New York City that has no known or suspected contamination would still be considered clean soil and does not need to be managed as solid waste. However, considering the pervasiveness of historic fill being excavated in New York City, soil may still qualify as general fill, but must be subjected to confirmatory testing to determine where such soil may be used off-site.

360.2(a)(136)
Comment: Due to New York State's definition of hazardous waste and exclusion of "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy," oil and gas development waste is considered, by definition, solid waste. This type of waste will not be considered hazardous, regardless of the fact that its constituent chemicals (benzene, arsenic, etc.) are, in fact, hazardous. This is an outdated regulatory inconsistency which allows for hazardous waste to be disposed of in municipal landfills, where the effluent is processed at municipal sewage treatment plants. Many commenters asked that the DEC use this opportunity to close this "loophole" and require that wastes be disposed of at facilities based on their chemical constituencies, rather than an arbitrary and flawed regulatory definition.

Response: The definition of hazardous waste is found in the Part 370 series and is outside the scope of this rulemaking. However, the Department disagrees with the statement that hazardous waste is being disposed in municipal landfills.

Definitions
Comment: DEC has failed to classify drill cutting as technologically enhanced naturally occurring radioactive material (TENORM). Specifically, the DEC excludes drill cutting from ever being defined as "processed and concentrated," so laws governing the

Response: In New York State, solid waste management facilities and hazardous waste management facilities are handled under separate regulations.

360.2(b)(225)
Comment: Recycle – definition should include products that are prepared from waste in accordance to an engineered specification that incorporates additional expense(s) to be incurred to manufacture such product(s) beyond handling, transfer and disposal.

Response: The definition of recycle is sufficiently broad to include the products referenced in the comment and does not need to be more specifically defined in order to achieve the regulatory purpose for which the definition is needed.

360.2(b)(268)
Comment: Thermal treatment – definition(s) does not provide for heat transfer technologies that operate in the absence of oxygen (gasification).

Response: The definition does not require the technology to include oxygen and does specifically list gasification.

360.2(b)(284)
Comment: Still present is a definition of "uncontaminated", but use of this term is for the most part minimized from use, as it is specifically deleted from the definition of C&D debris. If the definition of uncontaminated remains, a definition of contaminated should also be presented.

Response: Uncontaminated is used several times in Part 360. The term contaminated is not used without explanation alongside the terms, therefore a definition is not warranted.

Comment: The definition of uncontaminated is ineffective and contradicts the wise corrections DEC made in its approach to historic fill. This provision maintains that concept that characterization of material is not a function of what is actually in the material, but vague references to the past of the material and the intentions of the people in the past who handled the material. Under this definition, a large amount of pristine blue stone becomes legally
contaminated because a sufficient number of paper coffee cups were placed on top of the stone. The dangerous and ineffective nature of this approach was recognized in your changes to historic fill. We strongly suggest that these
definitions simply provide chemical limits on the content of the material independent of any other factor.

Response: The final regulations include provisions to characterize fill material, found in section 360.13, to provide additional clarity and to assist in implementation. Section 360.13 and Subpart 361-5 include testing requirements.

The Department also disagrees that, in the example provided, a pile of blue stone would become contaminated by paper cups. The proposed definition provides that to be uncontaminated, a material must not be comingled with other solid waste. According to its ordinary meaning, to commingle is to blend thoroughly, or to combine into a more or less uniform whole. It is not reasonably likely that paper cups could be so thoroughly mixed with stone to become a uniform whole.

Comment: The definition should be changed to "VISUALLY UNCONTAMINATED" since all the references throughout Part 360 relate to a material being uncontaminated with respect to being mixed with other wastes. The definition of uncontaminated states that it must be free from petroleum, pesticides and hazardous wastes, but makes no connection to the Part 375 Soil Cleanup Objectives to logically make that distinction. It is simply not possible to LOOK at a waste and determine if it is UNCONTAMINATED (free from petroleum, pesticides or hazardous wastes) without supporting laboratory results. DER-10 provides for testing guidelines for soils and should be applied to verify that it is "UNCONTAMINATED".

Response: Section 360.13 and Subpart 361-5 include additional criteria, including analytical requirements, to verify the status of materials that may be beneficially used.

360.2(b)(308)
Comment: Wood debris from any source should be either adulterated or unadulterated. We are splitting hairs too thin and casting further confusion into the regulatory process. There are too many references to different types of wood(s) definitions.

- Unadulterated is waste wood, no coatings of any type on it and no ingredients injected into it. Examples are any part of a tree, unadulterated dimensional stick lumber from C&D recovery such as unadulterated floor joists, wall studs, ceiling rafters, wooden pallets.
- Adulterated waste wood;
    - Any manufactured ingredient added into or onto the external surface or internal fiber of the wood products.
    - Typical unadulterated waste woods;
        1. Painted
        2. Glued – Internally contains glue or other type adhesive and/or pressed together
        3. Creosote coating or injection
        4. Pressure treated lumber coated or injected

Response: Different types of wood are handled at various types of solid waste management facilities - composting, mulch, construction and demolition debris handling and recovery and landfills. Separate definitions are useful in outlining what can be accepted at each of these facilities.

360.4 Transition

Response: The intent of the regulation is not to regulate Department staff. The point of the proposed regulation, which has not been revised since the proposed regulation, is to inform the regulated community of the circumstances which are not appropriate for a variance.

360.11 Comprehensive Recycling Analysis

Comment: This section must maintain the requirement that comprehensive recycling analyses ("CRAs") continue to report on the recycling rate. While waste generated is an important metric, recycling participation rates help public officials and the public understand whether or not local recycling programs are improving, stagnating or falling behind.

Response: The Department believes the reporting metric identified in the state solid waste management plan (Beyond Waste) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal is a more comprehensive and appropriate metric for comparison purposes and better encompasses all of the contributing factors for true waste reduction including recycling, reuse and source reduction measures that may be very difficult to measure and track independently.

360.12 Beneficial use

Comment: The commenter noted that revised regulations do not provide for any public participation in case-specific beneficial use determinations.

Response: The comment is correct. Case-specific BUDs are not subject to public participation regulations.

360.12(a)(1)
Comment: The third sentence in paragraph § 360.12(a)(1) stating that "this section also does not apply to waste used in a manner that constitutes disposal" should be removed. This terminology "used in a manner that constitutes disposal" is not defined in Part 360, but has a specific meaning under the hazardous waste regulations in Part 371 which should not be inferred here for solid waste without being clearly defined. The requirement for a determination as to whether a proposed use constitutes a beneficial use rather than disposal is adequately addressed by §360.12(d)(3)(ii), so the sentence referenced above is not necessary in § 360.12(a)(1) and could lead to inappropriate interpretations if retained.

Response: The Department disagrees that this terminology cannot be used in this section. The 1993 version of 6 NYCRR 360-1.15(d)(2)(i) contains the criterion for beneficial use, "the essential nature of the proposed use of the material constitutes a reuse rather than a disposal" and this wording was subject to public review in the March 2016 Proposed Part 360.

360.12(a)(1)
Comment: Does material that qualifies as BUD at its point of generation lose its BUD designation when it reaches the 361 facility?

Response: The material "qualifying as a BUD at its point of generation" only does so if it is used in the manner specified in the BUD (pre-determined or case-specific). If the material is sent to a Part 361 facility, the BUD does not apply to it.

360.12(a)(1) and 361-5.2
Comment: It says that "The materials cease to be solid waste when used according to this section." This seems to indicate a material such as "recycled material or residue generated from uncontaminated asphalt pavement and asphalt millings" which is listed in 360.12(c)(3)(ix), would not be considered a solid waste so long as it met the requirements of both 360.12(a) (for example, not stored more than 365 days) and (c)(3)(ix). This would imply that millings or uncontaminated asphalt pavement chunks would not be considered solid waste, but then they are still listed as a C&D material under 361-5.2. At what point are millings and asphalt waste considered 'beneficial use'?

Response: Asphalt millings and pavement chunks, to qualify for the pre-determined BUD in 360.12(c)(3)(ix) must meet a municipal or state specification for reuse; until they can meet this specification, they are regulated as a C&D debris.

360.12(a)(1) and 360.12(c)(3)(viii) and (ix).
Comment: The Applicability subdivision of Section 360.12 provides that "materials cease to be solid waste when used according to this section" – but in the next sentence, that waste cessation does not apply to materials that are being sent to facilities subject to regulation under Part 361. Then further on in 360.12(c)(3), pre-determined BUDs in 360.12(c)(3)(viii) for concrete, brick and similar materials, and (ix) for asphalt pavement and millings, apparently do not apply to these same materials. These provisions are contradictory.

Response: The Department disagrees that these provisions contradict one another. Materials sent to a facility regulated under Part 361 are not being sent to a site of "use according to this section" but rather are being stored, handled, treated or processed prior to being used pursuant to the pre-determined BUD (or a case-specific BUD), and hence the BUD does not apply. Once processed to meet an appropriate specification, however, the pre-determined BUDs in paragraph 360.12(c) attach. The BUDs in this paragraph were worded as they are to allow for beneficial use regardless whether the material is sent to a Part 361 facility, provided it meets an appropriate specification.

360.12(a)(2)
Comment: We request that NYSDEC clarify that its discretion under this provision to require permits for land placement in place of a BUD is only applicable to case-specific BUD determinations and would not apply if land placement is done under a pre-determined BUD, or involves General Fill, Restricted-, or Limited-Use Fill. This provision

would be unworkable if applicable to those instances and would result in significant increases in construction bids in order to account for unknown outcomes to construction budget and schedule. We recommend that NYSDEC revise 360.12(a)(2) so that the provision is limited to case-specific BUD determinations

Response: The reservation specified in proposed 360.12(a)(2) is meant to put the regulatory community on notice that a permit may be required for large fill projects. In general, the purpose of a BUD is to promote reuse of a material which would otherwise qualify as a solid waste, and the expectation is that use of material under a BUD will not pose adverse impacts. However, 360.12(a)(2) serves as a back stop in the event that land placement of an unlimited amount of fill leads to unexpected and adverse impacts on public health and the environment.

360.12(a)(3)
Comment: Section 360.12(a)(3) provides that materials may not be stored for more than 365 days (at a C&D
facility) prior to beneficial use. But if they are BUD material at the point of generation, yet transported to a 361 facility, do the storage time limitations apply to this material?

Response: Yes, the storage limit applies everywhere including a solid waste management facility unless a longer storage time is approved through the solid waste management facility's registration or permit. The intent is to ensure the material is beneficially used in a reasonable time frame.

360.12(a)(3)
Comment: Commenters objected to storage periods for BUDs, some stating they appear to be arbitrary or do not make sense for materials which must be accumulated for construction purposes and may be used over multiple construction seasons. One commenter recommended extension to two years; others requested this period not apply at all to inert "exempt C&D" materials such as recycled concrete aggregate or asphalt millings, or processed recyclables such as glass aggregate.

Response: As a default storage period, the Department believes 365 days is reasonable for construction projects. As stated, a longer period can be authorized through a registration, permit condition or case-specific BUD.

360.12(b)
Comment: New York must forbid so-called "beneficial use" of drilling wastes. Since fracking is banned in New York and little conventional drilling takes place, banning these wastes from disposal in the state would protect our environment, extend the life of landfills and remove a subsidy for out-of-state drilling interests.

Response: Conventional drilling does not generate a significant quantity of cuttings or other drilling waste, but production brine is generated from operating conventional gas and oil wells in New York State. Application of these brines, and those from gas storage

caverns, pursuant to requirements in 360.12(d), to de-ice roads, suppress dust on or stabilize unpaved roads, is not disposal but a legitimate beneficial use, and therefore has not been prohibited in the final regulations.

Part 360.12(c)
Comment: With the clarification of alternative operating cover as a BUD, more pre-determined BUDs should be made available for the landfill industry, in-line with what the Department has already approved state-wide or on many case-by-case bases. These should include at a minimum municipal solid waste incinerator ash and non-hazardous petroleum contaminated soil. Several Part 360 Operating Permits contain a pre-approved BUD listing for material that are permitted for use as daily cover at the site. It is very important that these permit conditions be maintained, as sites have entered into multiple long-term agreements that are based upon the use of these materials as AOC. Thus, we request that renewal of BUDs be concurrent with the renewal of operating permits. This will reduce the burden on both the facility and the Department for application, review, and approval of BUDs in combination with renewal of the permit.

Response: The final regulations do not include alternative operating cover (AOC) in Section 360.12 as a beneficial use at all. AOC is waste that may be approved for use at a landfill based on its characteristics and is addressed in Section 363-6.21. Since AOC is not addressed through a BUD, its approval will be part of landfill permits and any conditions or time limitations imposed by those permits.

360.12(c)
Comment: Pre-determined BUDs that authorize the use of solid wastes for construction should allow them to be used in all instances, including landfills.

Response: The Department believes that use of non-hazardous solid wastes in landfills in place of conventional materials for construction, operation, or closure of a landfill should not be pre-determined but rather based on the unique circumstances of each landfill and whether the material will meet the engineering requirements for its proposed use and pose no adverse public health or environmental effect if used in the specific landfill. For this reason, use of solid waste in landfills are addressed in Section 363-6.21.

360.12(c)
Comment: There appears to be some inconsistency as to when fill materials are no longer considered solid waste comparing different sections of the draft regulations. In 360-12(c)(1) it states "when used", but in 360-13(a) it states "once delivered" or "once delivered to the site of reuse" or "upon being characterized", depending on fill category. This is significant to understanding when transportation requires a permit, and when it does not.

Response: The phrase "when used" in 360.12(c)(1)(ii) is followed by, "...in accordance with section 360.13..." and should be understood as referring to any points of waste cessation identified in Section 360.13.

360.12(c)
Comment: Commenter strongly recommends including a BUD for small quantities of aggregate production/reuse spoil applicable solely for transportation projects, has a purposeful use for a residential/ property owner, and would be beneficial. Such materials should be limited to traditionally exempt C&D, such as clean concrete, brick, rock, etc.

Response: A small-quantity (ten cubic yards) threshold is present for these materials in the final regulations for characterization of fill material and for Part 364 transporter authorization.

360.12(c)(1)(ii)
Comment: Refers to fill material used in accordance with 360.13 which provides unrealistic and impractical constraints along with vague and ambiguous use criteria.

Response: The presence of this language in the final regulations emphasizes that Section 360.13 refers to the pre-determined, self-implementing use of fill material, and in most instances comes alongside current industry and Department practice for identifying absence or presence of contamination in excavated materials and evaluating their appropriate reuse as fill.

360.12(c)(1)(iii)
Comment: Comments were received that limiting the use of navigational dredged material (NDM) only as "aggregate" pursuant to this pre-determined BUD, would limit NDM use too severely, especially preventing its use as fill. At minimum, this term "aggregate" should mean the same as "commercial aggregate" in 360.2(b).

Response: The Department believes the use of NDM as commercial aggregate is sufficiently broad, only excluding uses that may require laboratory analysis or further review for beneficial use pursuant to 360.12(e) due, for example, to placement in sensitive settings. The word "commercial" has been added to the final regulations to clarify that the uses as defined in 360.2(b) are intended.

360.12(c)(2)(iii)
Comment: Please confirm our understanding of 360.12(c)(2)(iii), that, "car wash grit," includes grit collected in oil water separators (OWS) from the washing of State/County/Municipal transportation agency and highway Department vehicles, which is collected separately from oil.

Response: The grit from the source described by the commenter can be used pursuant to this pre-determined BUD if meeting the criteria of this BUD (sand or gravel that is free from litter and objectionable odors).

Section 360.12(c)(2)(iii)
Comment: Disposition of street sweepings does not protect the environment. We are mystified again that by simply classifying material that may contain contamination is generally classified as clean while there is an extremely high likelihood that these materials are contaminated. This broad interpretation permits dumping of materials that are likely contaminated and could have significant impact to the environment. This loophole should be closed. In many parts of the world, these materials are recognized as contaminated materials.

Response: The pre-determined BUD makes clear the limitations on use of street sweepings, which the Department believes will prevent environmental harm from this material.

360.12(c)(2)(iv)
Comment: This pre-determined BUD for waste tires to secure tarpaulins should not restrict farmers and other users of this BUD solely to passenger tires; many will use larger vehicle tires.

Response: The language of this pre-determined BUD is not intended to restrict the type of tire but rather to limit tires to the number of passenger tire equivalents, as defined in 360.2(b).

360.12(c)(2)(iv)
Comment: Farmers will need guidance to understand how many tires can be used pursuant to the "tire equivalent per square foot" limitation and also will need more time than the Transition period in 360.4(p) to bring current use of tires into compliance with this BUD. Cutting or piercing tires as required in the BUD to drain water, will be labor- and time-intensive and costly. Funding should be offered to small farmers through appropriate agencies to purchase tire cutters or providing funds directly to farmers to halve or hole their tires.

Response: The calculation of 0.25 passenger tire equivalents per square foot of cover or bunker area identified in this pre-determined BUD equated to a tire laid flat touching each other across the entire surface of the cover or bunker. Based on conversations as part of the rulemaking process, a transition of 180 days was determined to be reasonable.

360.12(c)(2)(iv)
Comment: The commenter requests that DEC increase the allowable passenger tire equivalent percentage per square foot from 0.25 to 0.50 passenger tire equivalents per square foot. This would allow greater flexibility for farmers who may need to place more

tires on their bunkers due to weather or other farm-specific conditions. The 0.50 passenger tire equivalents would also provide greater flexibility for farmers who use a wide variety of tires to weigh down the tarps covering the bunks. We request that a higher per square foot concentration be allowed along the tarp seams and edges of the bunks. These areas require more tires or tire equivalents to help ensure that rain and other elements are not able to enter the bunk area.

Response: The Department has based this per-square-foot basis for limiting the number of waste tires used under this pre-determined BUD based on current maximum agricultural and salt-storage practice. The regulation does not require a rigid spacing of tires but limits the total number of tires kept at farm, salt storage or other facility to a reasonable number to secure tarps.

360.12(c)(3)(ii)
Comment: DEC should expand this to include other agricultural products, such as, for example its use as an ingredient in a farm animal bedding product.

Response: The Department will not extend this waste stream (unadulterated wood combustion ash) to other uses without further study and demonstration of its effectiveness and safety to livestock and the environment.

360.12(c)(3)(v)-(vii)
Comment: In the Department's State Solid Waste Management Plan, the Department committed to "review all BUDs, pre-determined or case-specific as discussed in the following section, for coal ash and FGD residuals for consistency with EPA final rule and any guidance or information that results from the final rule." *Beyond Waste* at p 169. Beneficial use is plainly preferable to landfill disposal. Beneficial use of CCR should not be any more restrictive under Part 360 than allowable under 40 CFR Part 257, nor should the Rule impose obstacles, such as hastened closure, denying the potential beneficial use. Accordingly, the final Rule should provide time frames consistent with 40 CFR Part 257. The complexity and unnecessary burden of overlapping federal and state regulation would best be addressed by deferring regulatory action on CCR until the Department works with EPA and stakeholders to adopt 40 CFR Part 257 into the State's regulations.

Response: The Department is unaware of any conflict between the final Part 360 and EPA's final regulation with regard to beneficial use of coal combustion residuals. EPA has delegated solid waste management to the Department, and provided that any Department regulations are as stringent or more than EPA's, they are acceptable to EPA.

360.12(c)(3)(viii)
Comment: The commenter questions the value of "recognizability" in determining materials to be uncontaminated and acceptable for production of aggregate that can be used pursuant to this pre-determined BUD. Why aren't analytical results used instead?

No other regulatory authority in the United States has a similar approach. This approach is more objective and fair also when enforcement actions are taken.

Response: Unaided visual observation is a rational and sufficient method for determining the presence of contamination on concrete, brick, rock and similar materials prior to crushing. Analytical testing at this point would not be practical or necessary. Rather, sampling and analysis are used to verify materials leaving a facility that processes these materials into aggregate.

360.12(c)(3)(viii) and (ix)
Comment: The materials in these BUDs should not have to meet a DOT specification to be used as an aggregate or in asphalt pavement. Most work is commercial, not State and to limit the use of these materials to DOT projects or specifications will lead to more of these materials going into landfills. Specifications of any Federal, State or Local government agency or authority or other specifications should be allowed, as approved by a New York Professional Engineer.

Response: The Department has replaced "Department of Transportation" to "municipal or state" specifications or standards in the final regulation.

360.12(c)(3)(viii) and (ix)
Comment: Several comments raised objection to the requirement of these pre-determined BUDs for the respective materials to meet Department of Transportation specifications. One commenter asked that similar or stricter municipal specifications be allowed. Others stated that many private projects do not require materials to meet DOT specifications. Others stated forcing materials to meet DOT specifications that may come from a variety of sources, not necessarily State projects, would greatly limit the current market of reuse. On the product end, there is widespread sale and distribution in the construction market of material that does not meet Department of Transportation specifications, whether virgin or recycled.

Response: The Department has replaced "Department of Transportation" to "municipal or state" specifications or standards in the final regulation. These clauses are not intended to limit where recycled concrete aggregate or recycled asphalt pavement can originate, as long as it is uncontaminated and recognizable (before processing into RCA or RAP). State and municipal specifications provide a recognized standard that is a minimum for demonstrating a waste material (as opposed to a mined or virgin material) is an effective substitute for a mined material. Meeting these specifications does not restrict material from being used in any public or private construction project.

360.12(c)(3)(viii) and (ix)
Comment: These pre-determined BUDs each cite "a specification established by the Department of Transportation for use …(as aggregate or an ingredient in asphalt pavement)". DOT does not have specifications for RCA or RAP; these references should be removed.

Response: The Department understands this comment to mean that DOT has no specification entitled "Recycled Asphalt Pavement" or "Recycled Concrete Aggregate", and therefore these materials are not addressed in DOT Standard Specifications. Nonetheless, DOT's Standard Specifications clearly include RAP and RCA in Standard Specifications for aggregate, subbase, and other applications, and accordingly DOT provides specifications for the use of RAP and RCA. Furthermore, these clauses have been changed to require meeting "a municipal or state" specification or standard in place of the DOT Standard Specifications.

360.12(c)(3)(viii)
Comment: The legitimate reuse of uncontaminated soil, brick, concrete, rock, asphalt pavement and glass should continue to be the subject of a pre-determined BUD. Legitimate uses would include construction needs within an approved site plan under the jurisdiction of the local government. These materials should be exempt from Part 360 when placed into commerce. In fact, these types of materials are a marketable commodity that readily compete with
virgin earth materials.

Response: This comment captures the intent of 360.12(c)(3)(viii) and (ix) and 360.12(c)(4)(i), with the provision that facilities which process these materials to meet BUD requirements must comply with applicable Part 361 final regulations.

360.12(c)(3)(ix)
Comment: The March 2016 Proposed Part 360 referred to millings by listing "C&D debris use in accordance with section 361-5.6" under bullet (iv) in the previous 360.12(c)(4), which said the materials were no longer solid waste after they left a facility subject to regulation under 361 or 362. This appears to have been specifically removed, and new bullets referencing recycled aggregate and recycled asphalt products was added under 360.12(c)(3), which says that they cease to be solid waste by meeting the requirements for the intended use. This seems to imply these materials do not require processing at a Part 361 facility, but yet RCA and RAP are subject to facility regulation in the proposed 361 and the pre-determined BUDs do not apply to materials sent to Part 361 facilities. How are RCA and RAP regulated under the new proposal?

Response: RCA and RAP are a solid waste unless meeting the conditions of this pre-determined BUD. Concrete, masonry, brick, asphalt chunks or asphalt millings that require processing, or which must be stored, prior to use under this pre-determined BUD, must be processed or stored at a facility authorized pursuant to Subpart 361-5 unless the facility is exempted in Part 361.

360.12(c)(3)(viii) and (ix)
Comment: These pre-determined BUDs require separate storage of the segregated materials. This provision's apparent prohibition of a direct loadout at the site of intended use will add significant new burdens and costs to projects by increasing handling and

transfer time and cost, and by increasing land needed for stockpiling, without a corresponding environmental benefit. We suggest that the regulation allow direct transfer from the project site to the site of re-use without the necessity of intermediate stockpiling. This seems to have been the Department's intent (as stated in the June 2017 Assessment of Public Comment) and if so should be clearly stated in the regulation.

Response: No prohibition on direct transfer or use is intended; this storage requirement merely states if these materials are not used directly but are stored, the storage must be in a separate area as a discrete stream. The Department believes no further clarification is needed to these clauses. Also, a pre-determined beneficial use has been added to this paragraph in the final regulation specifically for asphalt pavement and millings received at an asphalt manufacturing plant for incorporation into an asphalt product.

360.12(c)(3)(ix)
Comment: At the end of the day, we are aware of and share the Department's concerns regarding "midnight dumping". However, it appears that the Department's efforts to address this issue will only result in an outsized impact on those businesses already complying with Department regulations (and coincidentally reducing the waste stream headed to landfills by recycling RAP). It is respectfully submitted that the Department's efforts should be focused on enforcing current regulations rather than creating additional regulatory hurdles for the hot mix asphalt pavement industry.

Response: The Department disagrees that the final regulation, properly understood, will result in less recycling and more disposal of RAP. The regulation will come alongside current sustainable use of RAP and make enforcement easier for environmentally unsafe or noncompliant practices.

360.12(c)(3)(ix)
Comment: The language of this revision suggests that the Pre-Determined BUD for asphalt reuse (including millings) would apply only, or primarily, to road construction and maintenance. The limitation to "road" construction appears to be unintentionally narrow, since there are other common related uses for asphalt, such as parking, building pads, sidewalks, and site paving. We suggest that this language be revised to clarify that asphalt may be reused in such common paving projects under this Pre-Determined BUD. This is consistent with the Revised Regulatory Impact Statement's note that recycled asphalt may be used as "an ingredient in asphalt pavement for roadways, parking lots, or other similar uses." See Consolidated Revised Regulatory Impact Statement, at p. 26.

Response: The Department has added language to this pre-determined BUD to clarify that recycled asphalt millings can also be used for construction or maintenance of other paved surfaces. "Other…uses" is retained in recognition that RAP or millings may be

used for construction of paved surface shoulders or to backfill cuts or trenches in pavement.

360.12(c)(3)(ix)
Comment: We know that almost all milled asphalt pavement currently goes to a Part 361 C&D handling/recovery
facility for processing back into a useable product. This material stream would be in jeopardy because, in the first instance, the industry would not understand whether the RAP meets the BUD definition. And, it would be unclear if the limitations of Part 361 apply to the RAP, even if it is a BUD. Further complicating things is the fact that Part 361 would preclude the successful (and indeed, oftentimes project-sponsor required) reuse of RAP.

Response: The Department disagrees with this assessment. Part 361 merely regulates the facility that processes the RAP, and this pre-determined BUD addresses the RAP product, which is a product upon meeting the pre-determined BUD criteria (whether or not it is processed at a Part 361 facility; for example, if it is processed outside of New York State but meets these BUD criteria). A New York State processor – or an out-of-state processor doing business in the state – will be accustomed to meeting the criteria for RAP in this pre-determined BUD.

360.12(c)(3)(viii) and (ix)
Comment: We strongly recommend that 360.12(c)(3)(viii) and (ix) Beneficial Use be revised to state that Recycled Asphalt Pavement (RAP) and Recycled Concrete Aggregate (RCA) are completely exempt from regulation under Part 360 with no restrictions on amounts stockpiled or distributed, and are not subject to registration or reporting requirements. RCA and RAP should be listed in paragraph 360.12(c)(1) instead of paragraph 360.12(c)(3).

Response: The Department agrees that the use of RCA and RAP meet the criteria of beneficial use – provided they are produced to meet a recognized specification and contain no deleterious material or chemical contamination. These pre-determined BUDs are intended to establish these criteria. Furthermore, facilities sizing and sorting these materials for use as RCA and RAP do impact the environment, and local communities, and require regulation. Therefore, a complete exemption is not warranted.

360.12(c)(3)(ix)
Comment: What does uncontaminated asphalt pavement mean, as asphalt is made from petroleum products and inherently contains compounds in concentrations which will exceed Part 375 objectives?

Response: "Uncontaminated" has the meaning in 360.2(b), i.e., that it is not mixed with other waste or affected by a petroleum or chemical spill (except for road runoff).

360.12(c)(3)(viii)
Comment: Paragraphs (viii) and (ix) do not specify "location of use".

Response: No "location of use" is intended to be specified for pre-determined BUDs in paragraph 360.12(c)(3); these materials can go to any location.

360.12(c)(3)(viii)
Comment: To the extent uncontaminated recognizable concrete and asphalt is not a waste but in a BUD, but comes from New York City, will it require a transport manifest/tracking document?

Response: RCA and RAP aggregate products meeting BUD criteria (often, after processing) will be exempt from Part 364 requirements pursuant to 364-2.1(b)(13).

360.12(c)(3)(viii)
Comment: Several public comments suggested, in reference to subparagraph 360.12(c)(3)(viii), that the regulations should indicate which Department of Transportation specification must be met in order for material to qualify for the pre-determined beneficial use determination. Comments also suggested that the way recycled aggregate or residue is stored should not disqualify material from meeting the BUD.

Response: The specification will be dependent upon the intended use of the material. Guidance will be provided by the Department. Storage in separate piles helps to ensure product quality is maintained.

360.12(c)(3)(viii) and (ix)
Comment: The revision indicates that asphalt is removed from the previous "recognizable and uncontaminated concrete, rock, brick, asphalt pavement, soil.." that held a pre-determined BUD for aggregate and subbase, and that it would be managed separately as a distinct waste stream. The Department has identified reasons that asphalt and asphalt millings should be managed separately from soils, but we have not found a rationale for managing asphalt separately from other "RUCARBS" materials. As a result, we do not believe the Department has identified an environmental benefit to such a separate management requirement. If the Department nevertheless determines that asphalt should be managed separately from other "RUCRB" materials, we urge DEC to allow for *de minimis* or incidental quantities of asphalt in other material streams, to prevent a material stream from being unreasonably rejected from reuse.

Response: Recognizing that "RUCARBS" materials, with or without soil included, eventually may be mingled with soil and become unrecognizable, the Department's goal is to divert asphalt to uses back in asphalt or in road or paved surface construction. While the Department will not specify a *de minimus* limit, it recognizes that incidental asphalt may be present in demolished concrete.

360.12(c)(4)
Comment: This section states, "The following cease to be waste when the material leaves a facility subject to exemption or regulation under Part 361 or 362, provided the material is ultimately recycled or reused." Does this include C&D debris, including fill/soil, "reused" as fill (e.g., for mine reclamation)? Does it include pieces of asphalt cement, RAP millings, concrete chunks, etc., that have not yet been processed?

Response: No. This paragraph applies only to the materials listed in the paragraph. Reuse of C&D debris and fill material is addressed elsewhere.

360.12(c)(5)
Comment: Several requirements were received in opposition to the reporting requirement for greater than 10,000 tons in a year of any pre-determined beneficial use material. Objections came to the additional paperwork and a questionable benefit in reporting for materials that meet BUD requirements and accordingly do not pose harm to the environment.

Response: This requirement will facilitate the Department's compiling of metrics to determine how much of waste streams with pre-determined BUDs are being reused, and will help the Department follow up on complaints and noncompliance.

360.12(c)(5)
Comment: Several comments requesting clarification of this requirement were received: What constitutes "distributing" 10,000 tons or more of a material with a pre-determined BUD? We interpret the reporting requirements of this section to apply only to the entity producing a marketable commodity. We request clarification in the proposed regulatory language as to whether "any person" could include a corporation and further whether the reporting obligation is to be completed by the generator of beneficial use material and is to be completed on an entity-wide basis rather than for individual sites or projects.

Response: "Person" has the meaning stated in 360.2(b), and "distributing" has been added to account for materials being used by the entity who generated them, or which are provided free of charge to others but nonetheless meet BUD criteria and are beneficially used pursuant to a pre-determined BUD.

360.12(c)(5)
Comment: Materials that meet all of the requirements for a BUD should be exempt from further Part 360 requirements, including annual reports. The Department stated that annual reporting should not be needed for
pre-determined BUDs in the June 2017 Assessment of Public Comments on the Solid Waste Regulations.

Response: The Department acknowledges this error; it was determined not to change the annual reporting requirement, but a contrary statement in the Assessment was not removed.

360.12(d)
Comment: Entities should be able to beneficially reuse excess contaminated soils excavated in a construction project in areas where there are soils with similar chemical characteristics and end use. This practice of reusing excavated soils equal to or one step above the end use category for the placement location would not cause negative environmental impacts.

Response: The Department has considered these concepts and incorporated some of them in Section 360.13 for pre-determined beneficial use of fill material. Site use alone cannot guide what type of fill material is appropriate.

360.12(d)(2)(iv)
Comment: The requirement for analytical data is overly burdensome and vague. First, obtaining an analysis of the chemical constituents of any analogous raw material or commercial product for which the waste is proposed to be an effective substitute is not reasonable because it would essentially require procurement of the raw material or commercial product for testing and analysis, which is not even feasible in most cases. This would also be infeasible for "typical" clean backfill which varies significantly based on local soil background and other factors. For fill material, cannot appropriate Part 375 SCOs be used as a measure of clean backfill?

Response: This requirement is intentionally broad, and not prescriptive, to allow for many types of materials and many possible modes of beneficial use. Ordinarily the analogous raw material will be commonly obtainable from commercial sources and its chemical and physical characteristics can be analyzed by the petitioner, or obtained from the literature. The commenter is correct in stating that Part 375 SCOs can be used in place of an project-specific analysis of "typical clean backfill" to evaluate soil-like materials to be placed on the land; the appropriate SCOs are stated in 360.12(d)(3)(vi).

360.12(d)(2)(v)
Comment: In the June 2017 Proposed Revisions, NYSDEC eliminated the condition that standards must be "acceptable to the Department," but did not clarify which "governmental or industry standards or specifications" would be adopted. It remains unclear who will be evaluating the justification and how one will determine if that justification is acceptable. There should be a statement such as, "the BUD petition must include an explanation of the alternate material use and that this meets the intended acceptable use of the raw material for which it is a substitute." We urge NYSDEC to clarify what governmental or industry standards or specifications the use must exceed or meet.

Response: The Department will be evaluating all information submitted as part of a beneficial use petition. One of the requirements and tools the Department will use in its evaluation will be the information related to comparison with governmental or industry standards or specifications as required in the referenced subparagraph.

360.12(d)(2)(vii)
Comment: We recommend that NYSDEC clarify that testing be done before beneficial use, specify for what parameters the testing must be done (e.g., RCRA 14 metals, SVOCs, etc.), and describe what frequency will be deemed "periodic."

Response: The Department will not prescribe any list of tests or parameters, since a variety of materials have been and will continue to be proposed for beneficial use, some for which typical soil or waste testing would not be informative or appropriate. Likewise, a fixed frequency of sampling is not prescribed. The petitioner should propose testing that is appropriate and representative of the material proposed for beneficial use. Sampling parameters, tests, and frequencies are stated for various specific materials elsewhere in Part 360 and Part 361 that may offer the petitioner a starting place to develop a sampling protocol for a material such as a soil-like material intended as fill (pre-determined BUDs in Section 360.13 will not be used) or for a recycled organic waste product (Subpart 361-3 unless this Subpart is directly applicable).

360.12(d)(2)(vii) (*a*) (*1*)
Comment: This section should clarify that periodic testing be performed according to the Table 1 referenced in Section 360.13 of this regulation.

Response: The sampling protocol in Table 1 of Section 360.13 is intended for fill material and is not appropriate for all materials that have been or could be proposed for beneficial use. It also is not intended for periodic confirmatory sampling of a product from an ongoing process or use, but rather is intended to characterize one finite source of fill material.

360.12(d)(2)(vii)(*a*)(*2*)
Comment: A time period for storage of a BUD commodity is unnecessary.

Response: Many BUD materials do not lose their solid waste status until they are used, therefore a storage limit is necessary. As stated in the final regulation, this time period can be extended or eliminated if approved as part of the case-specific BUD.

360.12(d)(2)(vii)(*a*)(*3*)
Comment: Procedures should include dust suppression.

Response: Dust suppression is included in the petition requirement for "best management practices designed to minimize uncontrolled dispersion" in 360.12(d)(2)(vii)(*a*)(*4*).

360.12(d)(2)(vii)(b)
Comment: This section should clarify the specific criteria to be applied. No guidance is provided on the standard that Department will use to compare the waste and the product for which the waste is proposed to be used as a substitute. This would also be unnecessary for soil reuse, which is already compared to SCOs.

Response: As with many other requirements for case-specific BUDs, the Department will not specify criteria which would hinder the beneficial use of a material where the criteria would not be meaningful in determining whether the material poses an adverse effect to the environment and public health and whether the material is an effective substitute. The petitioner should discuss criteria for their unique material with the Department. An exception is material used on the land as fill or cover, which as commenters note are compared to Part 375 SCOs stated in 360.12(d)(3)(vi).

360.13(d)(3)
Comment: We urge NYSDEC to provide a timeframe or schedule for review and approval of case-specific BUDs.

Response: A rigid timeframe cannot be imposed in the final regulation since case-specific BUD petitions will differ in complexity.

360.12(d)(3)(iv)
Comment: The Department should clarify that "processing," does not include the importation and placement of material in a pile and mixing it with other imported material to make a more consistent material. These types of "mixing" activities are regularly undertaken with waste prior to beneficial use and do not involve any contaminants being added to the waste.

Response: The intent of this clause is to make clear that a case-specific BUD cannot substitute for a facility authorization. The Department will review the proposed waste control plan, including any activities such as storage and blending, and determine whether these constitute decontamination or processing, in which case the petitioner may be required to obtain an appropriate facility registration or permit in addition to the BUD.

360.12(d)(3)(iv)
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 proposed 360.12(d)(3)(iv).

Response: All case-specific BUDs are valid when the regulations are effective until the time renewal is required.

360.12(d)(3)(vi)

Comment: The June 2017 Proposed Revision of this section still does not address previous comments and still requires demonstration of properties or characteristics unique to the material or use that are acceptable to the Department, implying unknown and unpredictable outcomes that will drive up the costs of construction bids significantly. The Department should provide examples of what criteria it will use to determine "acceptable concentrations." The subdivision does not elaborate on any properties or characteristics that may be considered unique and thus creates a very vague standard. In addition, it would appear that this subdivision needs to be reconciled with the three levels of Fill Material established by 360.13 which clearly allow for use of materials that exceed the lowest acceptable levels outlined in the part 375 tables.

Response: The Department has addressed most construction materials elsewhere with pre-determined beneficial uses such as in 360.12(c) and 360.13. This subdivision addresses unique materials and situations when an otherwise pre-determined beneficial use material may not conform to pre-determined criteria. The Department acknowledges that some criteria differ from this clause for Restricted-Use Fill and Limited-Use Fill, but these pre-determined use categories also include specific limitations on physical composition of these materials, and where and how these categories of fill can be used.

360.12(d)(3)(vi)
Comment: Commenters objected to inclusion of any of the Part 375 SCOs in the proposed rule for any BUD, or asked why higher SCO limits for commercial and industrial land use are not allowed.

Response: Unrestricted distribution of materials and placement of materials on the land as fill or cover without themselves being encapsulated, or subject to institutional controls such as deed or use restrictions is not protective of public health and the environment. For the Department to allow any but the most stringent SCOs in projects authorized pursuant to Part 375, institutional controls would be required.

360.12(d)(3)(vi)
Comment: If soils from redevelopment projects are regulated as solid waste, is the intent to require off-site disposal above unrestricted criteria?

Response: The new fill material section 360.13 provides pre-determined beneficial uses for off-site use of excavated soil in excess to the needs of the project. There is also an associated pre-determined beneficial use for on-site use of these soils. Case-specific BUDs are still an option available to developers as well.

360.12(d)(3)(vi)
Comment: Part 375 standards may not be appropriate for Suffolk County, which, for example, has lower levels of arsenic (4 ppm) than the unrestricted SCO of 13 ppm.

Response: The intent of these criteria are not to restrict materials to local background concentrations, but to use criteria developed from public health risk assessment for residential land use and groundwater protection modeling as described in the Technical Support Document for Part 375.

360.12(d)(3)(vii)
Comment: The Department must clarify the applicable standard for whether a proposed use would "significantly adversely affect public health and the environment."

Response: This subdivision addresses case-specific beneficial use determinations; no one or limited group of standards can be used to determine whether all possible materials proposed for beneficial use may pose an adverse effect.

360.4 and 360.12(d)(7)
Comment: Existing Beneficial Use Determinations (BUDs) should not be rescinded and BUDs should not be limited to a five (5) year duration. The regulated community has expended considerable effort to secure the existing BUDs. The five-year time limit on case-specific BUDs has not been removed from the March 2016 proposal. This requirement effectively turns BUDs from a jurisdictional determination that material is not a waste when used in a beneficial manner, to a permit-like short term authorization. This change will create regulatory uncertainty and discourage businesses from recycling byproducts and waste materials, and will impact landfills and other facilities who rely on BUDs they currently hold as essential to their operation.

Response: The Department has determined that existing BUDs need review to determine if materials meet applicable, up-to-date criteria for protection of public health and environment. Case-specific BUDs will have a time limit to ensure ongoing review of compliance, effectiveness of the material in the use, and consistency with current beneficial use best practices and criteria for that material. The Department acknowledges this time limit will imply rights similar to other Department approvals such as permits. The Department will work with businesses and facilities to review and renew BUDs where appropriate. Once the final regulations take effect, landfill alternative operating cover approvals will be addressed pursuant to 363-6.21 instead of this subdivision.

360.12(e)(2)(i)(b)
Comment: In the June 2017 Proposed Revisions, NYSDEC's new proposal that NDM can only be reused under a case-specific BUD reviewed and approved by NYSDEC is even more stringent than NYSDEC's previous proposal, which we commented on as overly restrictive.

Response: This subdivision addresses case-specific determinations for NDM. A pre-determined beneficial use for NDM is found in 360.12(c)(iii).

360.12(e)(4)(ii)

Comment: We request that NYSDEC clarify the circumstances and types of additional sampling that would be required under this proposed regulation so that costs of analysis can be factored into construction contracts and other biddable work. We also request that NYSDEC provide a timeframe for NYSDEC reviews and approvals as it relates to the asterisked note under "TABLE: Sample Requirements", which states that "[t]he Department will require a project-specific approved sampling frequency."

Response: The final regulations provides some specifics, but recognizes the case-by-case nature of dredging projects. If other Department programs are involved in review of a project which includes beneficial use, Division of Materials Management (DMM) staff will coordinate sampling frequency with these other programs to ensure all objectives, including representative sampling and analysis of dredged material for beneficial use, are met. DMM staff will also coordinate with others to ensure a decision regarding a BUD, where possible, can be made coincident with other Department or agency approvals.

360.12(f)
Comment: Data on which the Department bases its assumption that conventional gas and oil well brine is safe to use for de-icing and dust control on roads, is old or lacking. More study should be made of actual concentrations of brine-related constituents in soils next to roads prior to the Department allowing further use of brine on roads. We also urge NYSDEC to require testing for naturally occurring nuclear materials, as non-Marcellus formations in New York State are known to contain such constituents.

Response: A considerable body of data concerning the natural ranges of minerals in brine from conventional-well formations has been amassed in the literature and through sampling provided by BUD holders. Actual well brine composition will vary but remain within these ranges. The final regulations nonetheless does not assume a natural limit in brine on constituents but contains criteria intended to protect public health and the environment when conventional well brine is used on roads. Likewise, the range of radiological substances present in conventional brine is sufficiently characterized that the Department has declined to require testing for these substances in case-specific BUDs.

360.12(f)(2)
Comment: Clarification is needed regarding whether the production company or marketer of the brine, or the user that applies it must prepare the application for a case-specific Beneficial Use Determination (BUD). If the user is the BUD holder, then should there be a parallel set of requirements that suppliers comply with prohibitions and provide required data? If the supplier or producer is the BUD holder, then should it not be an obligation of the producer/supplier to pass the BUD conditions and restrictions on to users?

Response: This paragraph identifies the person or entity spreading the brine as the BUD holder, though any entity acting on behalf of this person or entity can prepare the

BUD petition. The BUD holder is typically required to inform all employees or contractors of the BUD and its conditions. The BUD holder can make its own arrangements with suppliers, as needed, to ensure quality of the brine delivered, including meeting BUD criteria. The BUD holder is responsible for ensuring compliance with the BUD conditions and ensuring reporting is made to the Department.

360.12(f)(2)
Comment: Why is reporting required only annually, not monthly as required in some other jurisdictions? It is recommended that the Department require an analysis of a representative sample of the brine, obtained at the point of use, be tested at least semi-annually and included in the results in the March 31st annual report.

Response: The Department has determined annual sampling and reporting as detailed in this subdivision is sufficient and is capable of investigating problems or concerns in the interim.

Part 360.12(f)(2)(vi)
Comment: In the first sentence of §360.12(f)(2)(vi), the wording specifying the sampling location should be changed to read "which will be representative of the brine at a proposed point of use" since this information is appearing in a petition for an as-yet unapproved beneficial use.

Response: The existing language adequately conveyed that the proposed use was not allowed until actually approved by the Department. Nevertheless, the wording change has been made.

360.12(f)(2)(v)
Comment: The previously proposed Part 360.12(f)(2)(v) would have required all BUD holders to describe "the system used at the well location(s) to remove and minimize any oil or gas residue." In contrast, the modified proposal would allow operators to identify "any system used." In the latter proposal, there is no guarantee that the applicant will identify a separator system. The Department should revert to the original language making it clear that such a system must be used. We note further that this section should also refer to oil and gas separators at storage sites in addition to the well sites. To fix these minor gaps, we propose adjusting the language to read: (v) a description of any the system(s) used at the well and/or storage location(s) to separate brine and minimize any oil or gas in brine.

Response: The final regulations refers to any system used at the well location(s) to separate brine and minimize oil and gas in brine.

Part 360.12(f)(3)(i)
Comment: Commenters dispute that New York State currently does not allow production brine from the Marcellus Shale (as prohibited in the final regulations), asserting the Marcellus brine is spread illicitly or conventional brines are commingled

with Marcellus drilling waste. Commenters asked why brine from other shale formations, such as the Utica Shale, and not called out in the final regulations for restriction or prohibition.

Response: If spreading of Marcellus Shale production brine is occurring in New York State, it is happening in contravention of case-specific BUDs granted to date. This final regulation will assist the Department in enforcement of this prohibition going forward. The Utica Shale has not been developed to date, and will be evaluated when and if it is for beneficial use. In general, shale formation production brines are of poor quality for road treatment use, even if radiological or other constituents of concern were set aside from consideration.

360.12(f)(3)(i)-(iii)
Comment: The DEC must abandon the Beneficial Use Determination process for the use of production brine from oil and gas production wells and gas storage facilities to treat roads. There are no "beneficial" uses for drilling waste, regardless of whether the wastes are from "conventional" or fracked wells. This waste contains toxic chemicals, metals, excess salts, and carcinogens like benzene and radioactive material. One of the salts associated with "formation brine" which could be sprayed on roads and bridges or released from wastewater treatment plants into our waterways is bromide which when combined with chlorine from public water supplies creates trihalomethanes, a potent carcinogen. Brine from gas storage facilities contains similar contaminants. Currently chemical testing of liquid waste before it goes on roads is minimal, chemical thresholds are set very high, and restrictions on where spreading can occur are vague and limited.

Response: In this subdivision, the Department has set limitations to ensure use of gas and oil well production brine and gas storage brine to treat roads, a practice which has occurred for several decades, will pose minimal impacts to public health and the environment. The BUD process will require each user of brine to meet criteria, follow practices required in the final regulations, and report to the Department, as opposed to not regulating this practice at all or attempting to ban it altogether. Road treatment is a critical safety issue for small, rural municipalities in winter and an air quality and road integrity issue in the summer. The "excess salts" naturally occurring in these brines are an effective substitute for purchased rock salt or calcium chloride, and NYSDOT has developed protocols for salt use for de-icing to minimize runoff impact to soils and waterways. The ionic form of halogens in natural brines is inert and does not form trihalomethane compounds. Other constituents in brines can pose concern but the Department's approach is to limit their concentrations at the point of use.

360.12(f)(3)(iii)
Comment: The proposed Part 360.12(f)(3)(iii) also applies only to the well site, but should apply to both well and storage sites, whether single or multiple.

Response: The Department has retained this requirement only for well sites.

360.12(f)(3)(iv)
Comment: NYSDEC states without justification that a 50-foot buffer would be "adequately protective given other provisions to limit the quantity of brine spread." It is NYSDEC's duty under state law to protect water quality in all of the state's waters. Buffers of 100 feet from water bodies are common for nearly every industrial activity in New York. For instance, state freshwater wetlands are protected by a 100-foot buffer in which "discharging [of] sewage treatment effluent or other liquid wastes into or so as to drain into a freshwater wetland" is regulated. There is no justification for employing a shorter buffer to allow spraying of highly toxic chemicals. and the response to previous comments on the 50 foot setback elevates the value of roads over wetlands and water bodies.

Response: The Department has retained the 50-foot buffer in recognition that brine use of necessity takes place on roads that pass near or over bodies of water. Limitations on methods and quantity of brine used on road surfaces are intended to minimize runoff of brine, and the proposed conditions on production brine use in the final regulations are appropriately tailored to allow the beneficial use of brine while minimizing potential impacts. Use of conventional de-icing or dust control agents is fraught with the same or greater concern to minimize runoff and impact of the chemicals on waterways (examples include elevated phosphorus present in some organic enhancers such as brewery waste or beet juice mixed with de-icing salts). To the extent the commenter suggests the use of excess salt for de-icing and dust control is the equivalent of discharging sewage treatment effluent into a wetland, the comment is noted. Available data indicates that statements such as these are without a factual basis.

360.12(f)(3)(viii)
Comment: The adjustments to this section are important changes, given that the constituents of oil and gas wastes vary by well and over time. In order to be perfectly clear, and for the sake of consistency, proposed Part 360.12(f)(3)(viii) should specify that annual samples should also be obtained at a point of use.

Response: The requirement specifies that the samples must be representative. The provision has been revised to include that analysis includes prior to use.

360.12(f)(3)(ix)
Comment: Commenters asked for more detailed information to be included in annual reporting. Others expressed concern that the Department is overly reliant on the petitions and reports submitted and is not able to verify the information or identify non-compliance.

Response: The Department has determined reporting requirements in the final regulations are sufficiently detailed. If BUD holders want to make any change to the information submitted in the initial petition (for example, to add additional roads for treatment), the holders must request the Department specifically modify the BUD with

these changes. The Department relies in every program on reporting as a tool, but not the only tool, for tracking compliance. Enforcement related to the Waste Transporter program has helped ensure compliance with brine use BUDs.

360.12(f)(3)(i)
Comment: The prohibition against use of production brine from the Marcellus Shale has no sound technical justification and is arbitrary. Furthermore, it will burden interstate commerce by preventing the use of production brine from other states in New York, a probable violation of the U.S Constitution Commerce Clause.

Response: The Department has technical justification for its prohibition on Marcellus Shale brine and no direct intention to prohibit material from other states; conventional well brine from other states is not prohibited. There is therefore no preference to products placed in commerce based on the state in which a product originates. Marcellus Shale brine is known to contain naturally occurring radiological constituents, and is of poor quality for road treatment use due to the presence of excessive, non-beneficial mineral constituents.

360.12(f)(3)
Comment: Specific application rates must be defined for spreading oil and gas storage brine on roadways.

Response: The Department will not specify application rates in the final regulations, since these will vary depending on the width of road and other factors. Rather, the Department has specified other application practices for dust control and that de-icing use be consistent with NYSDOT practices.

Part 360.12(f)(3)(ii)
Comment: We continue to be concerned regarding the Department's use of the term "plugging fluids" in this rule and which has not been included in 360.2(b) Definitions. The term "plugging fluids" is not in common use within the oil and gas industry, and will be subject to varying, and potentially inappropriate, interpretations if left undefined. Also, any regulatory requirements specific to drilling fluids, flowback water (which is defined at § 360.2(b)(89) as separate from production brine), and plugging fluids should not be hidden within a regulatory section where both the Title and Applicability statement indicate that it addresses only gas storage brine and production brine.

Response: The Department agrees that the use of plugging fluids is not appropriate since there are no produced fluids associated with the plugging process. It is also impractical to imply that once a well is plugged there will be any associated fluids produced by a well that would either exist or be available for beneficial use. Therefore, the reference to plugging fluids was removed in the revised regulations.

Part 360.12(f)(3)(iii)

Comment: The Criteria specified for Barium of < 1.0 mg/l is unnecessarily and inappropriately low, particularly given that Calcium, Sodium, and Chloride will be > 20,000 mg/l, > 40,000 mg/l, and > 80,000 mg/l respectively. The commenter recommends that the Barium Criteria be increased to at least 350 mg/l, which would be consistent with the soil clean-up concentrations in §375-6.8 for both Unrestricted and Residential use, and also consistent with §360.12(d)(3)(vi) for use of materials on land. The regulatory requirements specified throughout §360.12(f) to ensure safe and environmentally sound handling and management of brine based on other constituents are more than adequate to ensure Barium concentrations well above the proposed 1.0 mg/l are also properly managed. As a comparator, even the EPA hazardous waste determination threshold for barium is 100 mg/L as identified by the Toxicity Characteristic Leaching Procedure (TCLP).

Response: The Department has based the barium limit on modeling of potential impact of barium to surface and groundwater near roads. Barium migration to surface and groundwater is limited due to potential human health impacts from drinking water with barium present.

Part 360.12(f)(3)(iii)-(xi)
Comment: As currently drafted, §360.12(f)(3) contains two subparagraphs numbered "(iii)," which appears to be an inadvertent duplication. The second paragraph (iii) should be renumbered (iv), and the following paragraphs similarly renumbered in sequence.

Response: This numbering has been corrected in the final regulations.

Part 360.12(f)(3)(x)
Comment: Paragraph §360.12(f)(3)(x) [which reads "The Department will determine in writing, on a case-specific basis, whether the petition constitutes a beneficial use, based on requirements described in this section and subdivision 360.12(d) of this Part"] should be removed from §360.12(f)(3), which deals with "conditions for brine use," and should be moved to § 360.12(f)(2) dealing with petitions, as paragraph § 360.12(f)(2)(viii). This paragraph deals with the petition process and the Department's determination regarding the petition, and does not address any conditions of brine use, so it would be more appropriately located in § 360.12(f)(2) dealing with petitions rather than in § 360.12(f)(3) which addresses conditions of use.

Response: The Department agrees and has made this change.

360.13 Special requirements for pre-determined beneficial use of fill material

360.13 General
Comment: This has been expanded on to the point that it is a brand new regulation, not a revised version of the historic fill section.

Response: The Department acknowledges having made significant changes to this section, in response to concerns expressed during the comment period for the March 2016 Proposed Part 360. These concerns went beyond management of historic fill to concerns about the transfer and reuse of soils of all types. Finding "historic fill" to be too narrow a definition and designation of material of concern, the Department has removed "historic fill" from 360.2 and replaced it with "Fill Material", with further types of material (General, Restricted-Use and Limited-Use Fill) and consolidated all pre-determined beneficial uses of soil and other material as fill into the current Section 360.13. It must be emphasized that this section expands on self-implementing, pre-determined reuse of soil and fill material and does not prohibit soil reuse with a case-specific beneficial use determination pursuant to 360.12(d).

360.13 General
Comment: Commenters frequently asked for clarification of requirements in this section, or that the Department would reword or add wording to various requirements to emphasize their applicability to certain materials or activities.

Response: The Department, where noted below, has reworded conflicting or unclear requirements in this section. However, wording has not been added where the Department has deemed requirements to be clear and in fact, commenters themselves could state specific requirements or exclusions. Another clarification that was frequently requested is that criteria and protocols apply in this section only to self-implementing, pre-determined beneficial uses of fill material. Persons who manage soils can always petition for case-specific BUD pursuant to 360.12(d) for unique circumstances such as materials that cannot meet criteria, or when a reduced number of samples is requested. As an alternative to characterization and reuse pursuant to this section, entities can direct soil to a facility authorized by the Department.

360.13 General
Comment: This section should be renamed and revised to clarify that the proposed uses described in the section constitute predetermined BUDs and that they do not preclude case-specific BUDs.

Response: Agreed. The title of section 360.13 and the applicability have been reworded.

360.13 General
Comment: Regulation of the excavation and movement of soil under Solid Waste regulations is duplicative of Department SPDES regulation of stormwater discharges from construction activity – and they are unnecessary.

Response: Stormwater discharge regulations are different than regulations governing the movement of soil within and from excavation activities. Stormwater regulations are meant to control the impact of precipitation and runoff from construction sites. Fill

material regulations under Part 360 are needed to control the movement of soil that may contain chemical or physical contaminants.

360.13 General
Comment: This section is over-reaching and attempts to establish jurisdiction over materials DEC has not regulated before, especially clean soils.

Response: Section 360.13 provides pre-determined beneficial use criteria for fill material. Section 360.13 does not regulate fill sent to processing facilities and does not regulate clean soils generated in New York State but outside New York City. The section was developed to address a limited universe of potentially problematic fill material.

360.13 General
Comment: The Department undermines its authority by trying to make the fill approvals self-implementing; this will not stop "bad actors" from misusing contaminated soils as fill, but rather adds a burden to law-abiding contractors that will especially hurt upstate contractors and small-businesses. The cost impact of these new fill regulations is not adequately evaluated in the support documents for the Proposed Part 360. Cost impacts have not been planned in consideration of the burden of complying with fill management requirements from other jurisdictions (local, state and federal).

Response: The handling of soils assumed to be uncontaminated has always been self-implementing, it has usually been up to the contractor to make the call that testing and special handling were required. It has been, and will continue to be, the Department's responsibility to enforce the regulations and keep bad actors from misusing contaminated soils as fill. Regarding upstate contractors, the regulations only affects those fills that qualify as limited-use or restricted-use.

360.13 General
Comment: If downstate fill management is the problem, why apply this proposed regulation statewide rather than targeting downstate?

Response: Problems with fill material management in New York City, on Long Island and in the lower Hudson Valley, did drive the development of regulations in this section, but fill material can presents problems everywhere in New York State, especially in upstate areas near cities and current or former industrial centers. Brownfields and Superfund regulations address some, but not all, potentially contaminated fill upstate that may be relocated to inappropriate sites.

360.13 General
Comment: The Department is not staffed or prepared to process the notifications and other paperwork that will be created by this regulation.

Response: The Department has reviewed its resources and is prepared to administer these regulations and to enforce compliance.

360.13 General
Comment: Can road maintenance and reconstruction be exempted from these regulations?

Response: This section only applies to fill material that would be brought directly to a road project or fill generated by the road project that it used directly on another site. It does not govern concrete or asphalt generated during the road work. Material that remains on-site at the road project is provided an exemption. The regulation of fill material received or leaving the road project is dependent on the quality of the fill and where it is generated, as outlined in the section.

360.13 General and 360.2(b)(102)
Comment: "Fill material" is defined in 360.2, but not General Fill, Restricted-Use Fill or Limited-Use Fill. These terms therefore are unclear. Does General Fill apply to any material that is not subject to characterization? To what extent do these categories apply to fill used on the same site?

Response: Definitions have been added to 360.2(b) for the three types of fill. It is correct that any material generated outside of the City of New York that is not required to be sampled and analyzed can be used without restriction. An exemption is included for on-site use anywhere in New York State.

360.13(a)
Comment: This regulation tries to enforce Part 364 requirements on BUD provisions for some types of fill material by moving the point of solid waste cessation beyond the point at which the materials have been transported. 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.

Response: Fill materials which require any kind of tracking should be the responsibility of the BUD holder, whether the generator or the recipient, as well as the transporter. Hence the applicable fill types do not cease being regulated as solid waste until they reach an appropriate place of use.

360.13(a)
Comment: Is fill material also considered a construction & demolition debris? Can fill material be managed at the C&D debris processing facility or does this section only intend direct haul of fill material?

Response: Fill material, though having its own definition, does constitute a component of C&D debris as defined in 360.2(b). Fill material management facilities are included in

Subpart 361-5, C&D Debris Handling and Recovery Facilities. Yes, fill material can be managed at a 361-5 authorized facility. The requirements in Section 360.13 apply only to direct transportation of fill material to end-use sites.

360.13(a)
Comment: Many permitted mine sites in New York have conditions within their mine permits or, other written approvals, to import clean RUCARBS into their mines for use as backfill for reclamation. This section appears to only apply to fill generated by an excavation activity as opposed to clean RUCARBS being imported to a site and reused as reclamation backfill. It is unclear, however, whether mine sites will be allowed to continue to import clean RUCARBS for use in reclamation. Also, it is not clear as to whether mine reclamation will be allowed under the "Beneficial Use of Fill Material" provisions of this section. The regulations should specifically clarify the "exemption" for the beneficial use of clean RUCARBS for mine reclamation and what, if any, specific requirements apply.

Response: Requirements of this section will apply only to entities who wish to place fill material directly transported from an excavation. Recognizable concrete, masonry products, brick and rock importation to mines, or aggregate or residue from processing of these materials, are addressed in Section 360.12 and in Subpart 363-2.

360.13(a)
Comment: This subdivision should clarify whether these regulations will apply to fill material originating from out of state. One commenter expressed concern that contractors generating fill material in surrounding states or provinces with more stringent testing or use requirements might take advantage of New York's pre-determined beneficial use requirements to import fill material without having performed characterization, if required, at the point of generation. Another commenter expressed concern the rules could be used to allow importation of drill cuttings or other soil-like waste from oil and gas development.

Response: Fill material excavated from outside the New York City that a generator intends to reuse in the State may be reused by complying with the pre-determined beneficial use determination provided in section 360.13. The revised regulations make a distinction between fill material generated in New York City and outside of New York City based on the history of fill material composition in urban soils but does not distinguish between fill material excavated in or out of State. Therefore, fill material generated out-of-state would fall into the same classification as fill material generated outside of New York City should a generator intend to reuse fill material in State. The fill material would be subject to the same criteria in 360.13 as material generated in the State from the pre-determined beneficial uses allowed pursuant to this section. The notification requirement in 360.13(j) for New York City includes imported material and will help to alert the Department of material from out-of-state sent to the City. Drill cuttings from oil and gas development are not fill material pursuant to the definition of fill material, but rather are Drilling and Production Waste as defined in subdivision

360.2(b), and hence are not allowed as fill under these predetermined uses. For both out-of-state fill material and for drill cuttings to be used in New York State as fill, these materials would require case-specific BUDs pursuant to subdivision 360.12(d).

360.13(a)
Comment: The New York City Clean Soil Bank and other successful soil reuse programs should be exempted from 360.13 requirements, some of which conflict with these programs and would hinder them, for example that materials do not cease being solid wastes until placement.

Response: Although the final regulations do not include an exemption for soil reuse programs, case-specific BUDs and MOUs can be developed with municipal entities who have soil management programs.

360.13(a)
Comment: The commenter applauds the Department establishing that clean soil ceases to be regulated as solid waste upon documenting that it is clean at the point of generation – but why is this waste exclusion not fully extended to soils generated within New York City? This discrimination is legally untenable.

Response: The Department has observed that many incidents of illegal fill disposal arise from materials originating in New York City, for this reason additional sampling, transport and notification requirements have been imposed on materials generated there.

360.13(b)
Comment: Can the meaning/intent of "on-site" be extended to all property owned by or under control of a utility company, similar to the meaning of the on-site exemptions in 360.14(b)(1)? The commenter requests clarification that control includes control of property by virtue of the utility's franchise agreement with a municipality that authorizes the utility's presence within the right-of-way.

Response: The definition of "on-site" cannot be altered from its definition in 360.2(b)(184) [now 360.2(b)(183)] as requested by the commenter, but entities such as a utility company could petition for case-specific BUDs for projects, or broader uses of materials, that do not conform to the restrictions of this or other predetermined beneficial uses in 360.13. The revised definition, which has not been modified in the final regulation, does however consider noncontiguous properties connected by a right-of-way to be "on-site."

360.13(b)
Comment: For determining use of fill material on the same site, can "similar" characteristics be determined using professional judgment that includes knowledge of prior site history of contamination, presence or absence of odors or visual signs of

contamination? If there is no evidence of contamination, is the fill material suitable for use on-site without testing?

Response: Yes, the expectation is for generators to use professional judgment in determining what constitutes similar characteristics. The commenter is also correct that no testing is necessary if excavated fill will be reused on-site.

360.13(b)
Comment: To require characterization pursuant to 360.13(c) into categories of Restricted-Use or Limited-Use Fill and especially comparison of "chemical characteristics" seems to run counter to the intent of this subdivision to exempt the activity of fill material relocation within the same site.

Response: The Department agrees that, as written, the revised regulations did not make clear whether fill intended to be reused on-site must be tested before placement. In response to this comment, this subdivision has been modified to more clearly reflect the intent to allow visually contaminated material on the same site in areas of similar-appearing material while avoiding impacts to public health and the environment.

360.13(b)
Comment: This definition seems to contradict the definition of "fill material" under 360.2(b)(l09); specifically, if one is reusing material on-site, then how can it be "excess to the needs of" the project? If it is not "excess," then it cannot be "fill material" under 360.2(b)(109) and, presumably, is unregulated.

Response: The Department agrees this discrepancy exists and has removed the phrase "excess to the needs of the project" from the definition of fill material in 360.2(b)(109). The intent in subdivision 360.13(b) is to confirm that materials moved within the boundaries of a project site are not subject to Department regulation while noting limits to this exemption.

360.13(b)
Comment: Regarding "similar physical characteristics" and "similar chemical characteristics", these terms seem to be used interchangeably in this section, even though they have very different meanings. We urge NYSDEC to develop a uniform interpretation of these terms throughout the state so that these provisions can be understood and consistently implemented by both the regulated community and by NYSDEC staff. It is also notable that this sub-section will require a different and stricter standard for onsite reuse of RUF and LUF than is established for reuse on other properties because Table 2 does not apply the physical and chemical similarity standard included here.

Response: The requirement for "similar chemical characteristics" has been removed. "Similar physical characteristics" has not been removed since this similarity can be left

to the judgment of the site owner or contractor, based on factors such as named in the second sentence (historical or visual evidence or odors).

360.13(c)
Comment: Is generator knowledge adequate to judge a fill material without laboratory analysis, even if from an urban site or commercial-use property?

Response: Generator knowledge can determine (for material generated in New York State but outside the City of New York) whether material has been impacted by a chemical or petroleum spill or previous use of the site and through observation of staining or non-soil particles in fill material except for industrial sites and sites with historical records of contamination. If contamination is known or suspected, laboratory analysis is required pursuant to determine if the material is General Fill, Restricted-Use or Limited-Use Fill.

360.13(c)
Comment: Does this rule set characterization responsibility at the point of the site of reuse, or at the point of generation?

Response: Characterization for use under one of the predetermined fill types (use categories) is *de facto* at the point of generation for materials being direct-hauled to a reuse site. Otherwise, characterization is the responsibility of a fill material processing facility.

360.13(c)(2)
Comment: If this provision is part of the final regulation, it should clarify whether fill leaving the state would be subject to this requirement.

Response: This section only applies to material managed in New York State. Material intended to leave the state is only subject to Part 364, to the extent that a transporter conducts regulated activities in state.

360.13(c)(2)
Comment: The requirement to characterize more than 10 cubic yards per project in New York City will present a logistical nightmare for small contractors, and for larger contractors with many small excavation projects (e.g., utility companies). Work cannot be held up while materials await laboratory results and characterization into a fill type before shipment. Staging excavated materials on the site pending characterization may also result in violation of City work permits. In New York City, excavated materials are normally immediately transported to a DEC-authorized, City-designated facility. Excavating the material and moving it to a temporary off-site location for testing is not an option because the proposed rules specifically require the material to be analyzed and notification sent to the Department before any material is moved. Can entities such as utilities be exempted from this regulation? Note that utility companies follow in-house protocols to evaluate soils for proper processing or disposal before projects start.

Response: The clarification that this section does not apply to fill material that is delivered to a processing facility regulated by Subpart 361-5 will alleviate many of the issues raised. In other cases, compliance with the criteria in the section or petitioning for a case-specific beneficial use determination are possibilities.

360.13(c)(2)
Comment: Several organizations, public and private, stated they have detailed protocols for the assessment of materials in planned excavations, such as the researching of site histories and past spill events, prior to beginning work. These organizations asked whether the Department would accept these protocols as being adequate to rule out the need for sampling and analysis (characterization) as required in 360.13(d).

Response: This section only applies to the direct use of fill material as outlined. If sampling and analysis is required, it must, at a minimum, follow the protocol outlined.

360.12(c)(2)
Comment: Please clarify that a, " ... history of reported spill events," including only minor spills that did not result in any significant soil contamination (i.e., traffic accidents, leaking pole transformers, etc.), would not trigger the characterization requirement, per 360.13(c)(2)(i)(b) and (c)(2)(ii).

Response: The Department's intent is that spills reported to DEC would be included in this assessment.

360.13(c)(2)(iii)
Comment: The term "industrial land use" indicates that only current land use is to be considered. This provision should be expanded to include historical land use and commercial land use as well as if land was used for chemical or petroleum storage, or other raw or waste materials were managed or stored on site. This section should also apply if, during excavation, visual indication of chemical or physical contamination is discovered.

Response: The provision also includes other indications of contamination as well as the industrial use of the site so these other actions on the site should be included.

360.13(c)(2)(iv)
Comment: The paragraph needs to be clear as to who can make these determinations. Is it the NYSDEC's intent to require a qualified environmental professional onsite during excavation? Do all excavations need to be certified by an environmental professional?

Response: Certification by a QEP is only necessary when sampling is required. The QEP takes responsibility that all sampling and analyses were done properly.

360.13(c)(2)(iv)
Comment: Table 2 requires chemical testing, whereas 360.13(c)(2)(iv) makes clear that chemical testing is only required if there is visual or physical evidence or contamination. This is contradictory and very problematic when fill is placed into commerce.

Response: The language in the section was revised to make it clear that not all material requires sampling and that some fill material does not have restrictions on use.

360.13(c)(3)
Comment: The sampling protocols for material leaving a 361-5 facility need to be created. The current language instructs a 361-5 facility to collect samples in accordance with 360.13(d), but this protocol is not workable for a facility where material from multiple sources will be received and processed in a continuous versus a batch or one-time manner from a single source.

Response: The sampling and analysis criteria in Subpart 361-5 have been revised for clarity to address the continuous nature of these facilities.

360.13(c)(3)
Comment: This section should not require characterization of materials before they are transported to a Department-authorized facility.

Response: The Department did not intend in this paragraph to imply that characterization is required before transport to an authorized facility. Fill material does not require characterization before transport to the facility and requirements for characterization at a facility are addressed in Subpart 361-5.

360.13(d)
Comment: Delay due to lab return results will impact construction schedules especially if done as work progresses – can pre excavation sampling be used?

Response: Yes, in-situ cores or test pits can be acceptable for characterization sampling if representative.

360.13(d)
Comment: QEPs are not needed for small scale projects. Less qualified individuals meeting several other accreditations, or following recognized industry protocols for site assessments and sampling, could accomplish an adequate level of certification for many fill management projects.

Response: QEPs are needed for certification of characterization for the predetermined Fill Types. An entity can request review of soil reuse under a case-specific BUD for deviation from any requirements in this subdivision.

360.13(d)
Comment: Sampling should only be for obviously contaminated materials, not for materials now recycled under current 360. Such materials should be sent directly to a facility intended for these materials and the facility be tasked with characterization.

Response: Sampling is only required for direct use of fill material under certain circumstances. Most material currently recycled in the most affected area, New York City, is currently sent to fill material processing facilities, and would not be required to be sampled.

360.13(d)
Comment: At what point do "distinctly different materials" need separate characterization (minimum volume of different material)

Response: This phrase has been deleted. The QEP must ensure that the sampling is representative.

360.13(d)
Comment: Is DEC approval required for sampling plans?

Response: No. However, please note that this subdivision has been renumbered.

360.13(d), Table 1
Comment: Commenters remarked on the minimum frequency of sampling in Table 1. One stated the sampling frequency is more stringent than previously accepted frequency of 0-500 CY, 501-1000 CY which should be continued. Another recommended the Department set a more stringent frequency, pointing to other states with stricter protocols, and let a QEP make the determination to reduce the frequency.

Response: No frequency has previously been specified or generally accepted by the Department for sampling of materials for reuse as suggested by the commenter. Table 1 provides a frequency similar to the Department's Environmental Remediation program for imported fill for smaller quantities and reduces this frequency for higher quantities of fill material. A QEP should require more samples if visually different materials are observed.

360.13(d)(2)
Comment: NYSDEC should provide the specifics as to when it would require a sieve analysis because this requirement would increase bid prices significantly. NYSDEC should also clarify under what circumstances sieve analysis would be "as required by the Department." As this provision is in the "chemical testing" section, NYSDEC should also make clear whether "contamination" in this part refers to non-chemical contaminants, such as wood.

Response: The provision has been clarified to state that the volume of physical contaminants is done by visual observation.

360.13(d)(2)
Comment: Require VOCs for all commercial and industrial sites or if underground storage tanks are present.

Response: The Department believes the conditions for VOC sampling in this paragraph (site history, odors or field instrument readings) are sufficient.

360.13(d)(4)
Comment: NYSDEC should clarify whether this request would be a case-specific petition or, rather, a short version of a petition that would allow reuse without the full BUD petition.

Response: The request noted here would require a full BUD petition.

360.13(b) & (d)(2)
Comment: These revisions add the requirement for asbestos sampling at sites where building demolition has occurred. The proposed asbestos content threshold for such material, to be used as Restricted or Limited Use Fill, is "Non-Detectable." The test method for asbestos is not prescribed, and typically asbestos containing materials (ACM) are regulated for disposal at a 1% concentration. While the regulations regarding asbestos are extensive, the requirement for a non-detectable concentration may unnecessarily remove fill material from reuse under this proposed regulation because of incidental fibers deposited from an off-site or non-demolition related source. There are numerous potential area sources of asbestos (e.g., such as a historic component of brake pads), and it is a naturally occurring fiber. Fibers present in materials from these sources are not generally deemed by regulators to pose an unacceptable risk to human health and the environment. As a result, significant quantities of potential BUD materials in urban areas could be disqualified from a beneficial reuse without a corresponding benefit or the
potential of an unacceptable risk. We recommend that if the provision for asbestos testing is included it should be a risk-based approach to identify acceptable levels of asbestos, corresponding to levels established under existing statutes and considering background concentrations of asbestos observed in urban areas.

Response: Soil with any detection of asbestos is potentially ACM and must be evaluated by the Department for any beneficial use pursuant to a case-specific BUD.

360.13(d)
Comment: Statistical analysis is allowed for Navigational Dredged Material (NDM) to demonstrate compliance with SCOs and Protection of Groundwater (PGW) criteria. We request consideration that a similar statistical approach be allowed for fill material characterization by the QEP, and provisions to request reduced sampling and analyses.

Response: Statistical analysis for fill material results may be appropriate, but in general, too few results will be required or obtained to conduct a statistical analysis. Since these characterization protocols support a self-implementing, predetermined use, if an entity wants to deviate from them, case-specific Department review and determination will be necessary pursuant to 360.12(d).

360.13(e)
Comment: Comments recommended additional restrictions on fill material reuse, such as limiting use to a designated distance from the generation point; pre-designated zones on maps where various types of fill are allowed or prohibited; and best management practices such as erosion controls, buffers around water bodies or water-supply wells.

Response: The Department considered limiting haul distance, but distance is less a factor in fill movement, and discouraging misuse, than haul cost. Many best management practices mentioned by commenters are covered in other Department regulations such as for stormwater control and wetlands protection.

360.13(e), Table 2
Comment: Does General Fill always require testing?

Response: No – only in circumstances outlined in this section. The language of the section has been clarified to eliminate confusion concerning what activities are covered.

360.13(e), Table 2
Comment: The Department should clarify in Table 2 that, when the BaP Equivalent is utilized, the criteria found in Part 375-6.S(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.

Response: The criteria for Restricted-Use Fill and Limited-Use Fill have been reworded to clarify when General Fill criteria can be exceeded for applicable parameters. Individual Protection of Groundwater SCOs must still be met for PAHs for Restricted-Fill use in Nassau and Suffolk counties.

360.13(e), Table 2, footnote
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.

Response: The Department believes the 30-day deadline to place these materials in their final location of use is not unreasonable. Deviation from this timeframe can be approved through a case-specific BUD for the project, with justification.

360.13(e), Table 2
Comment: General fill can't be used on undeveloped land or agricultural crop land? Does this mean a landowner can't take material to smooth over bad spots in his property so that he could develop it? Or that a farmer can't take suitable material to fill in low spots in a field? There aren't very many locations where it's possible to get rid of material that don't fall in to one of those two categories? And what is a landowner wants to create a level spot for future development? Forcing them to purchase gravel is excessive and cost prohibitive, and would cause increases in the cost of gravel for those people that truly need it, such as for roads, buildings and parking lots.

Response: The restrictions apply to material that is required to be sampled and qualifies as General Fill. Material that does not have to sampled is not subject to the use restrictions mentioned. If a landowner does wish to accept a material meeting General Fill criteria, the landowner could petition for a case-specific BUD.

360.13(e), Table 2
Comment: These PAH criteria should await EPA's proposed changes to toxicity factors for PAHs.

Response: Comment noted; as changes to soil cleanup objectives are promulgated, these will be incorporated into this section.

360.13(e), Table 2
Comment: Why must materials in Nassau and Suffolk Counties meet Part 375 Protection of Groundwater SCOs?

Response: This requirement is based on the restriction of waste disposal in these counties in the Long Island Landfill Law (ECL 27-0704) and the Department's interpretation that attaining the Protection of Groundwater SCO will fulfill the definition of "inert material as determined by the Commissioner".

360.13(e), Table 2
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.

Response: A case-specific BUD could be developed, if necessary, to allow this specialized beneficial use of Restricted-Use and Limited-Use Fill. However, the restriction to above the seasonal high water table is not intended to mean material cannot be placed in a flood zone, or below a flood elevation.

360.13(e), Table 2
Comment: The criteria for all three types of fill in this table conflict with the objective of preventing water quality impacts in the New York City Watershed. The 6 NYCRR Part 375 soil cleanup objectives are higher than natural background in the watershed and soils allowed under these rules will introduce contamination to less-contaminated areas. One of the most basic principles of environmental protection is "anti-degradation." If land and water are clean, they should remain so and regulations should be designed to ensure that outcome. Unfortunately, the proposed beneficial uses of fill material, however well-intentioned, do the opposite; they encourage the export of contaminated fill material excavated in the New York City metropolitan area and disposal of it in the relatively pristine New York City Watershed.

Furthermore, the allowance for up to 40% non-soil material and up to 100% non-soil material in Restricted-Use Fill and Limited-Use Fill, respectively, could result in releases from materials such as gypsum wallboard or coal combustion ash. These rules conflict with NYC DEP regulations for placement of construction and demolition debris in the Watershed, and also conflict with State Public Health Law.

Response: Beneficial use determinations made pursuant to 360.13 are intended to address the suitability of reusing material that would otherwise be regulated as a solid waste. BUDs granted by the Department do not provide the BUD holder with any right to violate any other state, federal or local laws or regulations. Therefore, enforcement of the Public Health Law or NYC DEP regulations should not be impeded or affected by determinations made pursuant to 360.13. As to the concern raised in the comment about non-soil materials, the definition of fill material in 360.2(b) indicates the fill material is soil and similar material. Wallboard is not similar to soil. Nevertheless, to make this more clear, the Department has added the term "inert" to "non-soil material" with an explanatory footnote noting potentially reactive (though non-putrescible) materials such as gypsum wallboard will be excluded. With regard to SCO criteria for General Fill: Anti-degradation is one principle of beneficial use of a material on the land, but so is similarity to commercially-available, non-waste products. The Department acknowledges the General Fill criteria will often exceed local background for soils, but they reflect maximum concentrations of constituents in typical construction fill that is presently regarded as uncontaminated. Furthermore, these criteria are protective of public health and groundwater quality, when these materials are used as specified in Table 2.

360.13(e), Table 2
Comment: Examples or better description of what constitutes acceptable "non-putrescible, non-soil material" are needed. Do these materials fit into the definition of fill material in 360-2(b)(109) for "soil and similar material"?

Response: The term "inert" has been added to "non-putrescible, non-soil material". "Inert" is not identical to "inert material" as defined in 360.2(b) but is explained in the

added footnote. For purposes of fill material, materials "similar" to soil will exhibit geotechnical or engineering properties when put in place that are adequate for the needs of a project. They will be durable, incompressible, non-degradable materials.

360.13(e), Table 2
Comment: Many commenters objected to use of the 6 NYCRR 375-6 soil cleanup objectives in this proposed regulation as being too stringent or not stringent enough, and fundamentally being inappropriate as they are cleanup standards, not reuse criteria.

Response: No soil criteria exist for beneficial use of soils in New York State. Therefore, at present, the determination of whether soil is uncontaminated is largely left to the discretion of the generator. The Part 375 criteria, while developed for the Superfund and Brownfields cleanup programs, are intended to be protective of public health in various land-use scenarios or protective of groundwater when materials are placed above the seasonal high water table. Unrestricted-Use SCOs, while based on rural background statewide, would frequently prohibit reuse of materials that are now commonly reused on construction sites as uncontaminated fill, including many native soils that exceed Rural State Background. With the restrictions included in the predetermined BUDs of Section 360.13, the Department believes the SCOs are protective of public health and the environment while allowing reuse of fill on construction projects.

360.13(e), Table 2
Comment: Allowable non-soil constituents in general fill should include masonry, concrete, and other materials traditionally considered "exempt" C&D debris. At least a de minimus allowance should be stated in criteria for General Fill.

Response: Masonry and concrete typically included in excavated soils are typically not recognizable, and should be sampled for beneficial use. Masonry and concrete that are recognizable have their own pre-determined BUD for use as aggregate in 360.12(c)(3).

360.13(e) Table 2
Comment: Commenters remarked the 40 percent limit for Restricted-Use Fill non-soil content appears arbitrary and without technical basis. Some objected that a value of 10 to 20 percent is more consistent with mapped urban ("historic") mixtures of ash and soil. Others asked why the percentage could not be higher, provided the non-soil content was inert and analytical results met chemical criteria. Still others requested a by-weight basis as being easier to measure than a by-volume basis. Others asked if the percentage applies across an entire site or must pockets of higher-percentage material be addressed separately?

Response: The 40 percent limit for inert, non-putrescible non-soil material is the basis for this self-implementing fill use determination. Ten to 20 percent are typically used as the minimum to indicate human involvement. Forty percent recognizes that human impact is acceptable but larger percentages may limit the engineering properties of the

fill for the uses specified for restricted-use fill. Entities can request use of materials of differing characteristics under a case-specific BUD (360.12(d)). A volumetric basis addresses non-soil contaminants of low density.

360.13(e), Table 2
Comment: "Transportation Corridor" should be defined.

Response: A definition of this term has been added to 360.2(b).

360.13(e) Table 2 and 360.13(h)
Comment: Table 2 provides detail on how fill may be re-used and paragraph 13(h) requires entities to maintain records for at least 3 years; however, in the case of limited-use fill, it appears that fill material meeting the Part 375 SCO metals criteria for Commercial Use may be utilized under any foundation and/or pavement regardless of zoning. NYSDEC should identify the protective measures it will institute for fill placed in areas zoned residential, such as a deed notice be required for fill movement/handling if a structure or paved area is redeveloped, renovated or modified.

Response: Placement of Limited-Use Fill is only allowed on projects with a local building permit or municipal authorization. A deed notice can be required by the municipality, if appropriate.

Comment: The restriction on placement of General Fill on "undeveloped land" will hamper its use on vacant undeveloped properties in New York City through the NYC Clean Soil Bank or other programs.

Response: A definition of undeveloped land has been added to 360.2(b) for clarity.

360.13(e) Table 2
Comment: Laboratory reporting limits present problems when they exceed criteria.

Response: The Department agrees, but points out the QEP's role will be to interpret unclear findings of fill characterization.

360.13(e) Table 2
Comment: Native material can exceed General Fill criteria.

Response: The Department acknowledges this concern. General Fill criteria are above Rural State Background as defined in Part 375, so this problem should be limited. If it occurs, the Department will review a case-specific BUD petition for this material.

360.13(e) Table 2
Comment: The Fill End Use criteria for Restricted-Use Fill include "or on sites where in-situ materials exceed . . ." As discussed above, more guidance is needed to make sure that the intent of this regulation is properly understood and implemented by both

the private sector and NYSDEC and that NYSDEC implements this provision equally in different parts of the state (or defines how this will be implemented differently).

Response: Taking place pursuant to this predetermined BUD, the placement of Restricted-Use Fill will be self-implementing and subject to the judgment of the generator and recipient.

360.13(e) Table 2
Comment: The new Restricted-Use and Limited-Use Fill categories will provide materials at low cost or no cost that previously were disposed. This may have unintended consequences, including allowing out-of-state materials to be imported to NYS sites, especially when the state where material is generated has more stringent criteria for use. This may especially happen with PAH-containing fill material. NYS may become a dumping ground for these materials.

Response: This concern is noted; however, the requirement that Restricted-Use and Limited-Use Fill must be used in a project approved under a local building permit or other municipal authorization, will help ensure legitimate reuse rather than disposal of these materials.

360.13(e), Table 2
Comment: Please clarify whether metals background levels should also be considered for General and Restricted Fill comparisons?

Response: With regard to General Fill, determining site-specific background would require sampling of every specific receiving site. With the intent of this regulation to allow pre-determined beneficial use and general sale or distribution of General Fill, the Department has instead chosen a uniform set of criteria, based on protection of public health and protection of groundwater.

360.13(f)
Comment: Several commenters objected to the prohibition on a fee or form of consideration to receive fill material. One commenter asserted since a BUD removes the material from regulation as a solid waste, its placement is not disposal as intended in the prohibition in the ECL for a fee or form of consideration for disposal of C&D debris. Some stated recipients of fill need reimbursement for costs of sampling and monitoring of incoming materials, getting permits and approvals, and to build infrastructure such as haul roads to place fill, and hence need to charge a fee.

Response: The prohibition of profit-making from receipt of some types of fill materials is important to discourage the formation of unpermitted landfills under guise of a BUD. If a material is worthy of beneficial use (an effective substitute for a commercial material), its generator should not have to pay to get rid of it. This does not "demonstrate a legitimate market" for the material. Costs of fill characterization will typically fall on the

generator and the recipient has only to verify that materials meet the type of fill appropriate for the site. Other expenses stated occur with any fill material.

360.13(f)
Comment: The no fee restriction will shut down all facilities as these charge for receipt of materials.

Response: This understanding is incorrect. This prohibition applies to placement of fill on land, (i.e., at its end-use location). Facilities receiving fill material to process and/or store for later use are not prohibited from charging for these services.

360.13(f)
Comment: This prohibition could have the effect of making it illegal for a contractor to lease private land to place excess fill.

Response: The final regulation has been changed to state "beneficial use" in this subdivision in place of "placement". Placement of excess fill such as described by the commenter would not constitute a beneficial use but rather temporary storage of soil, and would not be affected by this prohibition.

360.13(g)
Comment: This section should require that the fill material recipient be provided with the certification report.

Response: The Department has not included this requirement but has required that entities provide the Department with characterization results on request. These records effectively become a public record available to the fill recipient.

360.13(g)
Comment: Commenters expressed concern about the availability of qualified environmental professionals to certify any characterization sampling and analysis needed for fill.

Response: The Department has evaluated this concern and believes taken together with the limited number of projects which will require characterization, the growing number of QEPs will meet the need for those who want to manage fill material pursuant to these predetermined fill types.

360.13(g)
Comment: We are concerned about material being determined "General Fill" which is placed into commerce, and subsequently, on delivery to a site, is tested and found not to meet Table 2 chemical or physical criteria for General Fill. This material should not then be reclassified and possibly rejected. This possible scenario caused by these rules will create uncertainty hindering the reuse of fill, unless the proposed terms can forbid the reclassification of material once deemed "General Fill" especially by a QEP.

Response: The Department does not believe this change is necessary. This section does not require testing of fill material by the recipient or end-user. A more likely scenario is that the recipient asks for documentation of fill characterization by the generator or processing facility and accepts or rejects fill on that basis.

360.13(i)
Comment: This sentence is confusing and inconsistent with Part 364. Part 364- 1.2(e)(l l) 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. The paragraph needs to make clear that a Part 364 permit is not required for hauling fill elsewhere in the State.

Response: Part 364 and section 360.13 are compatible but are not necessarily equivalent in their regulatory oversight. Part 364 can require registration for the transport of fill that is not required to be sampled under 360.13. Part 364 does not focus solely on the beneficial use of fill to determine the need for the transporter to obtain a registration or permit.

360.13(i)
Comment: This subdivision should be modified to state the following: "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, unless the facility has a part 360 permit to handle such materials."

Response: This subdivision governs an end use site for beneficial use, not a processing or disposal site. Fill material sent to a regulated facility for processing or disposal is not addressed by 360.13

360.13(i)
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.

Response: The Department must word the regulation to be consistent with the Long Island Landfill Law (ECL 27-0704).

360.13(j)
Comment: When it is considered that 15 days advance notification is required in New York City for any transfer of fill material, these timeframes and associated delays add up for transfer to a processing facility, then transfer out of a processing facility to a site of use. Together with sampling and analysis this adds at least one month's delay to fill material movement in the City. The Department should reduce or eliminate the notification requirement. Notification in particular should not be required for materials in New York City that are classified as General Fill.

Response: Notification for all fill material generated, moved, used in or imported to New York City is necessary due to the prevalence of urban fill that does not meet General Fill criteria, and the Department's need to be aware of traffic in fill materials in the City in order to respond to complaints or noncompliance. This requirement, however, has been changed from 15 days to 5 days, and a threshold quantity has been added in the final regulations to provide some relief from the requirements.

360.13(j) and (k)
Comment: Numerous comments were received that the 15-day advance notification of transfers of fill material will frustrate emergency work or, in general, most maintenance and many construction jobs where materials have tight deadlines for removal of excavated materials.

Response: The Department has changed this advance notification from 15 days to 5 days and a threshold quantity has been added.

360.13(l)
Comment: This provision seems to say that any soil-like material that cannot fit into one of the pre-determined Fill Types or that cannot be used under a BUD, even if clean soil, must be treated as contaminated fill requiring Part 364-permitted transport and landfill disposal. The cost consequences of this requirement have not adequately been assessed in the EIS and other supporting documents for this proposed regulation.

Response: The Department has changed the wording of this subdivision to make it clear that materials not used under one of the pre-determined Fill Types is solid waste, not "contaminated fill".

360.14 Exempt facilities

Comment: Withdrawing the proposal to expand the various waste exemptions allowed in 360.14, such as the "State highway and municipally owned transportation corridor

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- The off-site reuse of any fill material generated in New York City in amounts greater than 10 cubic yards, or the off-site reuse of limited-use fill or restricted-use fill generated in locations in the state in amounts greater than 10 cubic yards, requires notification to DEC of at least 5 days prior to delivery [360.13(g)(2), (3)]. The form for this pre-notification can be found here: https://www.dec.ny.gov/chemical/8821.html. This is a one-time project notification which identifies the location of generation, the location of reuse, and the type and estimated amount of fill material to be reused among other information.

- Exempt fill, which is described in 360.12(c)(1)(ii), can be used on any site for any use. General fill and restricted-use fill, which are described in 360.13(f), can be used to level building sites so long as the appropriate requirements of Section 360.13 are met. For example, restricted-use fill can be used on sites where the existing site soils exhibit the criteria for either restricted-use fill or limited-use fill. Limited-use fill can only be used to level building sites where building footprints or pavement will cover them.

- The March 1, 2018 Enforcement Discretion Letter states in part that "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. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility." The implication of this decision is that fill material which moves through CDDHRFs does not require analytical sampling by any party prior to reuse under Section 360.13 until May 3, 2019 or until new regulations are promulgated. However, remaining requirements of Section 360.13, other than analytical requirements, continue to be applicable.

- Fill material outside of New York City which exhibits no evidence of historic impacts, such as spills, or exhibits no visual or other indication of chemical or physical contamination (e.g., odors, sheen, etc.) is not subject to the requirements of Section 360.13 (§360.12(c)(1)(ii)).

- A vehicle is exempt from waste transporter requirements in Part 364 if it is transporting a material which is no longer considered a waste under a BUD. The point at which the material ceases to be waste varies based on the BUD. For case-specific BUDs, that point occurs when the material is received at its point of use unless otherwise specified by DEC. For pre-determined BUDs, the point is specified in regulation. For example:

  - Some BUD materials cease being waste when they reach the location of use described in the BUD. Pre-determined BUDs of this type are located in §360.12(c)(2). In this case, a Part 364 authorization is required for transportation because the material remains a waste until it is delivered to the location of use.

  - Some BUD materials are no longer considered a waste when they meet the requirements of the intended reuse. Pre-determined BUDs of this type are located in §360.12(c)(3). For example, ground granulated blast-furnace slag which meets an industry standard is no longer considered a waste and therefore does not require transport under Part 364.

  - §360.13(b) describes the point at which fill material ceases to be waste. Any fill material generated in New York City continues to be considered a waste until it is delivered to the site of reuse; therefore, a Part 364 waste transporter is required for transport. The same is true of restricted-use fill, limited-use fill or contaminated fill generated anywhere in the state. For general fill generated outside of New York City, once the material has been determined to be general fill in accordance with §360.13(f), the material is no longer considered a waste and does not require transport by a Part 364 waste transporter.

  - Similarly, any fill material generated outside of New York City which shows no evidence of historical impacts or any visual or other indication of chemical of physical contamination is not considered a waste as per 360.12(c)(1)(ii) and does not require transport by a Part 364 transporter.

- As established in 360.13(b)(3), the pre-determined BUD for general fill generated in New York City does not attach until the material is delivered to the site of reuse. Therefore, it must be transported by a Part 364 registered or permitted transporter. However, general fill is a subset of C&D debris, so shipments of 10 cubic yards or less are exempt from Part 364 waste transporter requirements (§ 364-3.1(d)).

- Per the DEC's March 1, 2018 Enforcement Discretion Letter, asphalt pavement or asphalt millings of any size are exempt from Part 364 waste transporter requirements until May 4, 2019, unless an amendment to the rule is promulgated earlier. http://www.dec.ny.gov/regulations/81768.html

- Material which meets the requirements of the pre-determined BUDs found at § 360.12(c)(3)(viii), (ix), and (x) are exempt from Part 364 waste transporter requirements.

- To qualify for the pre-determined beneficial uses set forth in Part 360.12, the material intended for reuse cannot be mixed with any other material. However, in administering the program the Department acknowledges that small amounts of soil or other solid wastes which are present with material that would otherwise meet the requirements of a beneficial use determination (BUD) (e.g., small amounts of soil in a truckload of asphalt pavement or concrete) do not cause the material to

lose its BUD status; therefore, transport of these materials would not require a Part 364 waste transporter. This allowance is made by DEC to avoid unnecessary rejection of BUD material due to small amounts of material which are unavoidably included with BUD materials as they are generated. However, transportation anywhere in the state of mixed loads of C&D debris requires Part 364 authorization and may require waste tracking documents if the material is determined to be limited-use fill, restricted use fill or contaminated fill. DEC expects generators of BUD materials to make efforts to reduce the presence of soil in BUD materials.

- A Part 364 waste transporter registration is not required for transport of soil or fill material generated outside of New York City that has been determined to be general fill or has been determined to not have historical, visual, or other evidence of contamination. Please also see the discussion above about transportation of beneficial use materials.

- If a fill material does not meet the criteria for exempt fill found at 360.12(c)(1)(ii) and does not meet the criteria for general fill, restricted use fill, or limited use fill found in Part 360.13, then it is considered contaminated fill for purposes of the Part 360 Series.

360.12 Beneficial Use

Question: Can clean concrete alone or mixed with clean soil, be used without limit on properties for fill?

Response: No. An exemption in 363-2.1(h) allows concrete pieces, regardless of size or if mixed with other materials allowed in the exemption, on a private property up to 5000 cubic yards. Concrete and other specific wastes generated by state or municipal highway projects can be disposed on highway rights-of-way or municipally owned property without volume restriction (363-2.1(i)). General Fill (tested or untested) can be used in greater quantities, but this material cannot include any concrete.

If concrete is crushed to produce commercial aggregate as defined in the regulation, with this aggregate meeting a state or municipal specification, the aggregate could be used if appropriate as a subbase fill.

360.13 Special requirements for pre-determined beneficial use of fill material

Question: Section 360.13(b)(2) states that general fill generated outside of New York City ceases to be a waste once it is determined that it is general fill. My question is, how can we then regulate general fill in accordance with 360.13(f) Table 2? If the material is not a waste as soon as the general fill determination is made, why are the uses limited in Table 2?

Response: According to the definition found at 360.2(b)(121), "general fill" means fill material that meets criteria in subdivision 360.13(e) of this Part and 360.13(f) states that fill material can be beneficially used in accordance with Table 2 of 360.13(f).

Question: The applicability of section 360.13 states that the section does not apply to:

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 as identified in subparagraph 360.12(c)(1)(ii) of this Part.

However, section 360.13(d) requires testing of material that originates from a site with industrial land use. If material is excavated from an industrial site and the material has no evidence of contamination, how can we require testing of that material under a section that does not apply to that material?

Response: 360.13(a)(2) states that 360.13 does not apply to 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 as identified in subparagraph 360.12(c)(1)(ii) of this Part. Industrial land use constitutes an "evidence of historical impact", and thus fill material generated outside of New York City from industrial sites requires testing to be eligible for the predetermined beneficial use categories for fill.

Question: Section 360.13(d)(2)(iii) states that testing is required for material that originates outside of New York City if, during excavation, visual indication of chemical or physical contamination is discovered. To be consistent with the rest of this section should this be revised to say "visual or other indication (odors, etc.)"?

Response: Yes.

Question: What is the difference between fill material in 360.12(c)(1)(ii) – generated upstate with no indication of contamination – and 360.13(f) General Fill? Are these terms interchangeable?

Response: Fill Material in 360.12(c)(1)(ii) could be termed "Untested Fill Material". It can be used at any location not contravening another provision of the ECL. General Fill, on the other hand, has been tested (sampled and analyzed) and shown in this manner to meet General Fill criteria. Its use is prohibited on agricultural crop land and undeveloped land without a case-specific BUD.

Note General Fill also includes small quantities (less than 10 cubic yards per project) of soil generated in New York City with no indication of contamination. These fill materials do not require testing, but are subject to the limitations on use for General Fill in 360.13(f).

Question: In the definition of Fill Material in 360.2(b)(107), what is meant by "similar material" in "soil and similar material"?

Response: In the context of the fill material definition, "similar material" can mean any durable, granular material that contributes to the function of a material as fill – meaning that it can be excavated, transported, placed, and compacted for construction purposes and meets an engineering specification for the purpose for which fill is needed (grade adjustment, structural, barrier, berm, etc). No distinction is made in the definition whether the fill material is contaminated or uncontaminated. "Similar material" could include particles of crushed concrete or other human-made material, or slag or ash. Larger, recognizable particles of rock, demolition debris or waste would not constitute "similar material" for purposes of this definition. It is the purpose of Section 360.13 to allow contractors to further distinguish whether fill material contains chemical or physical contamination and based on this knowledge, to use the fill material appropriately.

Question: In 360.12(c)(1)(ii), does "physical contamination" include ash, slag, concrete, brick, or asphalt pavement?

Response: Yes, in addition to any other non-soil, non-rock, waste material. Buried vegetative material would not constitute physical contamination for purposes of Part 360 but may be considered deleterious material pursuant to a construction specification for fill.

Question: Do references to "General Fill" in Parts 361, 363 and 364 refer also to fill material in 360.12(c)(1(ii)?

Response: Yes, in general where general fill is referenced, "untested" fill material is also intended, for example as a component of exempt landfilling in 363-2(h).

Question: Does the prohibition on agricultural crop land use for General Fill in 360.13(f) stop General Fill from being used on urban community gardens?

Response: No. General Fill must meet Residential Public Health SCOs, and can be used for residential or community gardens.

Question: If I am sending excavated soil to a C&D debris handling and recovery facility, do I need to test or certify it as any certain type of fill material first?

Response: No. After May 3, 2019, the CDDHRF will be responsible to test fill material before it leaves the facility for use. The type of CDDHRF may vary depending on whether the fill material shows evidence of contamination or inclusion of materials other than soil, gravel or rock.

Question: Can the predetermined uses in 360.13 be applied to material excavated from a site in a Part 375 (DER) program?

Response: No. Case-specific determinations from DMM should be sought for these materials, unless all sample results are below unrestricted-use SCOs in 375-6.8(a) and no other materials are mixed with the soil.

Question: Can soils from a DER site be transported by exempt or registered Part 364 haulers?

Response: No. Vehicles transporting these soils (unless meeting the unrestricted criteria) must have Part 364 Waste Transporter permits.

Question: Can navigational dredged material be used pursuant to the 360.13 predetermined BUDs?

Response: No; a case-specific BUD must be obtained for NDM after it is dewatered or amended. However, this BUD can reflect the allowable concentrations and uses for any of the 360.13(f) types of fill material if the NDM will be marketed, or a case-specific BUD can be obtained for NDM from a particular source being used at a particular location.

Question: What happens if I test fill material and it cannot meet the criteria for the desired use?

Response: You can petition for a case-specific BUD under 360.12(d) for the material in the desired use. Depending on the material characteristics and analytical results, the BUD may restrict its use to a specific location.

Question: What if one or more of the testing samples exceed criteria for the Fill Material Type for which I hope to certify the material?

Response: All sample results must meet the criteria; results cannot be averaged or statistically manipulated. If the failing result is in a portion of the site that is visually (or by knowledge of site history) in an area of contamination, that portion could be excavated and separately managed, while the remaining soils are re-tested using the sample frequency in Table 1. A QEP must develop the sampling plan and document how segregation of contaminated material and retesting was performed.

Question: Can Table 1 sampling be performed before or after excavation?

Response: Sampling can be performed in-situ through test pits or borings prior to excavation, or after excavation. A QEP should design the sampling program to ensure the sampling is representative and that any visually contaminated portions of the site are excluded from excavated material intended for reuse.

Question: What about fill material that meets General Fill criteria upon testing, but has strong odors from petroleum contamination, organic matter decay or other cause?

Response: There is no prohibition against using this fill material as General Fill in 360.13, but contractors should exercise judgment concerning using material that will cause an odor nuisance.

Question: How does the March 1 2018 Enforcement Discretion effect sampling and analysis of fill material at CDDHFRs? (Same question asked and answered in 361-5 FAQ)

Response: The March 1, 2018 Enforcement Discretion Letter states in part that "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. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility."

The implication of this decision is that fill material which moves through CDDHRFs does not require analytical sampling prior to reuse under Part 360.13 until May 3, 2019 or new regulations are promulgated. However, remaining requirements of Part 360.13 other than analytical requirements continue to be applicable.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel
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OCT 12 2018

To Whom It May Concern:

This is to advise you that, subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, 361 and 362. The DEC will exercise this authority regarding the provisions outlined below until either January 31, 2020, or until an amendment to the present rule is promulgated, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced.

I. Regulatory Flexibility for Recyclables Handling and Recovery Facilities

Due to the decrease in available recyclables commodities markets, tip fees charged by some recyclables handling and recovery facilities ("RHRFs") are increasing. In order to decrease contamination in recyclables processed through single-stream facilities and increase the marketability of the resultant recyclables, some RHRF operators have slowed sorting lines resulting in material backlogs and increasing stockpiles of recyclables. In order to relieve regulatory impacts that have arisen due to these circumstances:

- DEC will utilize enforcement discretion and waive the 15 percent residue threshold found at 6 NYCRR § 361-1.3(a)(1) and (2) on a case-by-case basis for registered RHRFs. Requests under this provision must be directed to the appropriate DEC Regional Office.
- DEC will utilize enforcement discretion to allow, with DEC approval, storage of unprocessed or processed non-putrescible recyclables at locations owned or under the control of an owner or operator of a solid waste management facility. Requests under this provision must be directed to the appropriate DEC Regional Office.
- DEC reminds owners and operators of RHRFs that storage of unprocessed and processed non-putrescible recyclables longer than 180 calendar days is allowed with DEC approval. Requests for extensions for recyclables storage must be directed to the appropriate DEC Regional Office.

II. Metal Recovery from Municipal Waste Combustors

Efforts are in place across New York State to increase and enhance recycling collection systems and markets, including those associated with residential metal recycling. Curbside collection of recyclables is the primary means of separating metals from municipal solid waste (MSW), however, some recyclable metals still find their way into the disposal stream. When MSW is combusted at a municipal waste combustion (MWC) facility, a second opportunity to recover those metals presents itself. Metal in the MSW stream is not combusted, but instead passes through the process relatively unscathed. Many MWC facilities are designed to separate metal from the combustion ash residue, further reducing the waste that must be landfilled and redirecting valuable material to recycling.

In the past, DEC had considered metal in the MSW stream received at a MWC facility to be a part of the facility's permitted throughput capacity. However, because the metal is not combusted and because it is extracted for recycling rather than disposal, this practice should be strongly encouraged. Therefore, DEC will utilize enforcement discretion to allow for metal extracted from an MWC facility subsequent to combustion to not be considered part of the facility's throughput capacity.

III. Regulatory flexibility for the transfer of non-putrescible solid wastes on a vehicle for 10 days or less during transport

Presently, regulation of 10-day permit exempt transfer facilities is inconsistent with the regulatory requirement for hazardous waste transporters and for solid waste transporters. Recent updates to 6 NYCRR Part 360 eliminated one inconsistency by establishing a 10-day exemption from storage for non-putrescible solid wastes to match the permitting exemption found in 6 NYCRR Part 373 for hazardous waste transporters. However, the permit exemption in 6 NYCRR Part 360 remains more stringent than that in 6 NYCRR Part 373. In order to simplify the handling of both hazardous waste and solid waste at 10-day permit exempt transfer facilities, the Department is expanding the 6 NYCRR Part 360 permit exemption to more closely match that required by the exemption in 6 NYCRR Part 373 and other specific conditions, including secondary containment and U.S. Department of Transportation packaging requirements, established in 6 NYCRR Part 372 for 10-day exempt facilities.

Specifically, DEC will utilize enforcement discretion to waive the requirements of 6 NYCRR § 360.14, provided that the management of solid wastes by transporters meets the requirements of 6 NYCRR § 372.3(a)(6) and § 372.3(a)(7)(iii).

IV. Regulatory flexibility for the portion of any solid waste management facility subject to regulation under 6 NYCRR Subpart 374-2

Portions of solid waste management facilities subject to 6 NYCRR Subpart 374-2, Standards for the Management of Used Oil, are exempted from meeting certain standards found in 6 NYCRR Part 360. As part of a previous rulemaking for used oil, the exclusion for 6 NYCRR Subpart 374-2 facilities meeting the standards found in 6 NYCRR § 360.14 was unintentionally removed from 6 NYCRR Part 360. The absence of this exclusion causes transporters of used oil to be subject to two separate, but conflicting, sets of requirements when storing solid wastes at 10-day transfer facilities. It is DEC's intention that only the 6 NYCRR Subpart 374-2 conditions are to be in effect for these transporters.

To resolve the inconsistency, DEC will utilize enforcement discretion by waiving the requirements of 6 NYCRR § 360.14, as long as the transporter is in compliance with the applicable provisions of 6 NYCRR § 374-2.5 and 6 NYCRR § 374-2.10.

V. Continued operation of municipal land clearing debris landfills

Previous Part 360 regulations allow certain registered facilities to dispose of land clearing debris, concrete, asphalt and other similar materials without a liner. In order to help ensure that groundwater is protected from unauthorized disposal of solid waste, the current Part 360 regulations removed the allowance for registration for land clearing debris landfills, requiring that those facilities obtain permits and construct landfill liners for their continued operation. However, some municipalities have raised concerns that the continued use of these facilities is provided as a public service to their communities, that the municipality charges only a nominal fee which covers the cost of operation, and that the closure of the facilities will force these materials into MSW landfills thereby reducing airspace at those facilities.

In recognition of these circumstances, DEC utilizes its enforcement discretion by allowing the continued operation of municipally-owned landfills which prior to November 4, 2017 held a 360-7.2(a) registration and which accepts only tree debris, concrete, asphalt pavement, brick, rock, and soil which meets with the definition of general fill or the requirements of 6 NYCRR 360.12(c)(1)(ii).

Very truly yours,

Thomas S. Berkman
Deputy Commissioner
& General Counsel

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MAR 0 1 2018

To Whom It May Concern:

This is to advise you, that subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, Part 361, Part 364 and Part 365 of the newly enacted Part 360 Series. The DEC will exercise this authority regarding the above provisions until either May 3, 2019 or an amendment to the present rule is promulgated, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced.

I. Materials used in cement, concrete and asphalt pavement.

On September 5, 2017, the 6 NYCRR Part 360 Solid Waste Management Facilities regulations were revised, replaced and enhanced, creating a new Part 360 Series. The revisions modified beneficial use determinations for recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock. Under the new Part 360 Series several pre-determined beneficial uses (BUDs) were created to deal with the reuse of these materials (6 NYCRR 360.12 (c)(3)(viii), (ix) and (x)). Pursuant to these BUDs these materials cease to be a solid waste when the material meets the requirements for the intended use.

The Department will utilize its enforcement discretion with respect to facilities subject to the requirements of 6 NYCRR 361-5 and for materials that are destined for and/or stored and maintained at these facilities under the control of the generator or the person responsible for the generation, prior to processing or reuse, in conformance with 6 NYCRR 360.12 (c)(3)(viii), (ix) and (x).

In addition, these materials (i.e., materials under the control of the generator or the person responsible for the generation which are destined for and/or managed prior to reuse under 6 NYCRR 360.12(c)(3)(viii), (ix) and (x)) destined for and/or managed at facilities subject to the requirements of 6 NYCRR 361-5 may be managed as a commercial product or raw material and are not subject to Part 360 or Part 361.

The transporters handling these materials (i.e., materials destined for a facility under the control of the generator or the person responsible for the generation which are destined for and/or managed prior to reuse under 6 NYCRR 360.12(c)(3)(viii), (ix) and

(x)) are also not subject to the otherwise applicable provisions of 6 NYCRR 360.4, 360.15, and Part 364.

Recognizable, uncontaminated concrete, asphalt, rock, brick and soil used for reclamation at a facility permitted pursuant to the Mined Land Reclamation Law, will not be subject to the otherwise applicable provisions of Parts 360, 361 and 364, if the material has been reviewed, approved and incorporated into the mined land reclamation permit issued to the facility. No fee or any form of consideration may be received by the operator for use of this material. Any material transported to a mine site for such reclamation purposes is subject to monitoring and enforcement by the Department to ensure no unapproved wastes are accepted or disposed of during mining and reclamation activities. The Department reserves the right to disapprove use of such materials if placement of these materials at a mine site may constitute an environmental hazard.

II. Waste tires used to secure tarpaulins.

The new Part 360 Series, which addresses the use of waste tires to secure tarpaulins in common weather protection practices, requires adjustments to better suit the needs of the agricultural community. The Department will utilize its enforcement discretion with respect to the enforcement of 6 NYCRR Subpart 361-6, as long as the use of waste tires to secure tarpaulins is done in accordance with the pre-determined beneficial use found at Part 360.12(c)(2)(iv) or BUD 1137-0-00, dated December 4, 2014, which permits the use of waste tires to anchor plastic film or other cover material for corn silage, haylage or other agricultural feeds if certain conditions are met.

III. Construction and demolition facility fill material sampling requirements.

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

IV. Storage Requirements for Regulated Medical Waste (RMW).

6 NYCRR 365-1.2(b)(8) prohibits storage of untreated RMW as follows: "RMW, except sharps, may be held in patient care areas for a period not to exceed 24 hours and at a laboratory or other generation area for a period not to exceed 72 hours, at which time the RMW shall be moved to an RMW storage area. Not-withstanding these time frames, RMW that generates odors or other evidence of putrefaction must be moved to a storage area as soon as practicable." Additionally, 6 NYCRR 365-1.2(b)(7) states "sharps containers must be removed from the patient care or use areas to a room or area designated for RMW storage when: the container has reached the fill line indicated on the container; the container generates odors or other evidence of putrefaction; or within 90 days of use, whichever occurs first."

Based on concerns raised by small generators (dental offices, etc.) the Department will exercise its enforcement discretion with respect to these provisions and will require that sharps and RMW containers be removed from patient care or use areas to a room or area designated for RMW storage when the container has reached the fill line indicated on the container, is otherwise filled, or the container generates odors or other evidence of putrefaction, whichever occurs first.

Thank you for your cooperation in this matter. If you have any questions, please call Richard Clarkson of the Division of Materials Management at (518) 402-8678.

Sincerely,

Thomas S Berkman
Deputy Commissioner
& General Counsel

MEMORANDUM OF UNDERSTANDING

BETWEEN THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION DIVISIONS OF ENVIRONMENTAL REMEDIATION AND MATERIALS MANAGEMENT REGARDING BENEFICIAL USE DETERMINATIONS FOR SOLID WASTES USED IN DER SITE REMEDIES

THIS Memorandum of Understanding made this 12th day of November, 2013 by and between the New York State Department of Environmental Conservation (the Department) Divisions of Environmental Remediation (DER) and Materials Management (DMM).

WITNESSETH

WHEREAS, DER regulates the remediation of hazardous substance and petroleum-contaminated properties; and

WHEREAS, DMM regulates the management of solid waste, including the beneficial use of solid waste; and

WHEREAS, DER desires to make beneficial use determinations (BUDs) for the beneficial use of solid waste on DER remedial sites; and

WHEREAS, DMM agrees that DER should be delegated the authority to make beneficial use determinations for the beneficial use of solid waste on DER remedial sites;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties agree as follows:

I. PURPOSE

DER and DMM enter into this Memorandum of Understanding (MOU) to delineate the roles of each Division in order to facilitate beneficial use determination reviews for solid wastes to be used in remedial actions on DER-managed sites.

The purpose of this MOU is twofold:

1) for DMM to delegate authority to DER to grant BUDs for solid waste used as cover, backfill, or any other component of a Department-approved remedial plan for an inactive hazardous waste disposal site, brownfield cleanup program site, voluntary cleanup site, RCRA corrective action site, or environmental restoration program site pursuant to the requirements of 6 NYCRR Part 375, or for a spill site pursuant to 6 NYCRR Part 611; and
2) to outline procedures to ensure that the requirements of section 360-1.15 of 6 NYCRR Part 360, Solid Waste Management Facilities Regulations (Part 360), and other program objectives for beneficial use of solid wastes are met in DER's administration of BUDs for materials used in its remedial programs.

It is anticipated that the authority for DER to grant BUDs will be promulgated in the upcoming revision to Part 360. If regulations containing this authority are promulgated and are consistent with this MOU, DER's authority pursuant to those regulations shall be guided by this MOU and any subsequent revisions.

For projects in the Spill Response Program, the beneficial use of petroleum-contaminated material will continue to be implemented as described in STARS Memo #1, (http://www.dec.ny.gov/regulations/30902.html), and through corresponding pre-determined BUDs in 6 NYCRR 360-1.15(b).

II. PROGRAM RESPONSIBILITIES

A. Beneficial Use Determinations by DMM

A BUD is a jurisdictional determination by the Department, pursuant to Part 360-1.2(a)(4)(vii), that a solid waste, when used in a specific manner, is no longer regulated as a solid waste.

The regulations pertaining to BUDs are currently found in Section 360-1.15. Subdivision 360-1.15(b) identifies sixteen "pre-determined BUDs" or BUDs promulgated into regulation. Predetermined BUDs have been developed for waste streams whose characteristics are predictable and which have been found to have a beneficial use in certain recurring applications.

For materials not addressed by the predetermined BUDs, subdivision 360-1.15(d) sets forth the requirements for petitioning the Department for a case-specific BUD and the criteria for reviewing and granting or denying of the BUD. For use of a solid waste to be determined a beneficial use, the petition must demonstrate the following:

1) the use will not adversely affect human health and safety, the environment, or natural resources.
2) the solid waste is an effective substitute for a commercial product or can be used beneficially in the manufacture of a commercial product.
3) the essential nature of the use constitutes a legitimate reuse and not disposal.

Conditions may be attached to a case-specific BUD, which can vary greatly depending on the nature of the solid waste and its intended use; most of these restate the petitioner's proposed specifications and handling procedures. Case-specific BUDs are usually designated with a DMM file number, and an annual report is required from the grantee containing, at a minimum, the quantity of material beneficially used in the past year, chemical analysis results, locations where used, and other data as appropriate.

A BUD will not be granted pursuant to this MOU for a Part 371 hazardous waste. If soil or other waste exhibits a hazardous characteristic, the hazardous characteristic would have to be eliminated before a BUD could be considered. For environmental media or debris contaminated by a listed hazardous waste, a "contained-in" determination would have to be made by the Department concluding that the hazardous constituents are present at levels below established criteria prior to the material being considered for a BUD.

B. Beneficial Use of Solid Wastes at DER Remediation Sites

A remedy selected or approved by DER at a remediation site may involve components in which solid wastes could be used beneficially. The purpose of this MOU is to allow DER to grant BUDs for the use of materials as backfill or other remedy components on sites under its programs, on behalf of the Department and with minimal involvement by DMM. DMM hereby delegates authority to DER to review and approve BUDs pursuant to the terms of this MOU.

DER's authority to grant BUDs extends not only to imported materials, but also to those generated within the DER remedial site for beneficial use on the same site.

Soil Covers and Backfill: The most frequent scenario for beneficial use of a solid waste on a DER project involves the importation of soil or soil-like materials to a DER site as backfill or cover, or use of on-site contaminated soil. Section 6 NYCRR 375-6.7 contains criteria for acceptance of materials as fill, specifying that fill materials:

> *... be comprised of soil or other unregulated material as set forth in Part 360...;* and
>
> *... the Department may issue a site-specific exemption from [Section 360-6.7 requirements] based upon site specific conditions, including...a Department-issued beneficial use determination pursuant to Part 360....*

Excess soil is the solid waste most frequently imported as backfill to DER sites; however, other materials constituting solid waste may be suitable as fill. With a DER-granted BUD, other materials constituting solid waste would become "unregulated material as set forth in Part 360." These materials may include, but are not limited to, dredged material, foundry sand, water treatment ("alum") residuals, construction & demolition debris, waste glass, or ceramic cullet.

Other Remedy Components: Solid wastes may be imported for beneficial use in other components of a site remedy. Examples include:

- ingredients of manufactured topsoil;
- venting or filtration media;
- construction materials for site structures or stormwater management devices; and
- feedstocks for on-site treatment of hazardous wastes or impacted media.

BUDs for each of these may be granted and administered by DER under this MOU.

Off-Site Beneficial Use: Off-site beneficial use of solid waste generated on a DER site or through implementation of the site remedy is ***not*** covered by this MOU. Such use of solid wastes will be reviewed by DMM and, if appropriate, a BUD will be granted by DMM. A hazardous waste determination by DER may also be necessary; if a waste generated on a DER site is hazardous, a BUD cannot be granted under Part 360 (see Section II.A).

Processing of Solid Wastes for Beneficial Use:
If any decontamination, special handling or processing (as described in 360-1.15(d)(2)) is necessary for the material to be beneficially used, the material remains a solid waste while this activity is occurring, and the BUD only applies to the material after this activity has been completed. A BUD does not

authorize this activity, so any such activity that is not performed on the DER site must comply with all applicable Department permitting or other facility requirements (e.g., Part 360, Part 370-Series, and Air Facility regulations). Where such activities are performed on a DER site, they are exempt from the requirement to obtain other Department permits pursuant to §375-1.12 (including under Part 360), but must still comply with the substantive technical requirements of the applicable or relevant and appropriate regulation. In addition, under Part 360, processing, treatment, or temporary storage of solid waste at the site of its generation is exempt pursuant to 360-1.7(b)(4).

C. Review criteria for DER use in granting BUDs at Remediation Sites

1. A BUD may be identified or approved as part of the Record of Decision or other Decision Document for the site. Materials must meet analytical criteria (contaminant limits) specified in that document. These site-specific criteria are based on future use of the site, feasibility of cleanup, protection of human health and the environment, and other factors. 6 NYCRR 375-6.7(d) provides some default criteria for soil covers and backfill (or soil-like materials) based on the 375-6.8 Soil Cleanup Objectives (SCOs). As noted in 375-6.7(d)(3), DER can exempt soils from these criteria based upon "site-specific conditions." The BUD would not attach to the materials until all required treatment, handling and processing is completed. The Decision Document would include a requirement for the remedial party to provide an annual report as described in Section D.4 below.

2. The opportunity to beneficially use materials may also be identified during the remedial design or remedial action. This would be considered and documented in a "DER beneficial use determination memo" to be developed by DER.

3. For materials that cannot be classed by or evaluated by comparison to SCOs (e.g., waste concrete with surface contamination), DER should specify appropriate contaminant limits for beneficial use either in the Decision Document or in the documentation required by the DER BUD determination memo.

4. Materials must meet functional criteria for their intended beneficial use at the site. Materials intended for structural fill must meet geotechnical specifications; those intended for use as topsoil must support vegetation. Deleterious physical contaminants (for example, refuse or organic material in structural fill) cannot be accepted.

5. Beneficial use of solid wastes must not cause a remedial alternative to fail evaluation criteria of overall protection of human health and the environment, or conformance to applicable or relevant and appropriate standards, criteria and guidance.

6. Beneficial use of solid wastes will not be approved by DER if it will unnecessarily delay implementation of a selected remedy or an interim remedial action.

7. Analysis or testing of materials will be required as described in DER-10, Table 5.4(e)10. Additional sampling may be required, based on:
   a) whether the material is homogeneous;
   b) the material's source and any history of analytical results;
   c) the total volume of material proposed; and
   d) data quality assurance requirements for the project.

D. Procedure for petitioning for, reviewing and granting or denying BUDs by DER

1. In order to grant BUDs as delegated by this MOU, DER will evaluate materials proposed for beneficial use, in accordance with 6 NYCRR 360-1.15(d).

2. If a BUD is included in the ROD or other Decision Document, it should be fully addressed in the feasibility study or alternatives analysis. Beneficial use of waste materials may constitute a significant element of a remedy that should be considered in light of evaluation criteria in §375-1.8(f), and presented to the interested or affected public for comment as part of a Proposed Remedial Action Plan (PRAP).

   If a BUD is being considered during the remedial design or remedial action, the requirements and procedures for its use along with the basis of the approval of the BUD will be documented in the DER BUD approval memo.

3. For any material other than soil or dredged material, DMM technical review will be required. Although unlikely, if material were used in a manner resulting in an air discharge, Division of Air Resources (DAR) technical review would be required.

4. DER will incorporate reporting and recordkeeping requirements for all BUDs in accordance with Part 360 for the entity receiving the BUD approval. Such reporting will, at a minimum, include quantities of waste materials used on individual remedial projects, and also any project-specific analysis or testing results DER requires for beneficial use of materials. The entity granted the BUD will provide a summary annual report to DER with copy to DMM by February 28 in every calendar year stating the quantities of materials beneficially used on DER sites during the previous calendar year. The entity must also provide a summary of materials used under any BUDs in the DER final engineering report or construction completion report for the site or operable unit. DMM will record and track DER-granted BUDs through unique DER BUD identifying numbers as part of DMM's existing database for BUDs.

5. DER will make all decisions to grant or deny BUD requests consistent with procedures utilized by DMM pursuant to the applicable requirements of Part 360. These decisions will be made at the Central Office Bureau Director or a higher level.

6. The revocation of a BUD will be carried out by DER pursuant to the procedures enumerated in the memorandum from General Counsel dated March 30, 2011.

E. Off-Site Beneficial Use of Waste from DER Projects

Off-site use of waste or residuals under a BUD is the responsibility of DMM. DER, the responsible party, or the volunteer must petition the appropriate Regional Materials Management Supervisor, or the Central Office Organic Waste and Beneficial Use Section Chief, for the BUD. To ensure consistency with enforcement orders, decision documents, and DER-approved plans, DMM's response should go to the responsible party or volunteer with a copy to the DER project manager. The BUD will require annual reporting to DMM of quantities, locations of use, confirmatory analytical data, or other case-specific information.

III. INTERPRETATION OF THIS MOU

Questions relating to the interpretation of this Memorandum of Understanding or otherwise relating to BUDs will be brought to the attention of the Directors of the Divisions of Environmental Remediation and Materials Management for resolution in consultation with the Office of General Counsel.

IV. TERMINATION

This Memorandum of Understanding may be terminated by the Commissioner or by either Division. The reasons for termination will be stated in writing. The termination will become effective 30 days later. Both Divisions agree to provide for an orderly closure of this Memorandum of Understanding in the event of such termination.

IN WITNESS WHEREOF, the individuals listed below are authorized to sign and execute this Memorandum of Understanding between their respective Divisions, as of the date first referenced above.

Robert W. Schick, P.E.
Director, Division of Environmental Remediation

Salvatore Ervolina, P.E.
Director, Division of Materials Management

NYS CONSTRUCTION MATERIALS ASSOCIATION V. NYSDEC MATERIALS

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.

VERIFIED COMPLAINT-PETITION

Index No.: 00514-18
RJI No.: _____

Oral Argument is Requested

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, by and through their attorneys Couch White, LLP, as and for their Verified Complaint and Petition 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

represents the Plaintiff-Petitioners' interests before the New York Department of Environmental Conservation.

2. As is discussed in detail below and in the affidavits accompanying this Verified Complaint-Petition, [1] there is a long-standing and very successful program in New York that allows for literally millions of tons of asphalt pavement to be collected from, processed, and reused on the State's roadways rather than being landfilled (as it was historically).

3. Programs like New York's exist throughout the country and have made asphalt pavement the most recycled product in the country.[2]

4. Plaintiffs-Petitioners are proud to be part of this program that reduces the cost of public works projects, minimizes the use of natural resources, maximizes the amount of material kept out of landfills, maximizes the reuse of materials, reduces truck traffic and associated greenhouse gas emissions and other pollution, and saves the State's taxpayers millions of dollars a year.

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[1] Also submitted herewith is the Affidavit of DAVID S. HAMLING sworn to the 18th day of January, 2018 (the "Hamling Aff."), the Affidavit of MARK CLEMENTE sworn to the 16th day of January, 2018 (the "Clemente Aff."), the Affidavit of RYAN DuBOIS sworn to the 19th day of January, 2018 (the "DuBois Aff."), the Affidavit of DANIEL M. MEEHAN sworn to the 15th day of January, 2018 (the "Meehan Aff."), the Affidavit of JONATHAN COOK sworn to the 16th day of January, 2018 (the "Cook Aff."), the Affidavit of WILLIAM SCHMITZ sworn to the 19th day of January, 2018 (the "Schmitz Aff."), the Affidavit of GARY W. METCALF sworn to the 15th day of January, 2018 (the "Metcalf Aff."), and the Affidavit of ROBERT A. LoPINTO, P.E. (the "LoPinto Aff.") sworn to the 15th day of January, 2018, together with all the exhibits attached to each of the foregoing; and a Memorandum of Law dated January 22, 2018.

[2] The National Asphalt Pavement Association ("NAPA") has reported that:

> As early as 1993, the Environmental Protection Agency and Federal Highway Administration identified asphalt pavement as America's No. 1 recycled product in a report to Congress. It continues to be reclaimed and reused at a greater rate than any other product in the U.S. A wide range of waste materials are now incorporated into asphalt pavements, including ground tire rubber, slags, foundry sand, glass, and even pig manure, but the most widely used are reclaimed asphalt pavement (RAP) and recycled asphalt shingles (RAS). The use of recycled materials in asphalt pavements saves about 50 million cubic yards of landfill space each year. http://www.asphaltpavement.org/recycling#results

5. The recycling of asphalt pavement, commonly referred to as "RAP" (recycled asphalt pavement), is consistent with the New York's solid waste management policy to "reduce, reuse and recycle/recover."

6. Unfortunately, the Department of Environmental Conservation's recently issued Part 360 regulations threaten not only the success, but even the survival of the RAP recycling program.

7. Over the last one and a half years, during the rule-making process, Plaintiffs-Petitioners have tried to work with the Department of Environmental Conservation and explain the conceptual problems presented by the new rule, as well as the contradictory and internally inconsistent provisions of the new rule, to ensure that the RAP program can continue.

8. Plaintiffs-Petitioners' efforts were to no avail. As is discussed below, neither were the similar efforts of the Department of Transportation, Thruway Authority, myriad counties, municipalities and trade associations.

9. Now that the Department of Environmental Conservation has formally adopted the Rule, Plaintiffs-Petitioners' only recourse is to bring this action.

10. This is a combined declaratory judgment action and Article 78 proceeding brought pursuant to Section 3001 and Article 78 of the New York Civil Practice Law and Rules ("CPLR") to review and set aside Defendant-Respondent New York State Department of Environmental Conservation's ("DEC" or the "Department") adoption of a series of regulations known as Title 6 of the New York Compilation of Codes, Rules and Regulations ("NYCRR") Part 360, Part 361, Part 362, Part 363, Part 364, Part 365, Part 366, Part 369, and minor amendments to 6 NYCRR Part 621, Part 370, Part 371, Part 372, Part 373 and Part 374 (such amendments to Title 6 shall be

referred to collectively herein as the "Rule"), on grounds that the Rule is *ultra vires*, in violation of lawful procedure, and arbitrary and capricious.

11. This challenge is being filed to preserve the rights of these existing operators who hold one or more DEC permits for their existing operations, and are registered under the prior Part 360 regulations to allow the storage of RAP and other recognizable, uncontaminated, concrete, asphalt, rock, bricks and soil (collectively and commonly referred to as "RUCARBs") prior to their reuse.

12. Currently, all RUCARBs brought to one of Plaintiff-Petitioners' facilities will be reused in new aggregate. These materials are typically trucked back from a road construction project in the same truck that will deliver new asphalt to the paving operation. *See, e.g.* Clemente Aff. ¶13; Cook Aff. at ¶13. In this way, truck trips, and thereby, greenhouse gas emissions and other impacts related to trucking are substantially reduced, particularly compared to the impacts that would be generated should the RUCARBs go to a landfill for disposal instead of being reused as they are by Plaintiffs-Petitioners.

13. As previously stated, the reuse of these materials is significant. Indeed, more than 99 percent of reclaimed asphalt is put back into use. http://www.asphaltpavement.org/PDFs/IS138/IS138-2016_RAP-RAS-WMA_Survey_Final.pdf at 1.

14. The reuse of asphalt (and other aggregate materials) only increases with time. NAPA's 2016 survey revealed that at least 76.9 million tons of RAP was used in new asphalt mixtures, representing "more than 3.8 million tons (21.5 million barrels) of asphalt binder conserved, along with the replacement of some 73 million tons of virgin aggregate," resulting in a savings of over $2.1 billion. *Id.*

THE PARTIES & VENUE

15. Petitioner New York Construction Materials Association, Inc. ("NYMaterials") is a statewide, not-for-profit, trade association representing the business and regulatory interests of companies throughout New York State engaged in three types of production industries: (i) hot-mix asphalt (blacktop); (ii) ready-mixed concrete; and (iii) construction aggregates (sand, gravel and crushed stone).

16. NYMaterials is duly organized and existing under the laws of the State of New York with a principal office and place of business at 11 Century Hill Drive, Latham, New York 12110.

17. Petitioner Callanan Industries, Inc. ("Callanan") is duly organized and existing under the laws of the State of New York with a principal office and place of business at 8 Southwoods Boulevard, 4th Floor, Albany, New York 12211.

18. Callanan is a dues paying member of NYMaterials

19. Petitioner Suit-Kote Corporation ("Suit-Kote") is duly organized and existing under the laws of the State of New York with a principal office and place of business at 1911 Lorings Crossing, Cortland, New York 13045.

20. Suit-Kote is a dues paying member of NYMaterials.

21. Petitioner Hanson Aggregates New York, LLC ("Hanson") is duly organized and existing under the laws of the State of New York with a principal office and place of business at 4800 Jamesville Road, P.O. Box 513, Jamesville, New York 13078.

22. Hanson is a dues paying member of NYMaterials.

23. Petitioner Dolomite Products Company, Inc. ("Dolomite") is duly organized and existing under the laws of the State of New York with a principal office and place of business at 1150 Penfield Road, Rochester, New York 14625.

24. Dolomite is a dues paying member of NYMaterials.

25. Petitioner Gernatt Asphalt Products, Inc. ("Gernatt") is duly organized and existing under the laws of the State of New York with a principal office and place of business at 13870 Taylor Hollow Road, Collins, New York 14034.

26. Gernatt is a dues paying member of NYMaterials.

27. Petitioner Peckham Materials Corporation ("Peckham") is duly organized and existing under the laws of the State of New York with a principal office and place of business at 20 Haarlem Avenue, White Plains, New York 10603.

28. Peckham is a dues paying member of NYMaterials.

29. Defendant-Respondent Basil Seggos is the Commissioner of the New York State Department of Environmental Conservation ("Commissioner") who has his principal office in Albany, New York.

30. The Defendant-Respondent DEC is an administrative body organized and existing under the Environmental Conservation Law of the State of New York ("ECL"), with its principal office in Albany, New York. The DEC and Commissioner are collectively referred to herein as the "DEC Respondents."

31. Venue is proper in this Court pursuant to CPLR Section 7804(b) because DEC Respondents' primary office is located in Albany County.

BACKGROUND

32. The genesis of New York State's current program for managing solid waste is found in Chapter 399 of the Laws of 1973, ("Chapter 399") entitled "An Act To amend the environmental conservation law, in relation to the regulation of solid waste management facilities." A copy of Chapter 399 is attached hereto as **EXHIBIT 1**.

33. The legislative findings of Chapter 399 note that "[It] is the purpose of this act to assure that solid waste management is conducted in a safe, sanitary, efficient, economic and environmentally sound manner throughout the state by providing a unified regulatory framework therefore." *Id.* at 3.

34. To ensure a unified regulatory framework, the legislature, rather than leaving it to an administrative agency to do so, specifically defined the term "solid waste." *See Id.* at 4.

35. Chapter 399 defines "Solid Waste" as "materials or substances discarded or rejected as being spent, useless, worthless or in excess to the owner at the time of such discard or rejection, except sewage and other highly diluted water carried materials or substances and those in gaseous form." *Id.* at 4.

36. In Chapter 399, the Legislature also took it upon itself to specifically define "solid waste management." *See Id.* at 4 (defining "Solid Waste Management" as the "purposeful and systematic transportation, storage, processing, recovery and disposal of solid waste.")

37. Finally, Chapter 399 also defines the term "Solid Waste Management Facility" as:

> any facility employed beyond the initial solid waste collection process including, but not limited to, transfer stations, boiling facilities, rail haul or barge haul facilities, processing systems, including resource recovery facilities or other facilities for reducing solid waste volume, sanitary landfills, plants and facilities for compacting, composting or pyrolization of solid wastes, incinerators and other solid waste disposal reduction or conversion facilities. *Id.* at 4.

38. Having defined solid waste and solid waste management, the Legislature authorized the Department to promulgate regulations governing the operation of solid waste management facilities ("SWMF"). *Id.*

39. However, the Legislature declined to give the Department the authority to promulgate regulations defining "solid waste".

40. There was no need to. The Legislature had already expressly defined the term and thereby defined the scope of what DEC was to regulate.

41. Pursuant to Chapter 399, upon DEC promulgating regulations governing the operation of SWMF, no one would be allowed to construct or operate a SWMF without DEC's approval.

42. As set forth above, the Legislative rubric was clear - if a material or substance was discarded or rejected as being spent, useless, worthless or in excess to the owner at the time of such discard or rejection, it was to be managed from that point forward as solid waste and ultimately come to rest at a SWMF.

43. The clause, "at the time of such discard or rejection" included by the Legislature creates a threshold question in the definition of "solid waste." To constitute solid waste, the material or substance first had to be spent, useless, worthless or in excess to its owner at the time it was discarded or rejected. *Id.* at 4.

44. If the material or substance was not spent, useless, worthless or in excess to its owner, it was not solid waste, and, accordingly, never entered the sphere of materials going to a SWMF regulated by DEC (commonly referred to as the "solid waste stream").

45. The Legislature amended the definition of "solid waste" in 1977 to more precisely define the types of materials and substances that were to be considered and managed as solid waste.

46. This amendment, in Chapter 425 of the Laws of 1977 ("Chapter 425") provides that the definition of "solid waste" is:

> [A]ll 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 and those in gaseous form."

A copy of Chapter 425 is attached hereto as **EXHIBIT 2** at 7. (*in original)

47. Note that this definition left in place the threshold question of whether materials or substances that could qualify as "solid waste" were spent, useless, worthless or in excess to the owner at the time they were discarded or rejected.

48. The definition of solid waste contained in Chapter 425 is codified at ECL §27-0701(1) and has not changed since 1977.

49. As it had in 1973, the Legislature in Chapter 425 of 1977 again declined to give DEC the authority to promulgate regulations defining solid waste.

50. Once again, there was no need to as the Legislature had already expressly defined the term and thereby defined the scope of what DEC was to regulate.

51. The threshold question contained within the definition of "solid waste" discussed above was not amended, deleted, discarded, rejected or revised by the Legislature in 1977. *Id* at 7.

52. In 1980, the Legislature enacted Chapter 552 of the Laws of 1980 ("Chapter 552") which, as noted in the Governor's approval message, "directs the Department of Environmental Conservation to formulate a comprehensive State solid waste management plan." A copy of Chapter 552 and the Governor's approval message is attached hereto as **EXHIBIT 3**.

53. In Chapter 552, the Legislature set forth that:

> The legislature does hereby acknowledge and declare that unwanted residues of our society have polluted many of our land and water resources, while at the same time depleting our finite stock of natural resources. Energy is consumed at every step of the process of growing, mining, manufacturing and transporting products, and this energy is largely wasted and becomes unrecoverable when such products are used once and then discarded. Much of these material and energy resources can be conserved and recovered through reuse, recycling and other techniques of resource recovery.
>
> It is the purpose of this legislation to promote solid waste management planning and the development of solid waste management programs and facilities which will conserve natural resources, reduce the amount of solid waste generated, recover the maximum practical amount of materials and energy resources from solid waste, and dispose of non-recoverable wastes in an environmentally sound manner.
>
> Furthermore, the legislature declares it to be the public policy of this state to encourage and support the roles of the private sector in resource recovery and recycling, and local governments are urged to respect these activities as they implement solid waste management programs. In addition, it shall be a high priority of the state's solid waste management policy to promote expansion of markets for recovered materials to maximize their return to productive economic use. *See Id.* at 4 - 5.

54. In Chapter 552, the Legislature again found no need to redefine the essence of what made a material or substance a solid waste, but clearly noted that greater efforts were required to reduce the amount of solid waste generated so as to conserve natural resources, prevent the waste of energy that occurs when materials are only used once and discarded, and to engage the private sector in these efforts.

55. The Department of Law Memorandum to the Governor urging approval of Chapter 552 notes that the law "establishes a framework of State guidance and incentives to local governments and the private sector which should go a long way toward conserving the State's natural resources [and] reducing generation of solid waste." *See* Memorandum, attached hereto as **EXHIBIT 4**, at 2.

56. The outline of what we know today as "reduce, reuse, recycle" takes its first form in Chapter 552 of 1980. Preventing a material or substance from becoming a solid waste is the highest priority so as to preserve our natural resources. The next order of priority is to evaluate the solid waste stream with the goal of recovering as many resources as possible to prevent their ultimate disposal.

57. In 1988, the idea of "reduce, reuse, recycle" was codified by Chapter 70 of the laws of 1988, ("Chapter 70") known as the Solid Waste Management Act of 1988 ("SWMA"). A copy of the SWMA is attached hereto as **EXHIBIT 5**.

58. Section 2 of the SWMA sets forth the legislative intent and findings for the Act:

> The legislature finds and declares that the proper management of solid waste is necessary to protect public health and the environment. Toward this end, it is necessary to reduce the generation of solid waste, to accelerate the recovery and reuse of secondary materials within the state, to encourage the conservation of resources, to foster public and private initiatives to achieve these ends, and to encourage a new ethic among New York's citizens to conserve and reuse, rather than discard, useful materials. A state-local partnership is essential to achieving these ends.
>
> Waste reduction is a key strategy in the state solid waste management policy. The promotion of effective waste reduction strategies, on a statewide or regional basis, would assist local governments in developing more effective waste disposal programs. Thus, the state must identify and encourage the implementation of effective waste reduction techniques.
>
> The legislature further finds that, when accompanied by the development of adequate markets for materials separated from the waste stream, source separation and recycling programs can be effective ways to reduce the ultimate volume of solid waste requiring disposal. Thus, the state should provide enhanced assistance in developing and identifying markets for secondary materials. *See Id.*, at 3-4. (emphasis supplied).

59. Here, the Legislature has described the solid waste management hierarchy that is codified at ECL §27-0106 and drawn a sharp distinction between materials kept out of the waste

stream in the first instance (commodities) and those that are placed in the waste stream and later removed prior to disposal (secondary materials).

60. As noted in the Governor's Approval Memorandum for Chapter 70:

> Under the bill, a statutory hierarchy is established of solid waste management priorities emphasizing, in descending order of preference, waste reduction, reuse and recycling, energy recovery, incineration and disposal. Under the bill, the hierarchy becomes a matter of State law and is an explicit direction to state agencies when making solid waste management decisions.
>
> To implement this policy, the bill reflects and reinforces the traditional state-local framework for addressing solid waste management, with municipal governments retaining the basic responsibility for the planning and operation of solid waste management facilities and source separation/recycling programs and the State providing guidance and technical assistance for the development and implementation of local plans and programs.

See, Governor's Memorandum, attached hereto as **EXHIBIT 6** at 1.

61. Chapter 70, the Solid Waste Management Act, like its predecessors, provides the DEC with expanding authority to develop and implement and regulations for solid waste management facilities.

62. Yet, as it had in 1973, 1977, and 1980, the Legislature, in the Solid Waste Management Act of 1988, again declined to give DEC the authority to promulgate regulations defining solid waste.

63. There was no need to. The Legislature had already expressly defined the term and thereby defined the scope of what DEC was to regulate.

64. Over the course of the forty-five years that the Legislature has developed and refined the State's solid waste management priorities, through a minimum of eleven legislative enactments, it has never given DEC the authority to define what solid waste is or isn't.

65. Over the course of the forty-five years that the Legislature has developed and refined the State's solid waste management priorities, through a minimum of eleven legislative enactments, the Legislature has taken it upon itself to define "solid waste."

66. The Legislature's threshold question ("in excess to the owner at the time of such discard or rejection") contained within the definition of "solid waste," as discussed above, has never been amended, deleted, discarded, rejected or revised by the Legislature.

67. Today, the Legislative definition of solid waste remains as it was in 1977:

> 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 and those in gaseous form." ECL 27-0701(1) (*in original); *see also* Exh. 2 at 7.

68. Yet, despite having no authority to change this definition, DEC in Part 360 defines solid waste as:

> (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 that 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, chemically 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. 6 NYCRR 360.2(a)(1)

69. The Department ignores the statutory requirement that, in order to be waste, it first must be "spent, useless, worthless or in excess to the owners at the time of such discard or rejection."

70. The Department improperly adds subparagraphs (i), (ii), and (iii) to the definition of "discarded," when the Legislature already defined "discarded" as "spent, useless, worthless or in excess." ECL § 27-0701.

71. No further definition of the term "solid waste" was authorized.

72. No further definition of the term "discarded" beyond these plain and understandable words were authorized.

73. The Department's definition of solid waste designates "solid waste" based on the characteristics of the material and not on its intended use or the other considerations and limitations set forth by the Legislature.

74. Indeed, the Department expressly stated its view on what constitutes "solid waste" in response to a comment regarding the point at which a material or substance becomes solid waste:

> The provision that a material is considered "discarded" applies also to materials that are "accumulated...instead of or before being processed or disposed". A waste has to do not only with the current status of a material, but its intrinsic characteristics. If a material is not intentionally created by an industrial process, but rather is a byproduct, and further if it is not usable without processing or decontamination, or if it does not have an established market, it is appropriate to consider such material discarded even if still on the premises of or in possession of the generator.
>
> "Assessment of Public Comment for Public Comments Received on the New York State Department of Environmental Conservation Comprehensive Revisions to Solid Waste Regulations Found in 6 NYCRR Part 360, Part 364, Part 369 and Associated Regulations," dated June 2017 ("June Response to Comments"), attached hereto as **EXHIBIT 7**, at 77.

75. The Department's opinion of what and when a material or substance becomes a solid waste is far different from the Legislature's.

76. The Department has not explained why it believes it has the prerogative to define solid waste in a manner at odds with the Legislature's definition.

77. The Department's interpretation ignores the statutory intent to recognize that a substance or material only becomes a solid waste if the material or substance is spent, worthless, useless or in excess to its owner at the time of disposal.

78. The Department may believe that "it is appropriate to consider such material discarded even if still on the premises of or in possession of the generator" Exh. 7 at 77, but the Legislature, for 45 years, has stated otherwise.

79. The Department's interpretation of waste discourages innovation in the private sector in the reuse and commoditization of materials that would otherwise be sent to a landfill or otherwise disposed.

80. The Department was made aware that it had exceeded its statutory mandate during the rulemaking process. An engineer noted that the proposed definition "of Solid Waste offered by DEC is not as specified in the enabling legislation ECL 27-0701", and commented that DEC should not redefine any term specified by the enabling legislation." Comments of Thomas Pease, PE, PhD, dated September 12, 2016, attached hereto as **EXHIBIT 8**, at 5.

81. Washington County explicitly noted in its comments to the Department that the proposed Rule has "been extended far beyond [the Department's] statutory authority and are burdensome to business as well as the average citizen far in excess of their environmental effectiveness." Washington County Comment letter dated June 28, 2016, attached hereto as **EXHIBIT 9**, at 1-2 (affirming that asphalt milling should be exempt because "[t]o do otherwise

is going to divert material from the recycling stream to the solid waste stream which is exactly counter to the legislative mandate cited to justify promulgation of" the Rule).

82. The Department, however, did not revise its definition of solid waste.

83. Correspondingly, when the revised proposed Rule was issued in June, 2017, a commenter noted that the Department was improperly utilizing the term "discarded," and commented that "materials that have value and are not discarded should not be regulated solid wastes. The term 'Discarded' should be defined as it is integral to the definition of solid waste." Supplemental Assessment of Public Comment for Public Comments Received on the New York State Department of Environmental Conservation Comprehensive Revisions to Solid Waste Regulations Found in 6 NYCRR Part 360, Part 364, Part 369 and Associated Regulations Addressing the Revised Draft Regulations Issued in July 2017, dated August 2017 ("August Response to Comments"), attached hereto as **EXHIBIT 10**, at 15.

84. In response to these comments, the Department did not address its failure to comport with the statutory definition of "solid waste", but instead responded that "the language is consistent with the terminology found in the existing regulations." *Id.*

Beyond Waste

85. In 2010, DEC adopted and published *Beyond Waste (A Sustainable Materials Management Strategy for New York State)* (hereinafter "Beyond Waste"). A copy of *Beyond Waste* is attached hereto as **EXHIBIT 11**.

86. *Beyond Waste* constitutes the New York State Solid Waste Management Plan required by §27-0103 of the Environmental Conservation Law. ECL §27-0103 requires DEC to periodically review and update the State's plans and recommendations for the management of solid waste in the form of a plan such as *Beyond Waste*.

87. According to DEC, *Beyond Waste* set forth a new approach for New York State – a shift from focusing on end-of-pipe waste management techniques to looking upstream and more comprehensively at how materials that would otherwise become waste can be more sustainably managed through the state's economy. Exh. 11 at 1.

88. According to DEC, the materials management envisioned in *Beyond Waste* would capture the economic value of materials, conserve their imbedded energy, and minimize the generation of greenhouse gases and pollution. *Id.*

89. The policies, procedures and goals set forth in *Beyond Waste* were intended to serve as a resource for the State and all its residents, local jurisdictions and businesses. *Id.* at 2.

90. In *Beyond Waste*, the DEC notes that a materials management approach necessitates a change in terminology, as "[m]aterials are not waste until they are destined for a landfill or municipal combustor." *Id.* at 3.

91. This, of course, is consistent with the Legislature's definition of solid waste, but not the Department's own regulations.

92. DEC is the author of both *Beyond Waste* and the Part 360 regulations.

93. *Beyond Waste* reiterates New York's solid waste management hierarchy as set forth in ECL §27-0106, and includes the Department's recommendations on achieving and improving upon the success of that hierarchy.

94. The hierarchy referred to is the one established in Chapter 70 of the Laws of 1988 and codified in ECL §27-0106, namely to "reduce, reuse, recover."

95. It established the following priorities to guide the programs and decisions of DEC and other state agencies:

a. First, to reduce the amount of solid waste generated;

b. Second, to reuse material for the purpose for which it was originally intended or to recycle the material that cannot be reused;
c. Third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled; and
d. Fourth, to dispose of solid waste that is not being reused or recycled, or from which energy is not being recovered, by land or other methods approved by the department.

See Exh. 11 at 17, 24-26; *see also* § ECL 27-0106(1).

96. The Department also provides suggestions on how to satisfy their statutory obligation to encourage a reduction in landfilling, and an increase in the reuse of materials. *See, e.g.* Exh. 11 at 124-125, 146-147, 229-232.

97. DEC notes that *Beyond Waste* uses the terms "materials" and "materials management" in place of "waste" or "waste management" when referring to activities at the upper end of the hierarchy. The term "disposal" as used in the Plan includes municipal waste combustion, landfilling, and export for ultimate disposal. *Id.*

98. The Department makes plain that the quantitative and qualitative goals of the State's Solid Waste Management Plan is to minimize waste generation, maximize reuse and recycling and to minimize waste disposal. Exh. 11 at 26-27.

99. The goals set forth by DEC in *Beyond Waste* are consistent with the overall legislative scheme, discussed above, for solid waste management in New York State.

100. DEC characterizes its own role in material management planning as being the backbone of the solid waste management program, and notes that "[t]hrough regulations and their enforcement, DEC ensures that legal requirements are upheld and that public health and the environment are protected. Through its Part 360 regulations, DEC regulates the construction and

operation of solid waste management facilities to ensure they are protective of public health and the environment." *Id.* at 32.

101. Implicit in this statement, and again consistent with New York's legislative scheme, DEC recognizes that while they have the authority to regulate solid waste management facilities, they do not have the authority to define solid waste.

102. There is a bright line demarcating the scope and extent of DEC's jurisdiction. If a substance or material meets the legislative definition of "solid waste", DEC is authorized to regulate its management through ultimate disposal.

103. If a substance or material does not meet the legislative definition of "solid waste", DEC has no jurisdiction over its disposition.

104. It is the goal of the Legislature, as expressed through 45 years of legislation, to minimize the generation of solid waste in New York.

105. DEC expressly recognizes and espouses this legislative goal in *Beyond Waste*, the State's solid waste management plan.

106. Unfortunately, the Rule at issue in this matter is utterly violative of these mandates.

Promulgation of the Rule

107. On or about March 16, 2016, the Department issued a formal rulemaking for the proposed Rule.

108. This rulemaking included regulations governing construction and demolition ("C&D") debris, including RUCARBs, at proposed 6 NYCRR Part 361-5.

109. It also included a number of rulemaking documents required by the State Administrative Procedure Act ("SAPA"), and a proposed Draft Generic Environmental Impact Statement on the Proposed Amendments to 6 NYCRR Part 360 *et al.* ("DGEIS") to review the

potential environmental impacts related to the proposed Rule as required by the State Environmental Quality Review Act ("SEQRA").

110. The New York State Register Notice announced three public hearings across New York State, and a public comment period lasting until July 15, 2016, that was later extended to September 13, 2016.

111. NYMaterials submitted a comment letter regarding the proposed Rule dated September 13, 2016, a copy of which is attached to the Hamling Affidavit as **EXHIBIT A**. This comment letter included significant detail regarding the background and important role of the construction materials industry in achieving New York's legislative policy to "reduce, reuse, recover," as well as the significant adverse impacts the Rule posed to the environment and New York's road construction industry.

112. NYMaterials' letter was one of 350 comments that the Department received on the proposed Rule.

113. On or about June 21, 2017, the Department issued a Notice of Revised Rulemaking for the proposed Rule.

114. The revised proposed Rule included regulations governing C&D debris, including RUCARBs, at proposed 6 NYCRR §360.12 and 6 NYCRR Part 361-5.

115. The revised rulemaking included the June Response to Comments, as well as a number of revised rulemaking documents required by SAPA and a Revised Draft Generic Environmental Impact Statement SDGEIS on the Proposed Amendments to 6 NYCRR Part 360 et. al. ("SDGEIS").

116. The New York State Register Notice announced a public hearing on the revised proposed Rule, and a comment period lasting thirty days after the publication of the June 21, 2017 notice.

117. NYMaterials submitted a second comment letter regarding the revised proposed Rule dated July 21, 2017, a copy of which is attached to the Hamling Affidavit as **EXHIBIT B**. This comment letter also explained that DEC's proposed revisions to the Rule, while well-intentioned, did not resolve the problematic issues presented by the Rule that made it unworkable and would likely lead to the dismantling of the RUCARBs recycling industry, which is obviously at odds with the intent of the Legislature.

118. On or about August 23, 2017, the Department issued the August Response to Comments, as well as some related documents related to the Rule.

119. After NYMaterials reviewed the August Response to Comments, it submitted a further comment letter on behalf of its membership urging the Department to modify the Rule to address several critical concerns, which concerns are also included herein. A copy of this comment letter is attached to the Hamling Affidavit as **EXHIBIT C**.

120. Ultimately, the Department adopted the Rule by notice dated September 20, 2017 without addressing NYMaterials' concerns.

121. The Rule includes regulations governing, among other things, C&D debris, including RUCARBs, at 6 NYCRR §360.12 and 6 NYCRR Part 361-5.

122. The Rule became effective on November 4, 2017.

Destination Matters – An Illustration of the Rule

123. The discussions that follow break out various parts of the Rule and demonstrate inconsistencies and contradictions within and among the Rule's various provisions.

124. However, the Rule is obtuse and difficult to understand upon a first, or even a third reading.

125. Therefore, in an effort to make the real world results of the Rule more accessible, Plaintiffs-Petitioners have developed RAP FIGURE #1 to illustrate the effect of the Rule on the RAP recycling efforts. RAP FIGURE #1 appears on the next page.

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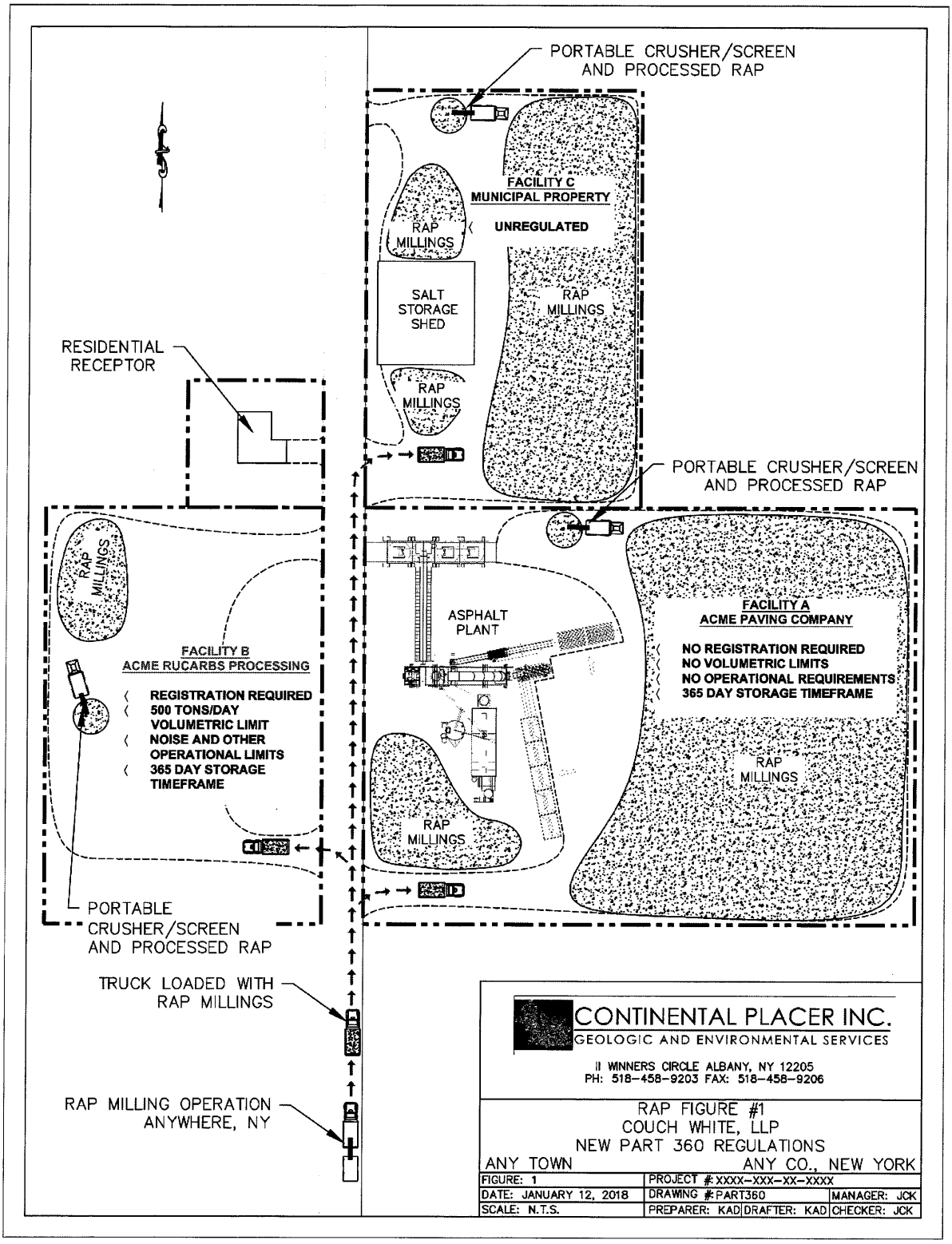

PORTABLE CRUSHER/SCREEN AND PROCESSED RAP
FACILITY C
MUNICIPAL PROPERTY
UNREGULATED
RAP MILLINGS
SALT STORAGE SHED
RAP MILLINGS
RAP MILLINGS
RESIDENTIAL RECEPTOR
PORTABLE CRUSHER/SCREEN AND PROCESSED RAP
RAP MILLINGS
FACILITY B
ACME RUCARBS PROCESSING
REGISTRATION REQUIRED
500 TONS/DAY VOLUMETRIC LIMIT
NOISE AND OTHER OPERATIONAL LIMITS
365 DAY STORAGE TIMEFRAME
ASPHALT PLANT
FACILITY A
ACME PAVING COMPANY
NO REGISTRATION REQUIRED
NO VOLUMETRIC LIMITS
NO OPERATIONAL REQUIREMENTS
365 DAY STORAGE TIMEFRAME
RAP MILLINGS
RAP MILLINGS
PORTABLE CRUSHER/SCREEN AND PROCESSED RAP
TRUCK LOADED WITH RAP MILLINGS
RAP MILLING OPERATION ANYWHERE, NY
CONTINENTAL PLACER INC.
GEOLOGIC AND ENVIRONMENTAL SERVICES
11 WINNERS CIRCLE ALBANY, NY 12205
PH: 518-458-9203 FAX: 518-458-9206
RAP FIGURE #1
COUCH WHITE, LLP
NEW PART 360 REGULATIONS
ANY TOWN ANY CO., NEW YORK
FIGURE: 1
PROJECT #: XXXX-XXX-XX-XXXX
DATE: JANUARY 12, 2018
DRAWING #: PART360
MANAGER: JCK
SCALE: N.T.S.
PREPARER: KAD
DRAFTER: KAD
CHECKER: JCK

126. The Rule creates three different regulatory pathways for how RAP is regulated once it has been milled from a roadway.

127. For this illustration, the roadway is a local town road.

128. After the RAP is milled, it is placed into a haul truck for transportation (see bottom of RAP Figure #1).

129. The haul truck can take the asphalt millings to either Facility A, B, or C.

130. If the haul truck goes to Facility A where the ACME Paving Company has an asphalt plant, it can deliver unlimited amounts of asphalt millings and leave them on the ground for up to 365 days.

131. The ACME Paving Company does not require any Part 360 approvals to run this operation and because it is not regulated, there are no operational restrictions (other than the time limit) placed on the facility. Crushing and screening of the asphalt millings is allowed without DEC approval.

132. If the haul truck instead takes the same load of asphalt millings to Facility B where the ACME company has a C&D processing facility, only 500 tons of millings per day (on a weekly average) from all sources, are allowed to be delivered to this facility.

133. At Facility B, the ACME company must apply for and obtain a Part 360 registration to operate the facility and the operating requirements of Part 361 apply (storage limits, noise limits, inventory control, tracking documentation, dust, odor and vector control, etc.). Use of the same type of crushing and screening equipment used at Facility A to process the asphalt millings at Facility B requires DEC approval.

134. If the haul truck instead takes the same material to Facility C owned by the Town, there are no restrictions on how much material can be brought to the facility, how long the material

may be kept at the facility, no operational requirements, no noise limits, and no restriction on crushing and screening the material using the same type of equipment used at Facility B.

135. In sum, the same material, with the same chemical and physical characteristics, from the same milling job, delivered by the same haul truck, is regulated in substantially different fashions based on nothing more than where the truck driver delivers the material.

136. Somehow, DEC has determined that RAP and other RUCARBs pose a potential impact to the environment and require regulation when handled by the private sector.

137. Yet, DEC's purported concerns evaporate when the same material is handled in the same manner by the public sector.

138. Obviously, and as is seen in the following pages, there is no justification for these arbitrary regulatory distinctions.

The Rule

139. As stated above, the Rule regulates the universe of "solid waste" as defined by the Department (*see* ¶ 68, *supra*), but not as defined by the legislature (*see* ¶ 67, *supra*).

140. The provisions of this rulemaking most relevant to this lawsuit are 6 NYCRR Parts 360, 361-5 and 364.

141. Part 360 contains, among its twenty-two different sections, definitions, permitting requirements, registration requirements, operating requirements, exemptions, and rules related to the beneficial reuse of materials.

142. Part 361-5 contains rules related to the design and operation of construction and demolition debris handling and recovery facilities ("CDDHRF").

143. CDDHRF, in general, but not exclusively, are authorized to store and process recognizable, uncontaminated concrete, asphalt, rock, and brick (*i.e.*, "RUCARBs").

144. For purposes of this complaint, CDDHRF will sometimes be referred to as "C&D facilities" or "RUCARB facilities."

145. Part 364 contains regulations related to the transporters and transportation of what the Rule calls "regulated waste".

146. Parts 360, 361-5 and 364 each have provisions that individually touch upon the use and reuse of RUCARBs, as well as provisions that interact with each other to allow DEC to regulate RUCARBs from cradle to grave.

147. As demonstrated above and below, and in the accompanying Affidavits submitted herewith, DEC has exceeded its jurisdiction, created contradictory regulatory provisions, regulatory uncertainty, and the opportunity for selective enforcement. Additionally, DEC has created a regulatory program that, even assuming it passed judicial review, will cause an increased use of natural resources, increase the amount of material disposed of at landfills, increase truck traffic and associated greenhouse gas emissions, and otherwise be at odds with the solid waste management policy of the State of New York.

PART 360

148. Part 360's definition of "solid waste" includes C&D debris which is further defined to include, generally, RUCARBs.

149. Part 360 does not make any distinction between RUCARBs that are destined for reuse and those destined for a landfill.

150. Part 360.2(a)(3) provides that several categories of material are designated "not solid waste for the purposes of Part 360, 361" and "364." While RUCARBs are not explicitly included in this section, they may qualify for the "not solid waste" designation as "materials that

are used in accordance with a determination by the department pursuant to the provisions of section 360.12." *Id.* at (3)(ix).

151. Section 360.12 of the Rule sets forth a number of pre-determined "beneficial use determinations" ("BUDs") which are a jurisdictional determination by the Department that a material meeting a particular BUD requirement no longer constitutes solid waste. These materials may only be stored for 365 days. 6 NYCRR 360.12(a)(3).

152. Germane to this Pleading, 360.12(a)(1) provides that materials which can be used "as effective substitutes for commercial products or raw materials *as determined by the department*[3]," ..."cease to be solid waste when used according to" section 360.12. *See Id.* at (a)(1).

153. In its very next sentence, §360.12(a)(1) provides that "[t]his section does not apply to materials that are being sent to facilities subject to regulation under Part 361 of this Title." *Id.*

154. A number of Part 360.12's pre-determined BUDs appear, at first glance, to be applicable to RUCARBs. These include:

> a. "Recycled aggregate or residue which meets a municipal or state specification or standard for use as a 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." 6 NYCRR 360.12(c)(3)(viii).
>
> b. "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 if separated from other waste prior to processing and subsequently processed and stored in a separate area as a discrete material stream." *Id.* at (ix).
>
> c. "Asphalt pavement and asphalt millings received at an asphalt manufacturing plant for incorporation into an asphalt product." *Id.* at (x).

[3] Emphasis supplied.

PART 361

155. Part 361 "applies to facilities that process and/or store construction and demolition ("C&D") debris in order to extract recyclable or reusable materials." 6 NYCRR § 361-5.1.

156. Subpart 361-5 requires either a registration or a permit for facilities that process or store "recognizable, uncontaminated...concrete and other masonry materials...brick and rock; asphalt pavement or asphalt millings." *Id.* at §5.2(a)(1), (2).

157. Thus, a facility where C&D is processed or stored is required to comply with Part 361-5, even though Part 360.12 says that these same materials are no longer a solid waste if they are source separated, processed and stored separately.

158. Part 361-5 contains a number of restrictions and requirements related to RUCARBs.

159. One such restriction requires a facility that receives up to 500 tons per day, based on a weekly average, to obtain a registration pursuant to 6 NYCRR 360.15 and 361.5-2(a).

160. However, if a facility receives 500 or more tons per day based on a weekly average, it must obtain a full solid waste management facility permit pursuant to 6 NYCRR §§ 360.16 and 361-5.3.

161. Whether a RUCARBs facility has a registration or a permit, it has to comply with a number of design and operating requirements. The first of these are the general operating requirements applicable to solid waste management facilities with permits or registrations generally, which are located at 6 NYCRR § 360.19.

162. Additional requirements specific to Part 361-5 are set forth at 6 NYCRR § 361-5.4. These include a requirement to weigh or measure the C&D debris in cubic yards and tons both when delivered and when leaving the facility. 6 NYCRR§ 361-5.4(b).

163. Part 361-5 also limits storage of RUCARBs "[t]o 365 calendar days," unless the conditions warranting an extension can be demonstrated. *Id.* at (f)(1).

164. Part 361-5 does not provide any procedural or regulatory certainty for this extension.

165. A separate provision in Part 361-5 allows "source-separated or processed and separated material that meets" one of the BUD designations set forth at 6 NYCRR 360.12 to "be stored without time restriction so long as the storage volume conforms with the declared storage volume identified in the application or registration." *Id.* at § 361-5.4(f)(1)(iv).

166. The Part 361-5 requirements and restrictions discussed above do not apply at municipally owned operations that process or store RUCARBs, no matter the volume handled or storage timeframe. *See*, 6 NYCRR § 360.14

167. Notwithstanding, private companies such as Plaintiffs-Petitioners contracting with municipalities or the New York State Department of Transportation or the New York State Thruway Authority remain subject to Part 361-5's requirements. This is true even where Plaintiffs-Petitioners handle RUCARBs generated as part of these contracts.

Impact of Part 360 & Part 361

168. Compared to the Rule, former Part 360 was a model of clarity.

169. Former Part 360 included a pre-determined BUD that treated "recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock placed in commerce for service as a substitute for conventional aggregate" as an item "not

considered solid waste." 6 NYCRR 360.15(b)(11). A copy of this regulation is attached hereto as **EXHIBIT 12**.[4]

170. Facilities that accepted these materials were regulated by former Part 360-16. A "facility receiving and processing only recognizable uncontaminated concrete and other masonry waste...asphalt pavement, brick, soil or rock" that has not been in contact with hazardous material or petroleum "and that is not commingled with any other solid waste" was obligated to register. 6 NYCRR § 360-16.1(d)(1)(i). A copy of former 6 NYCRR §360 – 16.1, §360 – 16.2 and §360 – 16.4 are attached hereto as **EXHIBIT 13**.

171. Former Part 360-16 made it clear how the registration, permit and BUD provisions worked together:

> Recognizable concrete, asphalt pavement, brick or rock which is separated from C&D debris at a C&D processing facility prior to any pulverization and subsequently pulverized or processed in a separate area, is exempt from [the disposal requirements in 360-16] and may be beneficially used in accordance with Section 360-1.25...or disposed of...the above materials may also be transferred to a registered facility dedicated solely for the recycling of recognizable uncontaminated concrete, asphalt pavement, brick, soil or stone. *Id.* at 360-16.4(c)(4).

172. As applicable to RUCARBs, former Section 360-16.4 did not contain any volumetric or storage time limitations. *See* Exh. 13 at§360-16.4; *compare,* 6 NYCRR §§ 361-5.2; 361-5.4.

173. A striking contrast exists between the former Part 360 provisions and the rampant contradictions and inconsistencies found in the Rule.

[4] There was no requirement, as there now is for two categories of BUDs relating to RUCARBs for the materials to meet some unidentified state or municipal specification. *See* Exh. 12; 6 NYCRR 360.12(c)(3)(viii) and (ix).

Part 360 Versus Part 361

174. The Rule states that the BUDs are intended to allow the materials to be used as "substitutes for commercial products or raw materials." 6 NYCRR § 360.12(a)(1). In fact, the regulations state that "[t]he materials cease to be solid waste when used according to this section." *Id.*

175. RUCARBs are typically stored and processed at a C&D facility. C&D facilities are now regulated by Part 361-5.

176. However, materials sent to a Part 361 facility are categorically precluded from being considered BUD material. 6 NYCRR § 360.12(a)(1) states that "[t]his section does not apply to materials that are being sent to facilities subject to regulation under Part 361." *Id.*

177. The second and third sentences in §360.12(a) described above contradict each other, as the RUCARBs BUDs at issue in Part 360.12(c)(3) (viii), (ix) and (x) are also subject to regulation in Part 361-5. *See* Rule at §§ 361-5.2, 361-5.4 (requiring a registration and imposing tonnage and storage limitation for locations that accept RUCARBs).

178. This contradiction creates confusion on the part of the regulated community.

179. The regulated community cannot be sure if RUCARBs can be BUD material because "RUCARBs" are specifically addressed in Part 361, and § 360.12(a)(1) states that materials that go to a 361-5 facility cannot be considered BUD material.

180. The regulated community cannot be sure if the Part 361 rules and restrictions apply to RUCARBs as §360.12(c)(3)(viii), (ix) and (x) states that RUCARBs are not a solid waste when source separated, processed and stored separately.

181. The regulated community cannot meaningfully determine whether and how they are regulated by these two contradictory provisions.

182. The regulated community is subject to differing interpretations of these contradictory provisions by the Department, and potentially, a court of law.

183. The regulated community is not afforded due process by these contradictory terms.

General Objections to the Rule

184. Each of the above issues are discussed in more detail, in separate sections, below, but it is critical to note that the Department was advised by numerous parties that implementing the Rule as proposed and as adopted would eviscerate the highly successful reuse of these commodities, with no corresponding environmental benefit, which is contrary to the Department's mandate to discourage landfilling and increase the reuse of materials.

185. As described above, all RUCARBs will be reused in aggregate if permitted by law and not regulated in a manner that is so burdensome that is more cost effective to landfill the materials. *See also* Meehan Aff. ¶21; Schmitz Aff. ¶19.

186. Indeed, many commenters advised the Department that the restrictions contained in the Rule would result in significant adverse environmental impacts.

187. These commenters covered many groups within the regulated community who use and reuse RUCARBs.

188. State agencies, including the NYSDOT and the New York State Thruway Authority ("NYTA"), which oversee countless miles of asphalt pavement and concrete construction, uniformly advised the Department against adopting the Rule.

189. In response to the proposed Rule issued in March 2016, the NYSDOT commented that the "draft revisions, as written, will have significant impacts on the NYSDOT program work.[5]

[5] The NYSDOT not only utilizes RAP and RCA in its construction projects, but it also includes the reuse of RUCARBs as important facets of its efforts to reduce greenhouse gas emissions and address climate change. https://www.dot.ny.gov/programs/climate-change/activities.

The NYSDOT recommends that the DEC conduct a cost/benefit analysis of statewide implementation of these proposed revisions." NYSDOT Comment Letter dated September 2, 2016, a copy of which is attached hereto as **EXHIBIT 14**, at 1.

190. The NYTA commented that the proposed Rule "will significantly impact the [NYTA]'s construction and maintenance programs. Cost for implementation of projects would increase significantly if these regulations are executed as proposed. In addition, the proposed changes could negatively impact the ability for effective use of resources and could reduce the amount of materials and resources effectively reused." NYTA Comment Letter dated July 27, 2016, a copy of which is attached hereto as **EXHIBIT 15**, at 1.

191. The NYTA, like NYSDOT, requested that "a cost impact statement ... be provided which describes the advantages to adopting these regulations based upon the impacts they cause to the state." *Id.* at 1; *see also Id.*, p. 1 of General Comments.

192. Additionally, these agencies requested that one or more BUDs be provided to allow reuse of RUCARBs in roadway construction. *See* Exh. 14 at 2-3; Exh. 15 at 2, pp. 1-2 of General Comments (noting that proposed Rule "could very likely divert appropriate material reuse to unneeded disposal at regulated facilities") .

193. These pivotal state agencies that engage in substantial roadway construction and maintenance throughout New York State were not the only governmental entities to speak out on the adverse effect the proposed Rule would have on the reuse of RUCARBs.

194. New York State Assemblyman Philip A. Palmesano commented, stating that the proposed Rule "will most certainly create increased cost for New York taxpayers, the NYSDOT, local Highway Departments as well as businesses in the construction arena." Assemblyman Palmesano Letter dated September 12, 2016 letter, attached hereto as **EXHIBIT 16**, at 1 (stating

also that "[t]he successful reuse of RUCARBs has prevented millions of tons of this material from clogging our landfills. The new Part 360 changes would force tons of the unused RUCARBs to now be sent to the local landfills.").

195. Many counties submitted comments that uniformly argued that the proposed rule would adversely impact, both environmentally and economically, the well-developed practice of reusing/recycling asphalt pavement and causing this desirable commodity to be landfilled rather than reused. Ontario County's comment is fairly representative of the counties' comments:

> The use of "roadway millings and reuse of asphalt materials is a well-developed practice of municipal highway departments and contractors that serve them across the state," if not exempt, "the result is going to be that material currently being reused in the field is going to end up in a landfill..." A copy of the Ontario County comment letter is attached hereto as **EXHIBIT 18**. *See also*, comments of Cayuga County, attached hereto as **EXHIBIT 17**; Erie County, attached hereto as **EXHIBIT 19**, Monroe County Department of Transportation, attached hereto as **EXHIBIT 20**, Rockland County, attached hereto as **EXHIBIT 21**, Broome County, attached hereto as **EXHIBIT 22** and Washington County, Exh. 9.

196. Two towns agreed with these substantial concerns. These include:

a. The Town of Alabama Comment Letter dated July 7, 2016, attached hereto as **EXHIBIT 23**, which states that "[u]sing road millings is a way to help reduce the cost of maintaining and repairing the roads of this state and to keep them from using landfill space unnecessarily. Which is what will happen with them, should these new regulations take effect and cause an undue fiscal burden on already stressed budgets."

b. The Town of Big Flats Comment Email dated June 30, 2016, attached hereto as **EXHIBIT 24**, which states that the regulations will result in "a waste of valuable material," which "runs counter to recycling and reuse policies in place across New York and the United States."

197. Additionally, a number of statewide associations representing the interests of governmental and private sector entities who daily manage RUCARBs in roadway construction, aggregate production, and other uses, commented.

198. In addition to Plaintiff-Petitioner NYMaterials, these trade associations include:

a. New York State County Highway Superintendents Association, Inc., ("NYSCHSA") attached hereto as **EXHIBIT 25**, (noting regular practice of reuse of asphalt "to divert waste from being deposited in a landfill and reducing the use of new raw materials.")

b. New York State Association of Town Superintendents of Highways, Inc., ("NYSATSH") attached hereto as **EXHIBIT 26**, (stating that the Rule "will unnecessarily increase costs for New York taxpayers...municipalities in NY have a longstanding practice of storing road millings at various sites for the future use for shoulders and...in future road projects...to reuse a valuable resource and cut down on costs.")

c. Associated General Contractors of New York State ("NYSAGC"), attached hereto as **EXHIBIT 27**, (stating that the generical contractors' "biggest concern[] is the proposal to eliminate the predetermined use for exempt...RAP, crushed concrete, and other recycled materials. This has historically been one of the best recycling efforts by our industry and most construction and material firms will be unable to comply with the proposed changes.")

d. Long Island Contractors Association ("LICA"), attached hereto as **EXHIBIT 28**, (stating that the Department should "remov[e RUCARBs] from the waste category at the earliest possible time of generation...and foster reuse and recycling," and instead, the proposed Rule will result in reduced recycling and material with "nowhere to go except directly to a landfill.")

e. The General Contractors Association of New York, Inc., ("GACNY") attached hereto as **EXHIBIT 29**, (noting that "the construction industry has a long and successful track record of the re-use and recycling of its debris material...the construction industry was a leader in recycling long before recycling was seen as an environmental benefit.")

f. The Business Council of New York State, Inc., attached hereto as **EXHIBIT 30**, (noting that "grinding brick and asphalt at yards is a common practice because the millings are often reused or repurposed. The material may be stockpiled to a project, availability or specific needs.")

g. New York State Association for Solid Waste Management, ("NYSASWM") which comments were formally endorsed by St. Lawrence County and Madison County, attached hereto as **EXHIBIT 31**, (stating that "[l]imiting storage requirements will force municipal highway departments to effectively dispose of asphalt millings instead of reuse/repurposing of the millings.")

h. AGC Member Submission, attached hereto as **EXHIBIT 32**, (noting that the proposed Rule "are excessive, create an economic burden far in excess of any environmental benefits, provide a disincentive to recycle asphalt pavements (which is contrary to guidance by Federal Highway Administration and Environmental Protection Agency that promotes the recycling of asphalt pavements)."); *see also* Comments submitted by the Solid Waste Association of North America, ("SWANA") attached hereto as **EXHIBIT 33**; the New York State Bar Association attached hereto as **EXHIBIT 34**, and the Environmental Energy Alliance of New York, attached hereto as **EXHIBIT 35**.

199. A number of operators submitted detailed comments on the benefits of the reuse of RUCARBs, noting that, based on their years of experience in the industry, RUCARBs are commodities, not waste.

200. The operators also described the impact of the proposed Rule on their reuse of RUCARBs for the production of aggregate, noting that the proposed Rule's regulation of RUCARBs is going to lead to significantly less recycling and more landfilling within the State, and increase the expenses for these businesses who will be forced to either (a) become solid waste management facilities or (b) abandon their recycling and reuse practices in favor of using virgin aggregate.

201. Many operators would have no choice but to use virgin aggregate over enduring the process and expense of becoming a permitted solid waste management facility.

202. In their comments, the operators also informed the Department of the volumes RAP/RCA they reuse so that the Department could understand the extent of the Rule's impact:

COMPANY	Amount of RAP (etc.) Processed Per Year
Barrett Paving Materials, Inc.	100,000 tons
Hanson Aggregates New York, LLC	300,000 tons on projects totaling 30 miles in 1 year
Peckham Industries, Inc.	400,000 tons
Thalle Industries	400,000 tons
Barre Stone Products	15,000 tons
Union Concrete and Construction Corp.	Not Provided
Glen O. Hawbaker, Inc.	125,000 tons in PA/6,000-7,000 tons NY

Eastern Materials, LLC	2,000 tons
Cushing Stone Co., Inc.	10,000 tons
Tezt Companies	87,000 tons
Milton CAT	N/A
Dolomite Products Company, Inc.	150,000 tons

Copies of these comment letters are attached hereto as **EXHIBITS 36-47.**

203. These concerns were also highlighted by Plaintiffs-Petitioners herein. *See* Schmitz Aff. ¶¶19-23; Metcalf Aff ¶¶24-29.

204. Similar concerns were raised by various operators at the June 2, 2016, June 6, 2016, June 7, 2016, and June 9, 2016 public hearings for the proposed Rule, as well as by consultants working in the industry who assist clients daily on these operations. *See* Griggs-Lang Consulting Geologists, Inc. letter dated September 13, 2016, attached hereto as **EXHIBIT 48.**

The Revised Proposed Rule Failed to Address the Universal Objections to the Proposed Rule.

205. In response to the revised proposed Rule issued in June, 2017, the commenters noted that DEC had failed to address the gravamen of the concern over destroying the RAP recycling program.

206. The NYSDOT stated that the revisions "are expected to have a substantial impact on aspects of the NYSDOT projects and programs." A copy of the NYSDOT July 21, 2017 letter is attached hereto as **EXHIBIT 49.**

207. Further, NYSDOT stated that its previously requested

> Cost/benefit/value analysis associated with the proposed revisions [was] not... addressed. Consequences resulting from implementation of these proposed revisions will impact the NYSDOT Capital Projects and highway maintenance operations, and it is anticipated to result in increases in project costs, overall. Please provide a cost/benefit/value analysis associated with the proposed revisions to the Part 360 regulations. *Id.* at 1.

208. The NYTA also commented again. Its July 21, 2017 comment letter mirrored the request for a cost impact statement, which the Department had failed to provide as part of issuance of the revised proposed Rule. A copy of NYTA's comment letter, attached hereto as **EXHIBIT 50**, at 1 (noting that the cost impact statement was necessary to evaluate any benefits as compared to "the impacts they cause to the state.").

209. NYTA cautioned that "[i]mplementation of these proposed revisions will affect the management of resources and is expected to provide added cost to projects and operations." *Id.*

210. Further, to protect the readily-reused, valuable, commodity nature of RUCARBs material, NYSDOT stated:

> The NYSDOT strongly recommends that 360.12(c)(3)(viii) and (ix) Beneficial Use be revised to state that Recycled Asphalt pavement (RAP) and Recycled Concrete Aggregate (RCA) are completely exempt from regulation under Part 360 with no restrictions on amounts stockpiled or distributed, and are not subject to registration or reporting requirements.
>
> The NYSDOT is concerned that if these activities are not exempt, this could significantly impact our maintenance and construction activities. The NYSDOT uses recycled aggregates (RAP and RCA) in our roads and bridges. It's one of the largest recycling programs in New York State, providing substantial cost savings and natural resource benefits. Exh. 49 at 3(*emphasis in original*).

211. The NYTA agreed, stating that it "recommends the Beneficial Use section be revised to state that asphalt and concrete materials are completely exempt from regulation under Part 360 with no restrictions on amounts stockpiled or transported and no registration or reporting requirements apply." *See* Exh. 50 at 1.

212. The New York State County Highway Superintendents Association, Inc. agreed, commenting that "common practices such as on-site masonry grinding operations at construction and demolition sites and even routine road milling operations could be severely impacted...." *See* NYSCHSA Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 51**, at 2.

213. NYSCHSA also noted that "the proposed regulations continues to raise concerns as they may affect municipalities and their highway departments and contractors relative to reuse of asphalt containing materials (RAM), road milling projects, road milling reuse, materials storage and facilities." *Id.* at 2 (also advising the Department again of the "well-developed practice of municipal highway departments and contractors across the state" of milling roads and "reuse of asphalt materials," to divert waste from landfills and reduce the amount of virgin material required.)

214. The NYSCHSA also advised the Department that "it is important that municipalities not be hindered in any way in this activity." *Id.* at 2.

215. The Associated General Contractors of New York State agreed, requesting that the BUDs set forth in 6 NYCRR 360.12(c)(3)(viii) and (ix) "be revised to...completely exempt [RAP and RCA] from regulation under Part 360 with no restrictions on amounts stockpiled or distributed and no registration or reporting requirements." NYSAGC July 21, 2017 comment letter, a copy of which is attached hereto as **EXHIBIT 52**, at 2.

216. NYSAGC also noted its "concern[] that if these activities are not exempt, this could significantly impact our state's maintenance and construction activities...AGC NYS members use...RAP and RCA...in our roads and bridges. It's one of the largest recycling programs in New York State and provides substantial cost savings and natural resource benefits." *Id.* at 3 (stating also that "having to permit" RUCARBs "facilities would lead to a much higher cost of doing business and may make the recycling effort too expense to continue for private firms," which would "lead to the use of more virgin raw materials for construction of our roads and bridges.").

217. The Long Island Contractors' Association agreed, and advised the Department that its curt analysis of the issue lacked "analysis or evaluation...to support the conclusions that these

changes will increase recycling and beneficial use of materials, indeed such an evaluation will show just the opposite." LICA Comment letter dated July 21, 2017, a copy of which is attached as **EXHIBIT 53**, at 5.

218. Numerous operators emphasized that the recycling of RAP and RCA would be severely hampered, and landfilling would increase, if the Rule were enacted. *See* Suit-Kote Corporation Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 54**, at 8. Union Concrete and Construction Corp. Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 55**, at 1 (noting that if they "are required to track each load and weight as proposed by DEC it will no longer be cost effective and [these] materials would alternatively be sent to the landfill, rather than reused as perfectly good construction products," with the additional impact of "return[ing] exclusively [to] mining and trucking virgin rock").

219. Indeed, one engineer aptly stated RUCARB recycling "should be exempt from Part 360 when placed into commerce. In fact, these types of material are a marketable commodity that readily compete with virgin earth material." Revised Part 360 Series Express Terms and Revised DGEIS Comments of Sterling Environmental Engineering, P.C., attached hereto as **EXHIBIT 56**, at 1.

220. It is therefore readily apparent that all levels of New York State government, and numerous companies, including Plaintiffs-Petitioners herein, needed the Department to address the reuse of RUCARBs for construction differently than proposed.

221. The Rule maintains several restrictions which will cause these entities, and the taxpayers, to endure increased construction and operational costs. The Rule will also result in an increase in landfilling, greenhouse gas emissions and other pollutants, and a decrease in the reuse

of a material that would, absent the Department's interference, be 100 percent reused as a commodity.

Request for Interpretation

222. Based upon the contradictory provisions of Part 360 and 361, a number of commenters inquired about how to interpret these provisions during the rulemaking process,

223. The NYSDOT "request[ed] clarification regarding if and how the BUD exemption applies to Subparts 361-5.2 and 5.3, which deal with registered vs. Permitted Facilities that store RAP and RCA." Exh. 49 at 4.

224. One operator did "not understand why in the applicability section it says '*This section does not apply to facilities subject to regulation under Part 361 of this Title.*' but yet the Department added a predetermined beneficial use specific to asphalt millings." Exh. 54 at 4 (noting also that 361-5 covers the same material). *See also* Revised Part 360 Series Express Terms and Revised DGEIS Comments of DA Holding, attached hereto as **EXHIBIT 51**, at 2.

225. The Department, in the rulemaking process, spoke to this inconsistency a number of times. Unfortunately, the Department's explanation did not resolve the inconsistencies and instead only served to increase the confusion.

226. In the June Response to Comments, the Department alternately stated:

a. "Receipt of unprocessed concrete or asphalt pavement from off-site requires a permit or registration under Part 361-5" Exh. 7 at 205.
b. "RAP used as an ingredient in producing new asphalt pavement would not be considered a waste and the asphalt plant producing the asphalt pavement would not be considered a solid waste management facility." *Id.* at 199.
c. "The predetermined BUD [for RUCARBs] is only intended to provide waste cessation for C&D debris products leaving a processing facility..." *Id.* at 89.

d. "The use of material that meets the pre-determined beneficial use determination requirements would not be required to meet the requirements of Subpart 361-5." *Id.* at 214.

227. Additional examples of DEC providing diametrically opposed responses are found in Exhibit 7 by comparing the responses at 81 and 203 to the responses at 87, 88, 204 and 214.

228. And finally, the Department muddied the issue by stating that the BUD for RUCARBs "attaches...when [the materials] meet the technical requirements for the intended use. The process may take place at the site of generation, a site under the same ownership or control as the site of generation, or an authorized solid waste management facility." *Id.* at 214.

229. The SDGEIS also includes a differing explanation, that the BUD determinations for RUCARBs "establish acceptable pre-determined BUDs...which can be used without additional department approval...the material need not be handled by a C&D debris handling and recovery facility in order to qualify for the determination." SDGEIS, a copy of whichis attached hereto as **EXHIBIT 58**, at 17.

230. The regulated community cannot understand how the BUD provisions interact with the Part 361-5 requirements based on these contradictory statements from the Department.

231. The August Response to Comments did not alleviate this morass.

232. When asked directly, by Plaintiff-Petitioner NYMaterials, how to interpret the statement in §360.12 that BUDs are no longer considered waste, which is followed by the statement that materials that are subject to Part 361-5 cannot use the BUDs, the Department stated

> [t]he Department disagrees that these provisions contradict one another. Materials sent to a facility regulated under Part 361 are not being sent to a site of "use according to this section" but rather are being stored, handled, treated or processed prior to being used pursuant to the pre-determined BUD...and hence the BUD does not apply. Once processed to meet an appropriate specification, however, the pre-determined BUDs in paragraph 360.12(c)(12) attach. The BUDs in this paragraph were worded as they are to allow for beneficial use regardless [*sic*] whether the

material is sent to a Part 361 facility, provided it meets an appropriate specification. Exh. 10 at 35.

233. The Rule does not state this, or provide any instruction that could assist a member of the regulated community in understanding whether or not they are covered by the various regulatory provisions.

234. Additionally, the Department stated that, on the one hand:

a. "RAP is considered C&D debris but section 360.12 has been clarified in the final regulations to allow beneficial uses of this material." Exh. 10 at 18.

b. "Asphalt millings and pavement chunks, to qualify for the pre-determined BUD in 360.12(c)(3)(ix) must meet a municipal or state specification for reuse; until they can meet this specification, they are regulated as a C&D debris." *Id.* at 35.

c. "[F]acilities that process these materials to meet BUD requirements must comply with applicable Part 361 final regulations." *Id.* at 42.

d. "RCA and RAP are a solid waste unless meeting the conditions of this pre-determined BUD. [RUCARBs] that require processing, or which must be stored, prior to use under this pre-determined BUD, must be processed or stored at a facility authorized pursuant to Subpart 361-5 unless the facility is exempted in Part 361." *Id.* at 42.

235. But the Department also stated in the August Response to Comments that:

a. "The final regulations have been revised to establish a pre-determined BUD for asphalt pavement and millings received at an asphalt manufacturing facility. No registration or permit would be required." Exh. 10 at 105.

b. "...[A]sphalt pavement and asphalt milling received at an asphalt manufacturing plant for incorporation into an asphalt product is considered a pre-determined beneficial use and no registration, permit or other Part 360 authorization is required for the facility." *Id.*

c. "A pre-determined BUD has been added in 360.12 for asphalt pavement and asphalt millings received at an asphalt pavement

manufacturing plant. Therefore, the requirements of 361-5 do not apply to asphalt manufacturing facilities." *Id.* at 110.

d. In response to a comment stating "does material that qualifies as BUD at its point of generation lose its BUD designation when it reaches the 361 facility?" the Department stated "[t]he material 'qualifying as a BUD at its point of generation' only does so if it is used in the manner specified in the BUD...If the material is sent to a Part 361 facility, the BUD does not apply to it." *Id.* at 35.

e. "Part 361 merely regulates the facility that processes the RAP, and this pre-determined BUD addresses the RAP product, which is a product upon meting the pre-determined BUD criteria (whether or not it is processed at a Part 361 facility...." *Id.* at 44.

236. The Findings Statement provides a final layer of confusion, in stating that "[t]he revised regulations establish acceptable pre-determined BUDs for C&D debris and C&D debris residues, which can be used without additional department approval." Findings Statement, attached hereto as **EXHIBIT 59**, at 14.

237. Therefore, the regulated community is left uncertain regarding the application of the BUD provisions and Part 361-5 to their operations.

238. The regulated community is left vulnerable to differing interpretations and potential enforcement at any time by the Department due to these differing provisions.

Limiting RUCARBs to 500 Tons Per Day

239. Many commenters noted the substantial negative impact that limiting the acceptance of RUCARBs to 500 tons per day would have to the highly successful recycling effort that occurs for road, bridge and other construction across New York State.

240. One operator noted it performed work on two reconstruction and pavement resurfacing projects totaling $20 million and covering approximately 30 miles of the New York State Thruway. *See* Exh. 37 at 3.

241. This 30 mile-project generated 300,000 tons of RAP, which was milled for reuse. This resulted in the avoidance of landfilling 300,000 tons of this material, as well as saving the taxpayers the approximately $19.5 million it would cost to landfill those materials. The cost of landfilling, which would be passed on to the public as part of the bidding process, would have nearly doubled the cost of the project had the material not been reused.

242. The Town of Big Flats noted, in response to the proposed Rule limiting RUCARBs to 250 tons per day, that "if a municipality engages in a project that uses more than 250 tons of material a day it will have to get a permit. However, 250 tons is equal to milling one inch of asphalt material from a roadway 20 feet wide by 2000 feet long (a very small section of roadway)." Exh. 24 at 1. Even doubling this amount results in a very small section of roadway work given the continuous roadway construction and maintenance required to keep our vital roadways safe for public travel.

243. During the 2016 comment period process, numerous trade associations advocated on behalf of their members that a limit on this successful, cost-saving and environmentally beneficial program would have disastrous effects upon reuse of RUCARBs materials, as substantial amounts are collected for reuse each day. *See* Exh. 27 at 3; Exh. 28 at 3; Exh. 32 at 4, 6, 10-11; Exh. 34 at 12; (noting that 2,400 tons per day ("TPD") of RUCARBs would not have an adverse impact according to recognized environmental standards).

244. Indeed, NYMaterials provided the Department with evidence of the amounts collected by a number of its members in its July 21, 2017 comment letter. These amounts include:

a. One operator takes in 1,200-1,775 tons per day for each of 8 projects they have worked on in the past two years.

b. Another operator reports more than 500 tpd at least 25 weeks a year, at up to 3 facilities.

c. One operator reports 20,000 to 80,000 tons of RAP during its operating season. During operations, this company receives 1,200 tons per day or more on nearly all days.

d. Another operator has a number of Part 360-registered facilities. One of these facilities, during the summer months when construction is at its peak, receives more than 10,000 tons per month to as much as nearly 40,000 tons per month. A second facility received 38,000 tons in one busy construction month. A third facility reported three months of heavy RAP receipts, ranging from 17,000 tons per month to over 40,000 tons per month.

e. One operator receives up to 200,000 tons per year between its facilities.

f. Another operator receives more than 2,500 tons per week up to 5 times a year, and more than 3,500 per week up to 4 times per year.

g. One operator receives more than 3,500 tons per week 4 weeks each year.

h. Another operator reports that they can have days that exceed 500 tons per day.

i. Operator reports that the asphalt is being milled at a rate of 1,000 to 2,500 tons per day. In fact, a 6.3 mile New York State Thruway Authority project is generating 1,500 tons of RAP each night. *See* Hamling Aff. Ex. B.

245. Again, all of this RAP will be reused in new asphalt, reducing landfilling, truck trips related to landfilling, and the use of virgin material. However, the Rule, and its 500 ton per day limitation, would destroy these beneficial objectives.

246. Additionally, many operators, such as those listed in Table 1, above, told the Department specifically that they reuse vast quantities of RUCARBs every year, and that limiting the amount eligible for a registration would increase costs such that the reuse of these materials would decrease, and landfilling would increase. *See* Hunters Point Recycling Comment Letter, attached hereto as **EXHIBIT 60**, at 1-2 (recommending threshold be set at least 2,400 tons per

day); Cobleskill Stone Products Comment Letter dated May 5, 2016, attached hereto as **EXHIBIT 61**, at 1-2 (describing reuse of RUCARBs, DOT reuse of millings, and reuse of millings in blacktop production, which will be negatively impacted by a tonnage limitation).

247. Various other operators who handle and recycle substantial quantities of RUCARBs agreed:

a. 500 tons per day is "a detriment to the recycling efforts conducted by our industry," which could result in recyclers "elect[ing] to not receive asphalt milling and therefore the State of New York and local municipalities will be forced to seek a registration or permit....or...landfill these materials." Exh. 54 at 7 (noting also that this will "increase... the cost to repair and rebuild roads").

b. A 500 ton per day limit "will cause thousands of tons of clean RUCARBs to be directed to landfills rather than allowing them to be beneficially reused." Revised Part 360 Series Express Terms and Revised DGEIS Comments, Hanson Aggregates New York LLC, a copy of which is attache as**EXHIBIT A** to the Hanson Aff.

c. Another operator noted that this limit will "tak[e] something that is environmentally beneficial and mak[e] it economically impossible." *See* Exh. 57 at 2.

d. Another operator stated that this limit will result in a lack of available facilities to take these materials, and "will exponentially drive up the cost of construction for major agencies." Exh. 41 at 1.

e. One operator noted that a single project for the NYS Route 17 reconstruction resulting in 1,500 tons of millings per day, and another was over 4,900 tons per day, and that the proposed Rule would "effectively eliminate" these facilities "from accepting millings." Stack Law Office Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 62**, at 1. *See also* Ebenezer Yard Materials Concrete Recycling Facility Comment Letter, attached hereto as **EXHIBIT 63** (stating that 500 tons per day limitation would require a permit "similar to a landfill, which would elevate our costs such that our business would be unsustainable").

248. NYSAGC also expressed its concern that requiring a permit for amounts over 500 tons per day would cause private contracting firms to landfill the material instead. Exh. 52 at 3.

249. Based on NYSAGC and its members' experience, "dropping the weekly average requirements...during [the registered facilities'] busiest time of year" would have a devastating impact, as these entities "see over 1000 tons of concrete, asphalt, rocks, brick and soil per day" at those times." *Id.* "Large local projects could cut off a facility in 2 days' time thus sending 1000's of tons of valuable recyclable material to a landfill." *Id.* (concluding that "[l]imiting the quantity of [RUCARBs] per day will only be hurting the environment and costing municipalities statewide.")

250. Consulting engineers with extensive experience assisting RUCARBs facilities with permitting and operations agreed. One such firm stated that

> 500 tons per day (weekly average) is too small for most blacktop plants...blacktop is the most recycled/reused material in the world and we should be fostering this pattern. Blacktop removed or milled up during construction or highway resurfacing jobs is typically brought back to the site by the trucks hauling fresh blacktop to the job site so there is no additional truck traffic. The recycled blacktop is then re-used in future blacktop." Exh. 48 at 3.

251. Similarly, an engineering firm stated that

> A facility that receives RAP...from a NYS DOT roadway project could see roughly 1,500 to 2,000 tons per day of RAP. The low requirement make it necessary for almost every Heavy-Highway Contractor and every Blacktop Plant within the state to require a permit. These are the most highly recycled products within the state. Reuse is only restricted by the NYSDOT specifications and practical limits. Any further regulation may significantly reduce the re-use of these materials. G-L Engineering, P.C. Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 64**, at 5; *see also* Comments for the 2016 proposed Part 360 regulations by Walden Environmental Engineering PLLC, attached hereto as **EXHIBIT 65**, at 2-4.

252. Another engineering firm, as well as several operators, observed that if the Department truly wanted to address a potential significant adverse environmental impact, such as traffic, it should use recognized rubrics for determining a significant adverse impact, such as the number of truck trips generated. Here, such an established rubric, at least 12 trucks per hour, or

1,920 tons per day, of inert RAP and RCA could be transported and not generate a significant adverse environmental impact. *See* Revised Part 360 Express Terms and Revised DGEIS Comments of Walden Environmental Engineering PLLC, attached hereto as **EXHIBIT 66**, at 1.

253. In the face of numerous examples of real time data regarding the reuse of RUCARBs in construction projects, and statements that the extensive permitting requirements imposed should an operator wish to accept more than 500 tons per day would cause the reuse of RUCARBs to decrease, landfilling to increase, and/or for firms to shutter their doors, the Department nevertheless adopted the 500 ton per day limit in Part 361-5.

Limitations on Storage

Inconsistent Provisions

254. The Rule contains various time limitations which, as with many other provisions in the Rule, contradict each other. For example, in §360.12(a)(2), a 365-day storage limitation is imposed for BUD materials, which would include RUCARBs qualifying for a BUD designation at §360.12(c)(3)(viii), (ix) and (x).

255. However, in Section 361-5.4(f)(1)(iv), the Rule states that "source-separated or processed and separated material 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 the storage volume conforms with the declared storage volume identified in the application or registration documents." *See also* Exh. 10 at 105.

256. The regulated community again cannot determine how to proceed.

257. If Plaintiffs-Petitioners can utilize the BUD provisions related to RUCARBs, those materials cannot be stored for longer than 365 days per Section 360.12.

258. However, if they process the materials at a Part 361 facility, Part 361 says those materials can be stored without time limitation, but only if they qualify as one of the BUDs in §360.12.

259. Section 360.12 says that any material that goes to a Part 361 facility cannot be considered a BUD material.

260. This makes the "storage for an unlimited time provision", 361-5.4(f)(1)(iv), meaningless as it only applies to materials that meet the §360.12 BUD requirements.

261. The Rule also restricts the storage of RUCARBs material prior to processing to 365 days. 6 NYCRR § 361-5.4(f)(1)(i).

262. The only thing that processing does to RAP is to break it into ever smaller pieces.

263. Under the Part 361 rubric, standing alone, large pieces of RAP can only be stored for 365 days, but if you crush it into smaller pieces, it can be stored indefinitely.

264. However, as discussed above, due to the interaction of Part 361 with §360.12, this could never happen.

265. As noted in the Plaintiffs-Petitioners' affidavits accompanying this Ver. Complaint, existing RAP piles in excess of what can be used in a 365 day period, absent landfilling the material, exist at many of Plaintiffs-Petitioners' facilities.

266. The Rule provides no instruction on the handling of existing piles and if or when they must be removed.

267. RUCARBs such as RAP and RCA are placed in a pile onsite where they are collected until a large enough pile is generated to justify the expense of processing the material. *See* Clemente Aff. ¶16; Metcalf Aff. ¶21.

268. The bottom of the pile would contain the oldest materials, making a requirement that those materials leave prior to the materials on top of them impracticable, unreasonable, and at any facility with a smaller footprint, a complete impossibility as there would be insufficient operating room to do so.

269. Further, it is impossible to maintain separation of different truckloads of RAP in a single pile, as each piece looks like the other - these are fragments of the same material.

270. The regulated community will not know how to comply with this requirement.

271. The Department will have unbridled discretion to enforce purported violations of this requirement.

Hardship Presented

272. Additionally, beyond the inconsistent provisions, the inclusion of a storage time limitation presents a substantial hardship for the generators of RUCARBs as well as the operators reusing this material.

273. The NYSDOT July, 2017 comment letter states that "[t]he NYSDOT strongly recommends that inert materials traditionally considered exempt C&D, as described in 360.12(a)(3), should not apply to the 365-day window for use." *See* Exh. 49 at 2.

274. The City of New York commented at length that a storage limitation for RUCARBs makes no sense as "[b]y its nature, material intended for beneficial reuse is expected to be non-putrescible and therefore material added more than 180 days to a stockpile does not in any way present a greater environmental hazard than that of more recently added material." City of New York Comment Letter dated September 13, 2016, attached hereto as **EXHIBIT 67**, at 19 (describing also impracticalities of limit for storing RAP for reuse in roadways).

275. The St. Lawrence County Department of Highways (and the New York State Association for Solid Waste Management) also commented that the time restrictions were too onerous, and the restriction should be significantly lessened "in recognition of the aggregate marketplace that commonly demands large volumes of material supplied within a small construction season window, and otherwise lesser intermittent demand." *Id.* at 3. A copy of this letter is attached hereto as **EXHIBIT 68**.

276. A number of counties and other municipalities also commented that the imposition of a time limit would significantly hamper reuse of RUCARBs given the realities of the construction season and the value of the materials for reuse. *See* Monroe County DES Comment letter, attached hereto as **EXHIBIT 69** at 2; Exh. 17 at 1; Exh. 18 at 7; Exh. 19 at 2; Exh. 20 at 2; Exh. 21 at 8; Exh. 22 at 2; Exh. 9 at 2; Exh. 24 at 2.

277. Similarly, numerous trade associations representing countless firms that use and reuse RUCARBs in their businesses commented that a storage limitation, particularly anything less than at least 24 months, is arbitrary and unrealistic for New York State as the construction industry effectively stops running during the winter months. *See* Exh. 31 at 8; Exh. 25 at 2-3; Exh. 27 at 4; Exh. 26 at 2; Exh. 28 (LICA) at 2; Exh. 35 (Env Eng All NY) at 2; Exh. 32 at 4, 6, 9-10; Exh. 33at 2; Construction & Demolition Recycling Association Comment Letter dated September 12, 2016, attached hereto as **EXHIBIT 70**, at 2.

278. In 2017, the NYSCHSA agreed, noting that storage of millings, which sometimes occurs "over winter for use in the next construction season" would be negatively impacted, as "[l]imiting storage requirements may force many municipal highway departments to effectively dispose of asphalt millings instead of reuse/repurposing of the millings." Exh. 51 at 3 (stating also

that "any time limit on the storage of this material would require a perpetual inventory accounting for the increases/decreases in the material stockpile; an absurd burden ...").

279. The NYSAGC, representing numerous contractors who work on state and local roadway construction projects, similarly commented that the 365-day limitation should not apply to "inert materials traditionally considered exempt C&D." See Exh. 52 at 1 (noting that due to short construction season, RUCARBs storage "has historically varied from months to years. NY's municipalities save material so that they have enough to do a road project; this could be a tremendous quantity and for a large project would directly surpass the time limit of 365 days currently in the regulations."). The LICA agreed with this. See Exh. 53 at 5.

280. Numerous operators who recycle RAP and RCA every day agree with NYSDOT, NYTA, and the other commenters. See Exh. 54 at 8 (stating that "many...locations that store asphalt millings wait until they have enough to complete a road construction project," which could take 1-2 years); Exh. 62 at 2 (noting that the material at the bottom of the stockpiles is the oldest, making a 365 day time limit unrealistic for its usage); Revised Part 360 Series Express Terms and Revised DGEIS Comments of Barrett Industries, attached hereto as **EXHIBIT 71**, at 2 (stating that "the cost of asphalt millings is less than producing virgin hot mix, the financial incentive is to reuse millings...implementation of these stockpile storage limits will effectively reduce the storage capacity at asphalt plants and cause asphalt to be hauled to the other, further away locations," and noting lack of environmental impact of material regardless of how long stored); Exh. 61 at 2 (discussing that a time limitation such as that included in the proposed Rule "is unrealistic and would deter operators from maintaining RAP facilities," as "annual blacktop production is dictated by market demand," and a time limit would create a problem of what to do with the millings after the deadline passed, which could be "insurmountable.").

281. In the face of numerous comments showing that the most successful recycling effort in the United States would be significantly hindered or face termination, due to a one-year limitation on storage, the Department nevertheless adopted the 365 day storage limit in Part 361-5.

Inclusion of the "State or Municipal Specification" Requirement

282. The revised proposed Rule added beneficial use determinations specifically for RUCARBs to Proposed Part 360.12. However, these BUDs were only available where the RUCARBs meet a specification issued by the NYSDOT. Proposed 6 NYCRR 360.12(c)(3)(viii), (ix).

283. Commenters, including the NYSCHSA, noted that they do "not believe a Department of Transportation (DOT) specification is necessary. All recycled asphalt pavement or recycled concrete aggregate should quality for a BUD if used for road construction and maintenance." Exh. 51 at 4. This Association also advised the Department that "there is no difference between recycled asphalt pavement and concrete aggregate that meets a state construction specification versus those that do not." *Id.*

284. Various operators noted, based on their extensive experience in recycling RAP, that there is no DOT specification for RAP itself, meaning that DOT does not require the RAP to have any characteristics or sizing in particular to be used. *See* Exh. 54 at 5 (noting also that DOT specification requirement would not "stop...bad actors from inappropriate using millings"); Exh. 57 at 1 (noting that "there are any number of materials in demand commercially that do not meet any" DOT specification); Hamling Aff. ¶34.

285. Contracts often require that RAP make up a certain percentage of the asphalt mix, but the RAP itself does not have to meet any requirements. *See* Hamling Aff. ¶34.

286. Consulting engineers with extensive experience assisting RUCARBs facilities with permitting and operations agree. One such firm stated during the comment period that RUCARBs should "not have to meet a DOT specification to be used as aggregate...most work is commercial, not State and to limit RUCARBs use to DOT projects or specifications will lead to more RUCARBs going into landfills." Revised Part 360 Series Express Terms and Revised DGEIS Comments of Griggs-Lang Consulting Geologists, a copy of which is attached hereto as **EXHIBIT 72**, at 1.

287. The Environmental Law Section of the New York State Bar Association ("NYSBA Environmental Section") also commented on the vagueness of a reference simply to a "DOT specification," and stated that "[t]he 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." NYSBA Environmental Section Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 73**, at 2.

288. The NYSBA Environmental Section also commented that this approach "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." *Id.*

289. And, when commenters pointed out in addition that the Department's stated goal of increased enforcement would not be met, and instead "an outsized impact on those businesses already complying with Department regulations" would result, the Department responded that "[t]he Department disagrees that the final regulation, properly understood, will result in less recycling and more disposal of RAP." Exh. 10 at 43.

290. How the Department could reach this conclusion given that state agencies, including NYSDOT and the NYTA, several counties and towns, a number of trade associations, and many operators who routinely reuse RUCARBs uniformly stated this position, is unknown.

291. In response to the numerous comments that there was no such "DOT specification," and/or that limiting the reuse of RUCARBs to only NYSDOT projects would massively restrict the amount of RUCARBs reused, and conversely, massively increase the amount of these materials landfilled, the DEC changed the language to allow either "state or local" specifications to qualify the RUCARBs material for BUD use. *See Id.; see also, e.g.,* Exh. 10 at 41-42; Exh. 71 at 1.

292. All of the same concerns regarding the existence of such a specification remain true for a "municipal or state" specification. *See* Hamling Aff. at ¶¶12; 34. RAP and RCA do not have to meet any specification to be reused, they simply may be present in certain quantities in new aggregate.

293. Nevertheless, the BUDs at § 360.12(c)(3)(viii) and (ix) rely upon the material "meeting a state or local specification" to qualify for use as BUD material.

294. The regulations do not define or clarify which "specification"(s) may apply. During the enactment process, the Department did not identify any particular specifications that would meet this requirement, despite being asked to do so.

295. The regulated community was also not notified that a significant change to the regulations was being made prior to the adoption of the Rule, and accordingly they had no opportunity to comment on it.

296. Therefore, to use either of these BUD designations, an operator would have to identify a state or local specification that would apply to the RUCARBs material. The Rule does

not provide a method for the operator to do so, which creates the potential for disparate enforcement and regulatory uncertainty.

Regulation of C&D Transport – Part 364

297. The Rule includes a provision governing the transport of solid waste in Part 364. This Part imposes registration and permitting requirements upon certain vehicles that transport "regulated waste."

298. The Environmental Conservation Law includes authorizing legislation regarding the transport of "regulated waste." *See generally* ECL Article 27, Title 3.

299. The purpose of this legislation is to:

> [P]rotect the environment from mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal and to prevent a discharge of wastes into the environment, whether accidental or intentional, except at a site approved for the treatment, storage or disposal of such wastes. ECL §27-0301.

300. The statute, as with "solid waste", expressly defines "regulated waste." This definition is: "any one of the following types of waste: raw sewage, septage, sludge from a sewage or water supply treatment plant, industrial-commercial waste, low-level radioactive waste as defined in subdivision nine of this section, waste tires or waste oil." ECL §27-0303(4).

301. Importantly, this statute also defines "waste." This definition is:

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, **and other discarded material**, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under article 17 of this chapter, or source, special nuclear or by-product material as defined in the Atomic Energy Act of 1954, as amended (68 Stat. 923) except as may be provided by existing agreements between the state and the federal government. ECL 27-0303(7)(*emphasis added*).

302. As with the statutory definition of "solid waste" for purposes of SWMF regulation in ECL §27-0701, the Legislature expressly requires that materials first be "discarded" before they are considered "waste."

303. And, the Legislature's definition of "regulated waste" lists explicit types of "waste." ECL 27-0303(4). But, the regulated waste must first meet the Legislature's definition of "waste."

304. The primary purpose of this statute is to authorize the Department to regulate the transport of "regulated waste." *See* ECL §27-0305(1) (stating that "no person shall engage in the transportation of regulated waste originating or terminating at a location in this state without a permit pursuant to this section.")

305. The Rule sets forth that "regulated waste means any of the following types of waste:

(a) Raw sewage, which includes portable toilet waste.
(b) Septage.
(c) Materials contaminated by raw or partially-treated sewage or septage.
(d) Sludge from a wastewater or water supply treatment plant.
(e) Industrial-commercial waste that originates at, is generated by, or occurs as a result of any industrial or commercial activity. Industrial-commercial waste includes, but is not limited to:
    (1) liquids such as acids, alkalis, caustics, leachate, petroleum (and its derivatives), and process or treatment wastewaters;
    (2) sludges that are semi-solid substances resulting from process or treatment operations, or residues from storage or use of liquids;
    (3) solidified chemicals, paints, or pigments;
    (4) the end-products or by-products of incineration or other forms of combustion, including ash;
    (5) foundry sand;
    (6) drilling and production waste;
    (7) navigational dredged material;
    (8) contained gaseous materials;
    (9) waste from commercial operations such as stores, offices, restaurants, etc.;

(10) construction and demolition (C&D) debris generated or transported by an industrial or commercial business;
(11) fill material generated by commercial or industrial activities; and
(12) friable asbestos-containing waste.

(f) Waste tires.
(g) Waste oil.
(h) Regulated medical waste (RMW), and wastes regulated under Subpart 365-3 of this Title.
(i) Source-separated household hazardous waste (HHW) transported from a collection event or site or by a commercial business.
(j) Infectious waste subject to Subpart 365-3 of this Title.
(k) Hazardous waste as defined in Part 371 of this Title.

6 NYCRR 364-1.2; *see also* 6 NYCRR 360.2(b)(227) (defining "regulated waste" as "wastes that must be transported by persons authorized under Part 364 of this Title and which are identified in section 364-1.2 of this Title.")

306. The Rule's definition of "regulated waste" again is inconsistent with the statutory definition. *See* ECL §27-0303(4), (7).

307. The Rule's definition of "regulated waste" ignores the statutory requirement that "waste" and "regulated waste" first be "discarded" before it becomes regulated waste. *Id.*

308. This improperly expands the Department's authority and is *ultra vires*.

309. Further, RUCARBs such as those managed by Plaintiffs-Petitioners are not discarded. They are deliberately collected for reuse. They have commercial value and will be 100 percent recycled in Plaintiffs-Petitioners' operations. *See* Meehan Aff. ¶24; Cook Aff. ¶22; DuBois Aff. ¶17.

310. It is also noted that "regulated waste" includes "construction and demolition (C&D) debris generated or transported by an industrial or commercial business," which means that C&D debris must be managed pursuant to a Part 364 permit or registration if generated by a business, but if the government generated such waste during construction, or transported it, the very same material would not require regulation.

311. Such distinction of the exact same material, used in the exact same way by these two actors, is arbitrary and capricious.

312. The Department may not expand the definition of "regulated waste" beyond that set forth by the Legislature and thereby expand the scope of its regulatory reach.

313. The Rule is accordingly *ultra vires* and arbitrary and capricious.

314. With respect to RUCARBs, the Department stated that "[f]or commercial solid waste and C&D debris, this will be the first time the transport of these waste streams will be subject to Part 364." DGEIS at 47. A copy of the DGEIS is attached hereto as **EXHIBIT 74**.

315. Trucks, now including trucks hauling RAP and RCA for reuse, will be required to register, add a registration number to each registered vehicle, and complete waste tracking forms for each truckload of C&D debris of 10 cubic yards or more.

316. As described above, the Department lacks statutory authority to regulate C&D debris where, as here, it is not "discarded." ECL §27-0303(4), (7).

317. The Department acknowledged this in *Beyond Waste*. In Section 3.12.3, Legislative Recommendations, the Department stated one such legislative recommendation was to "Expand the Waste Transporter Program to place specific requirements on transporters of MSW, recyclables, C&D debris and historic fill to...account for wastes that are not currently tracked." *See* Exh. 11 at 43 (emphasis supplied).

318. As there is no legislative authority for regulating the transport of C&D debris, the DEC cannot impose these requirements via regulation.

319. Notwithstanding this, the Department included a statement in the SDGEIS, the Final Generic Environmental Impact Statement ("FGEIS") and the Findings that "*Beyond Waste* recommends an expansion of the Waste Transporter Program to place specific requirements on

transporters of construction and demolition (C&D) debris and historic fill." Exh. 58 at 53; FGEIS, attached hereto as **EXHIBIT 75**, at 53; Exh. 59 at 36.

320. This half-truth not only contradicts the statement contained in the very document the SDGEIS references, but it ignores the Department's own conclusion that a statutory amendment would be necessary to expand the scope of wastes that the Department may include in the category of "regulated waste" subject to Part 364.

321. As with other provisions in the Rule, the Department's explanation of Part 364 creates confusion and potential inconsistencies.

322. In response to a comment inquiring about asphalt millings and the Part 364 requirements, the Department stated "[a]sphalt millings that meet the criteria of subparagraph 360.12(a)(3)(ix) are not considered a solid waste and are therefore not subject to Part 364. Contaminated asphalt and asphalt millings from a commercial or industrial site would require transportation in accordance with Part 364." Exh. 10 at 172; *see also Id.* at 174.

323. This leaves open for interpretation whether the BUD established at Section 360.12(a)(3)(x) is subject to Part 364, as well as whether trucking asphalt at a Part 361-5 facility, whether it meets a BUD requirement or not, would be regulated by Part 364.

324. This interpretation is also arbitrary and capricious as the material headed to a Section 360.12(a)(3)(x) asphalt manufacturing plant is the same material that would be headed to a Part 361-5 facility operated by Plaintiffs-Petitioners. If the material does not require regulation pursuant to Part 364 under the former, it is irrational to require the same material to be subject to Part 364 in the latter.

325. At least one county and some members of industry noticed this issue, commenting on the problems that would be generated in the construction setting by this rule, including the

trouble and cost of finding enough registered trucks, and the potential for trucks to be underloaded to evade the 10 cy limit "which will increase fuel emissions because you need to make more truck trips to move the same amount of material." Exh. 57 at 3; *see also* Exh. 32 at 3 (noting "construction is a 'feast or famine' type of industry. It is very common to encounter very short timeframes where an excessive number of trucks are needed on multiple jobs. When this occurs, it can be very difficult to find enough trucks without the added requirement of finding trucks permitted to carry solid waste."); Exh. 21 at 9.

Compliance with the State Administrative Procedure Act

326. Promulgation of the proposed Rule, the revised proposed Rule, and the adopted Rule was accompanied by a Regulatory Impact Statement ("RIS"), as well as a Consolidated Revised RIS, and ultimately, a Revised Consolidated RIS, respectively.

327. Promulgation of the proposed Rule, the revised proposed Rule, and the adopted Rule was accompanied by a Regulatory Flexibility Analysis for Small Businesses and Local Governments ("RFA"), a Revised RFA, and a final Revised RFA.

328. The Revised RIS includes a "Cost" section, which notes that C&D debris handling and recovery facilities, "the proposed regulation will result in some additional costs for regulated parties, including local governments." Revised RIS, a copy of which is attached hereto as **EXHIBIT 76**, at 42 (noting also additional costs "for transporting C&D debris" including "implementing the waste tracking system and registration and annual reporting requirements.")

329. However, the Department stated that the actual costs for a tracking system for each and every load of RUCARBs entering a C&D facility, at a rate higher than 500 tons per day, would include only "minimal administrative costs." Exh. 77 at 47.

330. The Department asserted the same views for the tracking requirement associated with Part 364 permits. *Id.* at 52-53.

331. As described in the Company Affidavits, the costs related to each of these tracking obligations would be substantially higher. Aside from the impacts to the road construction process by attempting to incorporate a tracking requirement for each and every truck, the sheer volume of documents generated will likely require that additional personnel be hired. *See* Meehan Aff. ¶56; DuBois Aff. ¶53.

332. The Revised RIS did not assess these impacts, and thus failed to provide any measure of the true cost.

333. The Revised RIS claims that "a small number" of RUCARBs reuse facilities, such as Plaintiffs-Petitioners herein, would be required to obtain a Part 360 Permit. Exh. 77 at 47.

334. As described at length above, numerous operators, handling vast quantities of material that is 100% reused, would either have to obtain a permit, pass the landfilling costs on to the taxpayers, or shut down their operations.

335. The Revised RIS assumes, with no supporting documentation whatsoever, that "[t]he estimated cost for applying for a Part 360 permit is between $20,000 and $50,000." *Id.* The Department also notes that "[t]his cost will vary significant based on the type, complexity, and location of the facility," and yet, includes no analysis, examples, or assessment of impact related to this assertion. *Id.*

336. The Revised RIS does not quantify the number of operations that could fall subject to this requirement, despite comments notifying DEC of numerous operators who would be impacted, and despite the Department's records that would show existing registered facilities with regulations who may be impacted.

337. As pointed out above, the regulated community anticipates this cost to be substantially higher, in the order of at least double the cost. *See also* Schmitz Aff. ¶¶45-47; Metcalf Aff. ¶¶55-57.

338. Plaintiffs-Petitioners and numerous other similar operators can reliably estimate these costs given that they already hold at least one, and often more than one, Department permit at each of their facilities.

339. The LoPinto Affidavit expects that the cost simply to get to a complete permit application is more than double the Department's estimate, ranging from $50,000 to $100,000.

340. The LoPinto Affidavit explains that, based on Mr. LoPinto's significant experience with permitting solid waste management facilities, that additional costs to complete SEQRA and potentially permitting hearings would increase that cost by $100,000 to $250,000.

341. Those permit proceeding involve not just substantial costs but often many months, or years, to obtain a permit. *See also* LoPinto Aff. at ¶¶77-87.

342. This cost and its impact on the regulated community was not evaluated in the Revised RIS.

343. The Revised RIS does not address the time it takes to obtain a permit, let alone the fact that all of the facilities must seek new permits at the same time.

344. The Revised RIS was issued after receipt of numerous comments to this effect from Plaintiffs-Petitioners and others.

345. The Department did not comply with its obligation to update its RIS with information regarding costs on the basis of it being "inaccurate or incomplete," at a minimum. SAPA §202-(a)(6).

346. Similarly lacking in compliance with SAPA is the statement in the Revised RIS that "the cost to the State lies within the Department, for implementation and administration of the regulatory program." Exh. 76 at 54.

347. This statement was made after the receipt of the NYSDOT and NYTA comments stating that a substantial cost to each agency was expected, and that a cost-benefit analysis should be prepared. *See* Exh. 14 at 1; Exh. 15 at 1.

348. The Department did not complete a cost-benefit analysis.

349. The Department did not even acknowledge these costs as part of its SAPA obligation to analyze the costs to the State. Exh. 76 at 54.

350. Plaintiffs-Petitioners also commented on this issue, noting that they perform work for NYSDOT and NYTA, and if the reuse of RUCARBs that occurs with all roadway construction were impeded, significant costs, including costs to the taxpayer, would be expected. *See* DuBois Aff. ¶¶20; Meehan Aff. ¶¶23.

351. The Department failed to address the substantial cost that would be incurred by at least two state agencies, which costs would be passed on to the taxpayers in the form of higher bidding costs. *See* Metcalf Aff. ¶26; Cook Aff. ¶21.

352. The same arguments apply with respect to the costs imposed on municipalities. Counties, towns and other municipalities similarly will experience increased bidding costs if the reuse of RUCARBs by Plaintiffs-Petitioners and other similar firms is decreased.

353. The Revised RIS does not address this substantial cost, despite comments from municipalities alerting the Department to this issue. *See* Exh. 17 at 1; Exh. 19 (Erie County letter) at 1.

354. The Final RIS contains the same flaws with respect to its analysis of costs to industry, the State, and to local municipalities, and accordingly also violates SAPA and is arbitrary and capricious. A copy of the Final RIS is attached hereto as **EXHIBIT 77.**

355. As stated above, after the conclusion of the comment period on the proposed rule, a Revised RFA, which is supposed to reflect comments received by the relevant stakeholders.

356. The Revised RFA does not do so.

357. The Revised RFA predicts that the revised proposed Rule "is not expected to negatively affect small business and local government." *See* Revised RFA, attached hereto as **EXHIBIT 78**, at 2.

358. This boilerplate statement ignores numerous comments from small businesses and local government stating that there would be significant negative impacts if the reuse of RUCARBs was restricted as proposed by the Rule. *See* ¶¶ 195-196, 275-276, *supra.*

359. The Revised RFA also states that the revised proposed Rule "will not impose any direct costs on small businesses or local governments." Exh. 78 at 3.

360. This too ignores the fact that the Department acknowledged that a permit for a part 361-5 facility would impose costs. As would the recordkeeping requirements. *See* Exh. 76 at 47, 52-53. The Revised RFA acknowledges this fact. *See* Exh. 78 at 4.

361. It also ignores the numerous comments submitted by local governments and small businesses stating that the excessive cost of complying with the revised proposed Rule would create a significant burden, if not cause the shutdown of businesses and significant costs to local municipalities. *See* ¶¶ 195-196, 275-276, *supra.*

362. The Revised RFA also states that the revised proposed Rule "appl[ies] to facilities that are currently subject to regulation and the proposed changes are not expected to significantly alter the operation or costs associated with those operations." Exh. 78 at 5.

363. The Rule itself as well as the Revised RIS and Final RIS make it clear that several alterations to RUCARBs reuse facilities are being imposed, and indeed, that such alterations to the current operations, including a tonnage and storage duration limitation, as well as tracking, are necessary.

364. These changes will impact small businesses and local governments. *See* ¶¶ 195-196, 275-276 *supra*.

365. Further, numerous comments were submitted that demonstrate that the Rule will significantly alter operations, which here, means substantially reducing the amount of RAP and RCA that is recycled and increasing landfilling, and that sizeable costs will be incurred. *See* ¶¶ 199-204, *supra*.

366. Both small businesses and local governments provided this feedback.

367. Finally, the Revised RFA identifies several categories of changes to the regulatory scheme included in the Rule. However, the Part 360 and Part 361 discussion leave out RUCARBs entirely, notwithstanding that over one hundred and twenty comments were submitted relating to this issue.

368. The Final RFA, issued with the Rule, contains each and every one of the above-identified statements. For the same reasons, the Final RFA violates SAPA. A copy of the Final RFA is attached hereto as **EXHIBIT 79**.

369. The Department's failure generally to properly identify and assess the regulatory burden placed on the RUCARBs community was noted by commenters. *See* Exh. 64 at 1 (stating

that the "supporting documents boast additional un-supported claims of no regulatory burden, and no impact on small business and no cost burden on the regulated community"); *see also Id.* at 5 (noting that the "supporting documents barely mention the significance of this product to NYS's recycling goals. It does not even make an attempt to explain the economics of the situation.")

370. Additionally, several commenters noted the Department's failure to properly complete its June Response to Comments and August Response to Comments. St. Lawrence County noted that

> The comments are organized only by topic with no information given on the commenter, nor were these indexed in anyway, making determination of whether or not a previously submitted individual comment was addressed nearly impossible. Furthermore, many comments were paraphrased or grouped together as "many commenters have expressed..." or "many commenters argued..." again obfuscating whether or not individual comments were addressed. In addition, many comments were arbitrarily isolated from what can only assume is a longer, more coherent comment, with which there is no longer any context, nor way to determine if the comment was indeed addressed or may be relevant to similar comments. Responses to these selectively extracted comments did not help to clarify questions with the proposed regulations. Exh. 68 at 1; see also New York State Association for Solid Waste Management Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 80**, at 1, which comments similarly.

371. Many comments identified the Department's failure to adequately assess the potential, and significant, costs of the Rule.

372. Among them were the NYSDOT and NYTA, which explicitly requested a cost-benefit analysis in their 2016 and 2017 comments.

373. The Department failed to provide this analysis, or indeed, any analysis of the impact to operators who reuse RUCARBs in the construction aggregate industry.

374. Many operators also commented that the Rule "will add a significant cost due to changes in operation as well as permitting and record-keeping costs," and "increasing the cost of millings will ultimately lead to an overall reduction in its reuse." Exh. 71 at 3; *see also* Cobleskill

Stone Products, Inc. letter dated July 17, 2017 attached hereto as **EXHIBIT 81**, at 3 (noting that anticipated permitting cost was significantly understated by the Department).

375. It is evident that the enactment of the Rule did not comply with SAPA. The Department failed to accurately identify, let alone quantify, the cost and impact to industry and to all levels of government. Worse, the Department received written comments from those entities noting these impacts and costs, and failed to acknowledge, let alone address them.

Compliance with the State Environmental Quality Review Act

376. The Rule, being an action carried out by a state agency, required compliance with SEQRA prior to final action by the Department.

377. The Department issued a DGEIS as part of the initial rulemaking in March 2016.

378. The DGEIS that accompanied the several hundred-page proposed Rule, which purports to regulate all manner of solid waste located across New York State, comprised all of 57 pages.

379. As one commenter aptly stated, this document "would not pass the muster of a review by the NYS DEC permitting staff of any Region within the state." Exh. 64; *see also Id.* at 5 (stating that the SEQRA documents do not "discuss the limited potential for environmental impacts" from RUCARBs, and they "summarily dismiss[] the situation and set[] the limits arbitrarily.")

380. The DGEIS asserted that "the Department has not identified any significant adverse environmental impacts that may result from the adoption of the proposed regulations." Exh. 74 at 1.

381. Instead of reviewing the environmental impacts to New York, statewide, resulting from the proposed Rule in its entirety, the DGEIS selectively focuses upon one, or at most a few,

issues related to various parts of the proposed Rule. The Department chose these issues without any input from the public.

382. There are no environmental studies included in the DGEIS, and, as it relates to RUCARBs, no quantifiable data or environmental information whatsoever is included.

383. The environmental setting for the action, which, according to the Department's SEQRA regulations, must include "a concise description of the environmental setting of the areas to be affected, sufficient to understand the impacts of the proposed action and alternatives," does not describe the environmental setting, instead focusing on "the prism of the regulatory landscape." *See* Exh. 74 at 8-10.

384. The DGEIS does not even describe how many solid waste management facilities are located in New York State, information of which the Department has unique access. And correspondingly, it does not describe the environmental setting (*i.e.*, location of any features of the environment across New York State) at even a high level, let alone the detail commensurate of an action changing the regulatory requirements for dozens, if not hundreds, of operating solid waste management facilities.

385. The assessment of potential environmental impact is limited, in most cases, to a mere 6-8 lines of text, with no supporting data. Conclusory statements such as the following, "Enhancement of the BUD program will provide more consistent and uniform procedures and regulatory criteria which will reduce the potential for materials to be mismanaged through the BUD program," abound. *See* Exh. 74at 14.

386. Absent is any identification or analysis of an impact to the environment, positive or negative, generated by the revisions to the BUD program. For example, if a particular BUD would reduce landfilling and thereby greenhouse gas emissions from trucking to the landfill, or if,

as here, a particular BUD would change the way commerce operates such that landfilling increased, or BUD operations changed, resulting in impacts from increased trucking, such impacts must be identified and assessed pursuant to SEQRA.

387. Entire sub-parts governing entire industries, such as many of the subparts in proposed 361, were given perhaps a page of analysis, in total. *See, e.g.* Exh. 74 at at 22-25 (covering subparts 361-1, 361-2, 361-3 and 361-4).

388. The analysis as it relates to RUCARBs and other materials characterized as C&D debris was a "generous" three page discussion. The Department asserted, with no data, studies, photographs or other substantiation, that "many areas of the State…have experienced significant illegal disposal of C&D debris," thus necessitating "additional criteria in the regulation to specify proper C&D debris management." Exh. 74 at 25.

389. As a fix, the Department proposed tracking these materials. *Id.* The DGEIS contains no discussion of the environmental impacts, positive or negative, associated with this requirement.

390. With no justification at all, the Department stated that it must impose a "throughput limit" on RUCARBs. *Id.*

391. As for the environmental impact of eviscerating the amount of RUCARBs material that can be feasibly reused across New York State, the DGEIS contains a generic and unsupported statement that "[p]rocessing of C&D debris can generate noise, dust and odors. It was concluded that processing of more than 250 tons per day of any C&D debris is likely to have some adverse impact on surrounding community and the environment." *Id.* at 25-26. The Department similarly asserted that "the additional requirements" on RUCARBs "should result in reduced processing of petroleum based asphalt materials in sensitive environmental settings." *Id.* at 26.

392. Left out of this statement, again, was any data, studies or other information demonstrating environmental impact, or even that any RUCARBs facilities are located in "sensitive environmental settings."

393. Also left out of this statement is the fact that Plaintiffs-Petitioners herein, and other operators reusing RUCARBs for asphalt, concrete and other aggregate are already extensively regulated, including permits from the Department pursuant to the Mined Land Reclamation Law, State Air Facility Permit, and State Pollutant Discharge Elimination System. These permits rigorously regulate and limit noise, dust and odors generated by these facilities.

394. Further, the vast majority, if not all, of these facilities will also have undergone extensive zoning review at the municipal level, which would similarly impose stringent conditions related to these issues to address the health and well-being of the community.

395. The same reasoning holds true for the conclusory statement that follows that "[c]urrent Part 360 regulations for C&D debris processing facilities that handle only RUCARBS or similar material have no restriction on the storage of unprocessed or processed material. This has led to facilities storing vast quantities of processed C&D debris for extensive periods of time, which may adversely impact surrounding communities." Exh. 74 at 26.

396. The DGEIS contains no supporting data, studies or other information for this conclusory position which impacts an already-highly regulated industry as it relates to Plaintiffs-Petitioners.

397. The New York Environmental Conservation Law requires that any solid waste regulations "be directed at the prevention or reduction of (i) water pollution, (ii) air pollution, (iii) noise pollution, (iv) obnoxious odors, (v) unsightly conditions caused by uncontrolled release of

litter, (vi) infestation of flies and vermin, and (vii) other conditions inimical to the public health, safety and welfare." NY ECL § 27-0703(2).

398. The DGEIS does not reference this statutory mandate.

399. Any passing reference to these environmental impacts in the DGEIS falls fatally short of a "hard look" at these issues.

400. The issuance of the revised proposed Rule in June 2017 included a SDGEIS, which, although exceeding sixty pages remains vastly insufficient to address the Department's SEQRA obligations. *See* Exh. 58.

401. As with the DGEIS, the SDGEIS included a "prism of the regulatory landscape" in lieu of an appropriate evaluation of the environmental setting. *See Id.* at 9-11. This includes a failure to so much as identify the number and scope of solid waste management facilities subject to the Rule.

402. The SDGEIS added nothing to the short shrift environmental analysis that was contained in the DGEIS as it relates to tracking requirements (Exh. 58 at 28-29), the need for "permitting thresholds" for RUCARBs (*Id.* at 29), and the need for a "daily tonnage" limits (*Id.* at 30).

403. This is despite the receipt of dozens of comments from Plaintiffs-Petitioners and other operators, as well as state and local government, warning that these conclusions were not supported, as well as notifying the Department that environmental impacts would increase as a result of the Rule. *See, e.g.* Exh. 32 at 4 (stating that "[n]umerous studies have documented that leachate or runoff from RAP storage in not a problem", and noting relevant studies).

404. Another operator requested, and was denied, any support for the assertion that "processing of C&D debris can generate noise, dust and odor" and thus a tonnage limit was

required, as the DGEIS contained "insufficient analysis, given the potentiality of shutting down a registered facility due to the time and expense to meet permitting requirements." Posilico Comment Letter dated September 13, 2016, attached hereto as **EXHIBIT 82**, at 15.

405. After the conclusion of the comment period on the revised proposed rule, the Department accepted an FGEIS on August 23, 2017. *See* Exh. 75.

406. The FGEIS does not comply with the Department's SEQRA regulations.

407. It states that "Public comments on the DGEIS...were solicited in both the summer of 2016 and 2017. The response to comments for both public comment periods are provided in separate documents, are incorporated into this FGEIS by reference are available upon request." Exh. 76 at 65.

408. The "response to comments" referenced are the June Response to Comments and the August Response to Comments.

409. However, the FGEIS and the June Response to Comments and the August Response to Comments violate SEQRA because none of those documents provide "copies or a summary of the substantive comments received and their source (whether or not the comments were received in the context of a hearing)." 6 NYCRR 617.9(b)(8).

410. Several commenters pointed out this failure.

411. Additionally, the FGEIS violates the SEQRA requirement that "[a]ll revisions and supplements to the draft EIS must be specifically indicated and identified as such in the final EIS." *Id.*

412. The FGEIS states that it "includes the revised draft GEIS," but it does not identify or indicate any changes made to the DGEIS or SDGEIS as part of the FGEIS.

413. The FGEIS carries forward the failings of the DGEIS and SDGEIS regarding the environmental setting, the conclusory and unsupported environmental impact analyses, tracking requirements, a tonnage limit, and a storage limit. *See generally Id.*

414. This is so, again, after the receipt of numerous additional comments regarding the environmental impacts that had not been analyzed, and indeed, that the Rule itself would result in significant adverse environmental impacts.

415. For example, an operator pointed out that the registrations and permit requirements would result in "contractors...moving RAP further distance contributing to pollution from trucks, increase[d] noise levels...minimizing the opportunity for those millings to be used locally." Exh. 54 at 7; *see also* Exh. 64 at 3 (stating that a term limit on storage is not necessary because "these materials are relatively inert and pose little to no potential to do environmental harm."); *See also* Beveridge & Diamond Comment Letter dated July 21, 2017, attached hereto as **EXHIBIT 83** (noting that "uncontaminated asphalt millings are a common BUD material, and their use in a wide variety of applications poses little or no risk to human or environmental receptors...since it is widely and commonly approved for use and reuse at or near the ground surface...").

416. One commenter noted that the DGEIS was inaccurate in its conclusory statement that "the 500 ton per day limit will only affect a small number of operations," noting that "the limitation will affect most blacktop operators, requiring them to comply with onerous and often irrelevant or impracticable permit requirements of the proposed regulations." Exh. 62 at 1. Indeed, "[t]he effect of the 500 ton per day limit will effectively decimate registered facilities from continuing to truly make a beneficial impact on the environment. NYSDOT will have to look for other, more costly alternatives for" the millings. *Id.*

417. Further, this commenter noted that RAP is "inert and do[es] not produce noxious odors, result in vector problems or similar types of concern as other C&D recycling facilities." *Id.* at 2; *See also* Exh. 81 at 2 (noting that Department's conclusory assertion that "unbound asphalt" can "impact environmental quality" is unsupported, as the materials do not separate even at high temperatures).

418. The Department issued a Findings Statement on or about September 5, 2017. Exh. 59.

419. The Findings Statement relies upon the insufficient "environmental analysis" in the DGEIS, SDGEIS and FGEIS.

420. The Findings Statement asserts that "[d]ue to significant concerns with groundwater impacts, etc. that have been raised related to management of C&D debris, the no action alternative was rejected." Exh. 59 at 22 .

421. However, the DGEIS, SDGEIS, and FGEIS lack any evidence of groundwater impacts related to C&D debris.

422. There are no studies, no data, not even a description of the nature of these impacts in these documents.

423. To the contrary, a member of the regulated community provided the Department with references to studies showing the opposite. *See* Exh. 32 at 4.

424. The Findings Statement also asserts that "[n]umerous complaints regarding negative impacts such as noise and dust have been received over the years related to facilities that receive only recognizable uncontaminated concrete, asphalt, brick, and soil." Exh. 59 at 23; *see also Id.* at 24.

425. However, the DGEIS, SDGEIS, and FGEIS lack any evidence of negative impacts related to noise and dust, or any complaints received.

426. There are no studies, no data, not even a description of the nature of these impacts in these documents.

427. The same holds true for the Department's assertion that additional regulations "should result in reduced processing of petroleum based asphalt materials in sensitive environmental settings." Exh. 59 at 23.

428. An additional failure to take a "hard look" exists in the statement that "[t]he impact of this unlimited and unregulated storage of vast quantities was evaluated and determined to be an issue...it was determined that the storage limits based on the reasonable storage volumes and capacity available at each facility is most appropriate and will adequately address potential adverse environmental impacts." This statement is utterly belied by the lack of any study, or even identification of the specific impacts the Department is referencing here, in the DGEIS, SDGEIS and FGEIS. Exh. 59 at 24.

429. Yet another unsupported finding and failure to take a hard look, for the same reasons, is the statement that "significant concerns" have been identified "about the need to expand the types of material permitted" under Part 364. Exh. 59 at 36.

430. The SEQRA record contains no studies, data or other information on this topic.

431. The SEQRA record also fails to substantiate the Department's boilerplate finding that it "has given due regard to the economic and technological feasibility of compliance and appropriately balanced those needs with actions that avoid or minimize adverse environmental impacts to the maximum extent practicable." Exh. 59 at 43.

432. Such a boilerplate conclusion, with no environmental data, studies or other information supporting it does not satisfy the Department's statutory obligation to "give due regard to the economic and technological feasibility of compliance therewith." ECL § 27-0703(2).

433. To the contrary, the record demonstrates that the Department ignored the significant economic concerns raised not just by the regulated private sector community, including Plaintiffs-Petitioners, but also the costs to state and local governments, as well as the taxpayers.

434. Overall, the DGEIS, SDGEIS, FGEIS and Findings Statement ignore the numerous comments submitted to them by parties who transport and reuse RUCARBs every day that, by restricting the reuse of RUCARBs for construction aggregate, additional and significant adverse environmental impacts would result.

435. This is a failure to take a "hard look" as required by SEQRA.

436. The Department even ignored comments pointing out that the SEQRA review contained only "un-supported conclusory claims of no impact." Exh. 64 at 1.

437. This is a failure to take a "hard look" as required by SEQRA.

438. Instead, the Department stated in the SDGEIS, the FGEIS and the Findings Statement that the "comments did not reveal significant potential negative environmental impacts from the rulemaking." Exh. 58 at 3; Exh. 75 at 4; Exh. 59 at 8.

439. The Findings Statement asserts that "[t]he Department carefully reviewed all public comments received during the two comment periods and these comments did not reveal any adverse impacts." Exh. 59 at 7.

440. Such statements are belied by the record, and illustrate the extent of the "rubber stamping" that occurred with respect to the Department's review of this statewide action.

441. Setting aside the extensive failure of the Department to identify relevant significant environmental impacts, and to address those impacts raised by the regulated community, the SEQRA record also contains statements that are consistent with Plaintiffs-Petitioners' comments.

442. As previously described, the Department asserted that regulation of RUCARBs is necessary due to unsubstantiated, generalized environmental impacts. And yet, the SDGEIS itself explicitly noted, with respect to proposed 6 NYCRR Part 360.14, that the very same RUCARBs handled by Plaintiffs-Petitioners for the same purposes as a governmental operator warranted an exemption from Part 360 in its entirety with respect to governmental operations. Exh. 58 at 19. Specifically, the Department states:

> A new exemption has been added for State highway and municipally owned transportation corridor generated construction and demolition debris disposal to ease burdens on government agencies and communities when rebuilding our critical infrastructure systems...the proposed revisions will ensure that facilities that pose no significant environmental impact will be exempt from regulation under Part 360 and the waste streams managed at the exempt facilities will not consume capacity in registered and permitted solid waste management facilities. *Id.*; *see also* Exh. 75 at 19.

443. As an initial matter, the Rule does not provide for an exemption for "State highway and municipally owned transportation generated construction and demolition debris disposal." *See* Rule at 6 NYCRR 360.14.

444. And, as described herein, the state and municipal construction work for infrastructure system is often times carried out by Plaintiffs-Petitioners and other similar companies across New York State.

445. If the material generated by these construction projects and reused for other construction work "pose[s] no significant environmental impact", then it is arbitrary for the

environmental review for the Rule to state that the same material does pose an environmental harm when used by the private sector.

446. Despite the generalized statements in the DGEIS, SDGEIS and FGEIS to the contrary, in the June Response to Comments, when asked about the tonnage limitation for a Part 361-5 RUCARBs facility, the Department stated that "[t]he subject material has low potential for environmental impacts and only the materials with the smallest potential for impact may be received, processed or sorted outside of an enclosed building." *Id.* at 201-202. Notably, the Rule allows RUCARBs to be stored outside of an enclosed building. 6 NYCRR 3601-5.4(a).

447. The Department also noted that these enclosure requirements "are more appropriate for demolition wastes and construction[] wastes that are more likely to impact human health and the environment if managed outside of an enclosed building." Exh. 10 at 103.

448. And, with respect to RUCARBs, the Department also acknowledges that the removal of several Part 361-5 "requirements for concrete, asphalt, fill material and similar wastes have taken the nature of those wastes into account." *Id.* at 104.

449. Further, the Department, in the August Response to Comments, noted that the requests for "stricter regulatory controls...were not accompanied by substantive evidence that the stricter regulations were required to address an actual environmental impact." *Id.* at 2.

450. This demonstrates that the conclusory statement in the Findings Statement that "significant concerns with groundwater impacts" were identified and warranted regulation of C&D debris, is not supported by the record. Exh. 59 at 22.

451. This also contradicts, and proves the lack of merit of the following unsupported statement: "[n]umerous complaints regarding negative impacts such as noise and dust have been

received over the years related to facilities that receive only recognizable uncontaminated concrete, asphalt, brick, and soil." Exh. 59 at 23.

452. As the Department failed to comply with SEQRA's procedural requirements, it violated SEQRA.

453. As the GEIS prepared in relation to the Rule fails to adequately identify environmental impacts, and provides no assessment of impacts, it violates SEQRA.

454. As the Findings Statement purports to rely upon the flawed GEIS, it violates SEQRA.

455. As the GEIS and Findings contain conclusory and unsupported statements that are contradicted by the Department's conclusions elsewhere in the record, they are arbitrary and capricious and violate SEQRA.

456. And, as the GEIS and Findings ignore comments from the regulated community identifying potential significant adverse environmental impacts, and in fact assert that no such comments were received, they are arbitrary and capricious and violate SEQRA.

AS AND FOR A FIRST CAUSE OF ACTION
(Usurping Legislative Function – "Solid Waste")

457. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "456" as if fully set forth herein.

458. The Legislature expressly defined "solid waste" for purposes of the Department regulating SWMF pursuant to the Rule. *See* ECL § 27-0701(1).

459. The Legislature did not authorize the Department to define "solid waste."

460. The Legislature only authorized the Department to regulate "solid waste management facilities."

461. The Rule leaves out a crucial element of the statutory definition of "solid waste," namely, that material is only "solid waste" if the material is discarded or rejected "as being spent, useless, worthless or in excess to the owner at the time of such discard or rejection." ECL §27-0701(1); 6 NYCRR 360.2(a)(1).

462. This element adds a threshold question to the determination of whether a material is "solid waste."

463. This threshold question was improperly removed by the Department, broadening the scope of materials regulated as "solid waste" far beyond that intended by the Legislature.

464. The Rule adds components to the terms "discarded or rejected" beyond those included or contemplated by the Legislature. *Id.* at (a)(2)(i), (ii) and (iii).

465. The Department emphasized its belief that a solid waste is determined by "its intrinsic characteristics" and whether it is "a byproduct," and indeed, the Department asserts that materials are a solid waste under this rubric "even if still on the premises of or in possession of the generator." Exh. 7 at 77.

466. This is in direct contradiction to the statutory definition of "solid waste."

467. Given the foregoing, the Department has usurped Legislative authority in determining the scope of "solid waste" and improperly increasing the scope of "solid waste" beyond what was intended by the Legislature.

468. As such, the Rule is *ultra vires*, contrary to law, arbitrary and capricious, lacking a rational basis, and should be annulled.

AS AND FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment – "Solid Waste")

469. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "468" as if fully set forth herein.

470. The Legislature defined the scope of "solid waste" for purposes of the Department's authority and the Rule.

471. In order to constitute solid waste, a material must first be discarded or rejected "as being spent, useless, worthless or in excess to the owner at the time of such discard or rejection." ECL §27-0701(1).

472. If a material is not "spent, useless, worthless or in excess," it does not become solid waste, and therefore, would not be subject to the Rule.

473. RUCARBs, including RAP and RCA, such as those managed by Plaintiffs-Petitioners are not discarded. They are deliberately collected for reuse. They have commercial value and will be 100 percent reused in Plaintiffs-Petitioners operations. *See* Clemente Aff. ¶22; DuBois Aff. ¶21.

474. The Department was alerted to this fact by the regulated industry during promulgation of the Rule. *See, e.g.* Exh. 9 at 1-2; Exh. 8 at 5.

475. The Department regulates RUCARBs such as those managed by Plaintiffs-Petitioners as solid waste, unless and until an exclusion qualifies.

476. Plaintiffs-Petitioners assert that these materials are not solid waste because they are not "spent, useless, worthless, or in excess." *See* Cook Aff ¶22; Schmitz Aff ¶22.

477. This constitutes a live and justiciable controversy.

478. Plaintiffs-Petitioners respectfully request a declaration that RUCARBs, including RAP and RCA, when collected and reused by Plaintiffs-Petitioners and similar operators, and used as a substitute for virgin material in construction aggregate, are not a "solid waste," as defined in ECL §27-0701, and thus, are not subject to the Rule.

479. Plaintiffs-Petitioners also respectfully request a declaration that that RUCARBs, including RAP and RCA, when collected and reused by Plaintiffs-Petitioners and similar operators, are not regulated by the Rule.

AS AND FOR A THIRD CAUSE OF ACTION
(*Ultra Vires* – Solid Waste Hierarchy)

480. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "479" as if fully set forth herein.

481. The Legislature established a hierarchy for the management of solid waste.

482. The hierarchy includes the following priorities to guide the programs and decisions of DEC and other state agencies:

a. First, to reduce the amount of solid waste generated;
b. Second, to reuse material for the purpose for which it was originally intended or to recycle the material that cannot be reused;
c. Third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled; and
d. Fourth, to dispose of solid waste that is not being reused or recycled, or from which energy is not being recovered, by land or other methods approved by the department. *See* ECL §27-0106(1).

483. The Department recognized this hierarchy in the recommendations and goals set forth in its solid waste management plan, *Beyond Waste*.

484. The Rule violates this hierarchy.

485. The Rule violates the goals and recommendations set forth in *Beyond Waste*.

486. The Rule, through its regulation of RUCARBs, such as those used by Plaintiffs-Petitioners herein, will restrict the successful reuse of these materials. *See* Meehan Aff. ¶¶20-24; Metcalf Aff. ¶¶23-28.

487. The Rule will result in operators sending RUCARBs to landfills to avoid the regulatory burdens imposed by the Rule. *See* DuBois Aff. ¶18; Clemente Aff. ¶19.

488. Increasing the volume of reusable materials that are landfilled is contrary to the Legislative hierarchy established at ECL §27-0106(1).

489. The Rule will result in operators reusing significantly less RUCARBs to avoid the regulatory burdens imposed by the Rule. *See* Schmitz ¶39; Meehan Aff. ¶41.

490. Decreasing the reuse of material for the purpose for which it was originally intended is contrary to the Legislative hierarchy established at ECL §27-0106(1).

491. Given the foregoing, the Rule is *ultra vires* and not in harmony with ECL § 27-0106 because it is counter to the statutory mandate that landfilling be decreased, and the reuse of solid wastes be increased.

492. As such, the Rule is *ultra vires*, contrary to law, arbitrary and capricious, lacking a rational basis, and should be annulled.

AS AND FOR A FOURTH CAUSE OF ACTION
(Arbitrary and Capricious – 500 Tons Per Day)

493. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "492" as if fully set forth herein.

494. The Rule limits the amount of RUCARBs that Plaintiffs-Petitioners may accept at their operations to 500 tons per day.

495. Numerous state and local governmental entities, and operators, including Plaintiffs-Petitioners commented in detail that limiting the acceptance of RUCARBs to 500 tons per day would decrease the reuse of these materials in construction aggregate. *See* ¶¶ 239-252, *supra.*

496. The volume of materials milled from state and local highways regularly exceeds 500 tons per day, and can be in the range of thousands of tons per day. *See* Cook Aff. ¶14; Metcalf Aff. ¶15-16.

497. In order to accept more than 500 tons per day, the Rule requires an operator to obtain a solid waste management facility permit. 6 NYCRR § 361-5.3.

498. Such a permit will take at least several months, and more likely, a few years to obtain, and will cost between $100,000 to as much as $500,000.

499. As such, operators notified the Department that obtaining a permit is not feasible, and it would be more cost effective to landfill the RUCARBs. *See* DuBois Aff. ¶18; Meehan Aff. ¶¶21.

500. Additionally, the cost of landfilling would, for governmental construction projects, be passed on to the taxpayer, as would the cost of increasing the amount of more costly virgin material in construction aggregate. *See* Clemente Aff. ¶21; Schmitz Aff. ¶21.

501. The 500 ton per day limitation in the Rule will therefore result in a reduction in the reuse of RUCARBs, and an increase in landfilling, which is contrary to the statutory solid waste management hierarchy. ECL § 27-0106(1).

502. For any RUCARBs that are not reused, the need for virgin raw material (rock, sand, gravel and others) would increase, which expedites the depletion of those resources.

503. Further, increasing landfilling and reducing reuse will impact the efficiency of construction work across New York State, as trucks will have to be directed to yet another location, a landfill, during the construction process. *See* Cook Aff. ¶¶15; Meehan Aff. ¶¶17.

504. This too will increase cost to the taxpayer.

505. The 500 ton per day limitation is contrary to the Department's own rubric to determine whether traffic impacts are significant.

506. Additionally, this limitation will increase environmental impacts.

507. Today, trucks leave a construction site carrying RUCARBs on their way back to a plant to obtain new asphalt or concrete. Few, if any, truck trips are generated beyond what would be required to supply the asphalt or concrete anyway. *See* DuBois Aff. ¶12; Schmitz Aff. ¶13.

508. If the material must instead be landfilled, separate trucks, beyond those going back to the plant, would have to travel from the construction site to a landfill, which could be located far from the project site. *See* Metcalf Aff. ¶¶15-16; Clemente Aff. ¶¶14-15.

509. Such a process will increase truck traffic and noise at the landfills, as well as greenhouse gas emissions from the additional truck trips. *See* Cook Aff. ¶¶15;32; Meehan Aff. ¶¶17-34.

510. Increasing the rate at which virgin raw materials are used, when valuable substitutes exist, violates principles of sustainability and increases environmental impact.

511. The Department failed to analyze these impacts as part of its SEQRA review or as part of promulgating the Rule, despite being notified of these issues.

512. The 500 tons per day limitation, and thereby the Rule, is arbitrary and capricious, not supported by substantial evidence, and lacks a rational basis, and therefore, the Rule should be annulled.

AS AND FOR A FIFTH CAUSE OF ACTION
(Arbitrary and Capricious – Storage Limitations)

513. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "512" as if fully set forth herein.

514. The Rule limits the storage of BUD materials, including any RUCARBs that may qualify as BUD materials, to 365 days. 6 NYCRR § 360.12(a)(3).

515. The Rule limits the storage of RUCARBs intended for reuse that have not been processed to 365 days. 6 NYCRR 361-5.4(f)(1).

516. The Rule, however, purports to allow the same BUD materials, if processed at a Part 361-5 facility, to be stored without time limit. *Id.* at (1)(iv).

517. Numerous state and local governmental entities, and operators, including Plaintiffs-Petitioners, commented in detail that limiting the storage time for RUCARBs to 365 days is not practical as the construction season is short, and the material needs to be available for the following construction season, and therefore, the limitation would decrease the reuse of these materials in construction aggregate. *See* ¶¶ 272-280, *supra.*

518. The volume of materials milled from state and local highways regularly exceeds 500 tons per day, and can be in the range of thousands of tons per day. *See* Clemente Aff. ¶16; Metcalf Aff. ¶¶15-16.

519. An operator such as Plaintiffs-Petitioners will reuse all RUCARBs they collect from their construction projects, as it is a valuable commodity.

520. As such, operators notified the Department that a storage limitation was not workable for this valuable material, and it would give the industry no choice but to landfill the RUCARBs. *See* DuBois Aff. ¶18; Meehan Aff. ¶21.

521. Additionally, the cost of landfilling would, for governmental construction projects, be passed on to the taxpayer, as would the cost of increasing the amount of more costly virgin material in construction aggregate. *See* Cook Aff ¶21; Schmitz Aff. ¶21.

522. The 365 day storage limitation in the Rule will therefore result in a reduction in the reuse of RUCARBs, and an increase in landfilling, which is contrary to the statutory solid waste management hierarchy. ECL § 27-0106(1).

523. For any RUCARBs that are not reused, the need for virgin raw material (rock, sand, gravel and others) would increase, which expedites the depletion of those resources.

524. Additionally, this limitation will increase environmental impacts.

525. Today, Plaintiffs-Petitioners and other similar operators gather RUCARBs at an existing quarry, asphalt plant or mine, and process them once a pile gathers enough size to warrant the cost of processing. This material is used directly in the production of new aggregate onsite. *See* Metcalf Aff. ¶21; Clemente Aff. ¶16.

526. If the material can only stay onsite for 365 days, it would be landfilled, which would generate truck trips to remove the material and bring it to a landfill, which could be located far from the Operator's facility. *See* DuBois Aff. ¶¶ 30-31; Meehan Aff. ¶¶33-34.

527. Such a process will increase truck traffic and noise at the landfills, as well as greenhouse gas emissions from the additional truck trips. *See* Schmitz Aff. ¶¶15-32; Clemente Aff. ¶15, 32.

528. Increasing the rate at which virgin raw materials are used, when valuable substitutes exist, violates principles of sustainability and increases environmental impact.

529. The Department failed to analyze these impacts as part of its SEQRA review or as part of promulgating the Rule, despite being notified of these issues.

530. The Rule is also arbitrary and capricious in that it is impractical to remove the "oldest" material at the 365 day deadline, as it is at the bottom of the pile and tracking loads of these materials is impractical.

531. The varying provisions in the Rule regarding BUD material create confusion in the regulated community, as they will not know how to treat materials that qualify for a BUD located at Part 361-5 facilities (to the extent BUD materials may permissibly be stored at a 361-5 facility) given the terms of 361-5.4(f)(1)(iv) and 360.12(a)(3).

532. The regulated community cannot meaningfully determine whether and how they are regulated by these two provisions.

533. The regulated community is subject to differing interpretations by the Department for purposes of permitting, exemptions and enforcement, and potentially, a court of law.

534. The regulated community could be subject to differing treatment of the same material at different locations.

535. The inconsistencies contained in the Rule do not provide fair notice to the regulated community of what is and is not permissible.

536. The regulated community is not afforded due process by these contradictory terms.

537. The 365 day storage limitation, and thereby the Rule, is therefore arbitrary and capricious, lacks a rational basis, is void for vagueness, is not supported by substantial evidence, and is violative of due process.

AS AND FOR A SIXTH CAUSE OF ACTION
(Arbitrary and Capricious – Inconsistent BUD & 361-5 Provisions)

538. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "537" as if fully set forth herein.

539. The Rule states that 6 NYCRR § 360.12, the BUD provisions, "applies to the use of certain wastes as effective substitutes for commercial products or raw materials as determined by the department. The materials cease to be solid waste when used according to this section. This section does not apply to materials that are being sent to facilities subject to regulation under Part 361 of this Title." *See Id.* at (a).

540. Section 360.12(c)(3) (viii), (ix), and (x) contain BUD provisions expressly related to RUCARBs, RAP and/or RCA.

541. Part 360.12(a) provides that any material that goes to a facility regulated by Part 361-5 cannot be considered a BUD material.

542. However, Part 361-5 contemplates the receipt, processing, and storage of BUD materials at a Part 361-5 facility. 6 NYCRR §§ 361-5.4(f)(1)(iv); 361-5.6(a).

543. According to Section 360.12(a), therefore, RUCARBs, RAP and/or RCA cannot utilize the BUD provisions.

544. The Department's responses during the rulemaking process did not alleviate these contradictory terms, instead, it provided contradictory guidance.

545. Complying with §360.12(a) and Part 360.12(c)(3)(viii), (ix) and (x), and Part 361-5 is not possible.

546. The contradiction in §360.12(a) creates confusion on the part of the regulated community.

547. They cannot be sure if the BUDs apply to RUCARBs because "RUCARBs" are specifically addressed in Part 361, and 360.12(a) states that materials that go to a 361-5 facility cannot utilize the BUDs.

548. They cannot be sure if Part 361-5 applies to RUCARBs because the BUDs so clearly reference the same material.

549. The regulated community cannot meaningfully determine whether and how they are regulated by these two provisions.

550. The regulated community is subject to differing interpretations by the Department, and potentially, a court of law, for purposes of permitting, exemptions and enforcement.

551. The regulated community could be subject to differing treatment of the same material at different locations.

552. The inconsistencies contained in the Rule do not provide fair notice to the regulated community of what is and is not permissible.

553. The regulated community is not afforded due process by these contradictory terms.

554. The Rule is therefore arbitrary and capricious, lacks a rational basis, is void for vagueness, and violative of due process.

AS AND FOR A SEVENTH CAUSE OF ACTION
(Arbitrary and Capricious – Disparate Treatment of Material)

555. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "554" as if fully set forth herein.

556. The Rule creates at least three regulatory regimes to govern the management of the same material, RUCARBs, RAP and RCA.

557. RUCARBs headed to a Part 361-5 facility are regulated. The facility must obtain a registration or permit, must limit the acceptance of RUCARBs to 500 tons per day or obtain a permit, and is subject to storage limitations and tracking requirements.

558. However, a BUD designation at 6 NYCRR §360.12(c)(3)(x) allows an "asphalt manufacturing plant" to receive these materials with no further requirements. No registration or permit is required, no tonnage limitations apply, and no tracking is required. However, storage is limited to 365 days.

559. Additionally, a facility owned by a municipality that generated the RUCARBs is completely exempt from Part 360, so it too would not require a registration or permit, no tonnage or storage limitations apply, and no tracking is required.

560. The same materials would be received at each facility, and processed in the identical manner to create the end product.

561. The apparent "dangers" of the RUCARBs are identical regardless of which of the three facilities they are sent to.

562. The only difference is the destination of the truck containing these materials.

563. To regulate the same material, used in the same manner to create new product, differently depending on the type of facility present at its destination is arbitrary and capricious, lacks a rational basis, creates regulatory uncertainty, and is otherwise violative of law.

564. The Rule should therefore be annulled.

AS AND FOR AN EIGHTH CAUSE OF ACTION
(Arbitrary and Capricious – Specification Requirement)

565. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "564" as if fully set forth herein.

566. The Rule includes two BUD designations that allow use of RAP and RCA in new aggregate, but only where that material "meets a municipal or state specification or standard for use" in aggregate or asphalt pavement. 6 NYCRR 360.12(c)(3)(viii), (ix).

567. There is no municipal or state "specification" for RAP or RCA.

568. These BUD designations included the "specification" requirement despite comments from the regulated community, including Plaintiffs-Petitioners, that there is no such specification.

569. These BUD designations were included despite comments from the regulated community, including Plaintiffs-Petitioners, that limiting reuse of RUCARBs to just municipal or state projects would reduce the amount of RUCARBs reused, and increase landfilling.

570. The inclusion of a "municipal or state specification or standard" in 6 NYCRR §360.12(c)(3)(viii) and (ix), and the Rule, is therefore arbitrary and capricious, lacks a rational basis, and should be annulled.

AS AND FOR A NINTH CAUSE OF ACTION
(Arbitrary and Capricious - SEQRA)

571. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "570" as if fully set forth herein.

572. The DGEIS prepared in relation to the Rule failed to take a "hard look" at the impacts resulting from the Rule. This includes:

a. It did not fully look at the impact of the Rule,
b. It did not examine the environmental setting,
c. It did not identify potential environmental impacts,
d. It did not assess the potential environmental impacts,
e. It did not include any environmental data, studies, records or information.
f. It did not comply with the Department's statutory obligation to evaluate certain impacts related to solid waste at ECL §27-0703(2).

573. The SDGEIS prepared in relation to the Rule also failed to take a "hard look" at the impacts resulting from the Rule. It suffers from the same defects as the DGEIS.

574. The SDGEIS fails to acknowledge or address numerous comments from the regulated community regarding significant adverse environmental impacts resulting from the Rule, including impacts such as increased trucking (to landfills), and increased greenhouse gas, as well as an increase in the use of virgin material instead of reuse of existing material.

575. The FGEIS prepared in relation to the Rule violated the procedural requirements of SEQRA, including the obligation to provide copies of the comments or identify the commenter, as well as to identify any new material within the DGEIS. 6 NYCRR § 617.9(b)(8).

576. The FGEIS prepared in relation to the Rule also failed to take a "hard look" at the impacts resulting from the Rule. It suffers from the same defects as the DGEIS and SDGEIS.

577. The FGEIS also fails to acknowledge or address numerous comments from the regulated community regarding significant adverse environmental impacts resulting from the Rule, including impacts such as increased trucking (to landfills), and increased greenhouse gas, as well as an increase in the use of virgin material instead of reuse of existing material.

578. The Findings Statement also fails to take a "hard look" as it relies upon the insufficient "environmental analysis" in the DGEIS, SDGEIS and FGEIS, and no environmental data, studies, or information is included to support the generalized conclusions regarding potential environmental impacts generated by existing RUCARBs management practices.

579. The Findings Statement and SEQRA review is violative of ECL § 27-0703(2), which requires that the Department give "due regard to the economic and technological feasibility of compliance and appropriately balance those needs with actions that avoid or minimize adverse environmental impacts to the maximum extent practicable." The SEQRA review ignores numerous comments advising the Department of significant economic concerns regarding the Rule.

580. The SEQRA review failed to take a "hard look" because it ignored the numerous comments submitted that demonstrated that the Rule would result in significant adverse environmental impacts related to the management of RUCARBs.

581. The SEQRA review instead rubberstamped the Rule and asserted that no significant potential negative environmental impacts from the Rule had been revealed by the rulemaking process.

582. The generalized assertions in the GEIS and Findings Statement are arbitrary and capricious because they contradict the Department's own statements elsewhere in the GEIS and the rulemaking.

583. The Department's failure to strictly comply with SEQRA's procedural requirements warrants annulment of the SEQRA review, and thereby the Rule, as arbitrary and capricious, violative of lawful procedure, lacking in a rational basis and is otherwise erroneous.

584. The Department's failure to take a hard look at the impacts resulting from the Rule warrants annulment of the SEQRA review, and thereby the Rule, as arbitrary and capricious, violative of lawful procedure, lacking in a rational basis and as otherwise erroneous.

AS AND FOR A TENTH CAUSE OF ACTION
(Usurping Legislative Function & Arbitrary and Capricious – Part 364)

585. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "584" as if fully set forth herein.

586. The Legislature has defined "regulated waste" for purposes of Part 364 of the Rule.

587. This definition requires that the "regulated waste" first constitute a waste. ECL §27-0303(4).

588. The definition of "waste" requires that the material first be "discarded." *Id.* at (7).

589. The Rule's definition of "regulated waste" does not match that authorized by the Legislature.

590. The Rule's definition ignores the requirement that the material must first be "discarded" to be subject to Part 364. 6 NYCRR § 364-1.2.

591. The term "discarded" adds a threshold question to the determination of whether a material is "regulated waste".

592. This threshold question was improperly removed by the Department, broadening the scope of materials included within the term "regulated waste" far beyond that intended by the Legislature.

593. Given the foregoing, the Department has usurped Legislative authority in determining the scope of "solid waste" and improperly increasing the scope of "solid waste" beyond what was intended by the Legislature.

594. The Rule purports to add RUCARBs to the definition of "regulated waste" in Part 364.

595. RUCARBs such as those managed by Plaintiffs-Petitioners are not discarded. They are deliberately collected for reuse. They have commercial value and will be 100 percent reused in Plaintiffs-Petitioners' operations. As such, they are not discarded.

596. Part 364 improperly distinguishes between waste "generated or transported by an industrial or commercial business," and waste that is not, requiring compliance with Part 364 for the former, and exempting other entities, such as governmental entities, from Part 364 when managing the same material in the same manner.

597. The Rule also expanded the categories of waste that constitute "regulated waste" beyond those authorized by the Legislature and thereby increased its regulatory reach beyond that contemplated by the Legislature.

598. The Department also created confusion regarding which types of RUCARBs reuse facilities must comply with Part 364.

599. As such, the Rule is *ultra vires*, contrary to law, arbitrary and capricious, lacking a rational basis, and should be annulled.

AS AND FOR AN ELEVENTH CAUSE OF ACTION
(SAPA Violations & Arbitrary and Capricious)

600. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "599" as if fully set forth herein.

601. The Regulatory Impact Statement prepared in relation to the Rule failed to comply with SAPA.

602. The costs to the regulated community, including Plaintiffs-Petitioners herein, were not adequately assessed, as:

a. The Department massively underestimated the costs to obtain a Part 360 Permit, the number of facilities affected, and the impact on the regulated community;
b. The Department failed to adequately assess the costs of the tracking requirements for RUCARBs imposed by the Rule.
c. The Department failed to address the costs to the State (and thereby the taxpayers) in the form of increased landfilling and thereby, increased construction costs resulting from the Rule.
d. The Department failed to address the costs to municipalities, who commented noting the same potential costs and impacts to their roadway construction programs.

603. The RIS contains all of these flaws despite numerous comments from the regulated community regarding these costs and impacts.

604. The RIS was not updated as required upon the receipt of information from the regulated community that demonstrated that the initial RIS was "inaccurate or incomplete." SAPA §202-(a)(6).

605. The costs to small businesses and local governments were not adequately assessed, as the RFA stated that no negative impact, or direct increased costs to these entities is expected, despite the receipt of numerous comments from the regulated community regarding these costs and impacts. It also erroneously ignored the changes to operations that would be required for RUCARBs management that would impact small businesses and local governments.

606. The Department's SAPA review failed to identify and assess the regulatory burden being placed on the regulated community, including Plaintiffs-Petitioners, despite receiving significant comments regarding this burden.

607. The Rule should therefore be annulled because of the Department's failure to comply with SAPA, and because it is accordingly arbitrary and capricious, lacking a rational basis, violative of lawful procedure and otherwise erroneous.

AS AND FOR AN TWELFTH CAUSE OF ACTION
(Arbitrary and Capricious)

608. Plaintiffs-Petitioners repeat and reallege each and every allegation contained in Paragraphs "1" through "607" as if fully set forth herein.

609. Each and every defect identified in the above eleven causes of action demonstrate that the Rule is arbitrary and capricious and should be annulled.

610. Taken together, the Department's expansion of the scope of "solid waste" that it is permitted to regulate; its enactment of regulations that violate the State's solid waste hierarchy; its enactment of a 500 ton per day tonnage limit and a 365 day storage limit; its inconsistent provisions

regarding the applicability of Part 360 and Part 361-5 (and the storage limit); its disparate treatment of the same RUCARBs material being processed and reused in the same manner; the Department's improper expansion of the scope of "regulated waste" subject to Part 364; the procedural and substantive violations of SEQRA; and, the numerous and varied SAPA violations, demonstrate that the Rule, *in toto*, cannot stand as a lawful enactment. It is too riven by contradictions and inconsistencies to be partly unwound, and rather must be rejected and discarded in its entirety.

611. The totality of all of these arbitrary and capricious, *ultra vires*, and unlawful acts is so significant that it warrants the annulment of the entire scheme as *ultra vires*, contrary to law, arbitrary and capricious, and lacking a rational basis.

WHEREFORE, Plaintiffs-Petitioners request an order and judgment pursuant to CPLR 3001 and CPLR Article 78 against the DEC Respondents as follows:

1. Declaring and directing that the Department of Environmental Conservation's Rule, which was effective November 4, 2017 was made in violation of lawful procedures, was arbitrary, capricious, *ultra vires*, and an abuse of discretion and therefore should be reversed and annulled;

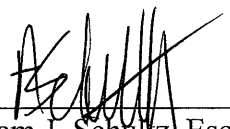
2. Declaring that RUCARBs, when used as a substitute for virgin material in construction aggregate, are not a "solid waste," and thus, are not subject to the Rule.

3. Declaring and directing that the Rule has no binding effect;

4. Granting Plaintiffs-Petitioners such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: January 22, 2018
Albany, New York

COUCH WHITE, LLP



Adam J. Schultz, Esq.
Alita J. Giuda, Esq.
Attorneys for Plaintiffs-Petitioners
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222
Telephone: (518) 426-4600

CORPORATE VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Davis S. Hamling, being duly sworn, deposes and says that deponent is President and CEO of New York Construction Materials Association, the corporation named in the within action; that deponent has read the foregoing Affidavit and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: My review of the Complaint, Affidavit, and other documents as it relates to Rule 360.

David S. Hamling
President & CEO
New York Construction Materials Association

Sworn to before me this
18 day of JANUARY, 2018.

Notary Public

NANCY L. STRANG
Notary Public, State of New York
Reg. No. 01ST6132501
Qualified in Schenectady County
Commission Expires 8/29/21

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.

STIPULATION AND ORDER

Index No. 00514-18
RJI No.

WHEREAS 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 (collectively, petitioners), by their attorneys Couch White, LLP, commenced this combined proceeding pursuant to CPLR article 78 and action for a declaratory

judgment by filing a Summons, Notice of Verified Petition, and Verified Petition and Complaint ("Complaint") with the Albany County Clerk on January 22, 2018; and

WHEREAS petitioners challenge newly-promulgated regulations adopted by defendant-respondent New York State Department of Environmental Conservation ("DEC" or "the Department"), known as Title 6 of the New York Compilation of Codes, Rules and Regulations ("NYCRR") Parts 360, 361, 362, 363, 364, 365, 366, 369, and amendments to 6 NYCRR Parts 621, 370, 371, 372, 373, and 374 (collectively, "the Rule"); and

WHEREAS, the Rule repealed and replaced the prior regulatory enactment located at 6 NYCRR Parts 360, 362, 363, 364, 369 and Subpart 373-4 ("Prior Part 360"); and

WHEREAS, pursuant to discussions with petitioners, the Department issued a public letter, dated March 1, 2018 (the "Letter," attached) and posted to the Department website, which allowed the Department to exercise its authority to use enforcement discretion as to portions of the Rule until May 3, 2019, or the date when an amendment to the Rule is promulgated, whichever is earlier; and

WHEREAS the Department has compiled and continues to update its Part 360 Series Clarifications to explain and clarify the Rule, available at https://www.dec.ny.gov/regulations/81768.html; and

WHEREAS the parties have reached a preliminary settlement in this matter; and

WHEREAS the parties intend to, in good faith, pursue a potential final settlement of this matter, and the parties reserve their rights as to that process; now

IT IS STIPULATED AND AGREED by and between the attorneys for petitioners and for the Department as follows:

1. The Department shall propose regulations to amend the Rule (hereinafter referred to as "the "Revised Rule") in compliance with the procedural and substantive requirements of the State Administrative Procedure Act, including all provisions requiring opportunities for notice and comment as well as public hearings; and

2. The Department, in consultation with petitioners, will continue to update its public Part 360 Series Clarifications, which will serve as guidance on the Department's official interpretations of the Rule and the enforcement discretion letter; and

3. The public Part 360 Series Clarifications relevant to this combined proceeding/action shall be binding until either a final judicial determination or until the effective date of the Revised Rule, whichever shall first occur; and

4. The return date for petitioners' combined proceeding/action shall be adjourned pending a status conference before this Court to be held on or about January 15, 2019; and

5. However, this shall not affect the rights of the parties to seek a conference before the Court to resolve any disputes arising out of this Agreement and/or discuss and resolve by further stipulation any issues that could be the subject of judicial relief or the Complaint; and the parties agree to attempt in good faith to so resolve any such issues prior to seeking judicial intervention; and

6. The Department shall maintain this Agreement, the attached Letter, and a link to the public Part 360 Series Clarifications on the Department's 6 NYCRR Part 360 website until either judicial determination of the combined proceeding/action or until the effective date of the Revised Rule, whichever shall first occur; and

7. Representatives of the Department will hold monthly meetings regarding the Revised Rule, the Rule, or Part 360 Series Clarifications, either in person or via teleconference, with representatives of petitioners beginning in May 2018 and continuing until the Department's issuance of the public draft of the Revised Rule;

8. This Court shall retain jurisdiction over this matter.

DATED: May 15th, 2018
Albany, New York

COUCH WHITE, LLP

By: _____
Adam J. Schultz, Esq.
Alita J. Giuda, Esq.
540 Broadway, P.O. Box 22222
Albany, New York 12201
Attorneys for Petitioners

DATED: May 15, 2018
Albany, New York

BARBARA D. UNDERWOOD
Acting Attorney General
State of New York

By: _____
Meredith G. Lee-Clark, Esq.

Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
Attorney for Respondents

SO ORDERED.

DATED: May 15, 2018
Albany, New York

Hon. Gerald W. Connolly
Acting Supreme Court Justice

NY Const. Materials Assn., et. al.

v.

NYS DEC et. al.

00514-18

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel
625 Broadway, 14th Floor, Albany, New York 12233-1010
P: (518) 402-8543 I F: (518) 402-9018
www.dec.ny.gov

MAR 0 1 2018

To Whom It May Concern:

This is to advise you, that subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, Part 361, Part 364 and Part 365 of the newly enacted Part 360 Series. The DEC will exercise this authority regarding the above provisions until either May 3, 2019 or an amendment to the present rule is promulgated, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced.

I. Materials used in cement, concrete and asphalt pavement.

On September 5, 2017, the 6 NYCRR Part 360 Solid Waste Management Facilities regulations were revised, replaced and enhanced, creating a new Part 360 Series. The revisions modified beneficial use determinations for recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock. Under the new Part 360 Series several pre-determined beneficial uses (BUDs) were created to deal with the reuse of these materials (6 NYCRR 360.12 (c)(3)(viii), (ix) and (x)). Pursuant to these BUDs these materials cease to be a solid waste when the material meets the requirements for the intended use.

The Department will utilize its enforcement discretion with respect to facilities subject to the requirements of 6 NYCRR 361-5 and for materials that are destined for and/or stored and maintained at these facilities under the control of the generator or the person responsible for the generation, prior to processing or reuse, in conformance with 6 NYCRR 360.12 (c)(3)(viii), (ix) and (x).

In addition, these materials (i.e., materials under the control of the generator or the person responsible for the generation which are destined for and/or managed prior to reuse under 6 NYCRR 360.12(c)(3)(viii), (ix) and (x)) destined for and/or managed at facilities subject to the requirements of 6 NYCRR 361-5 may be managed as a commercial product or raw material and are not subject to Part 360 or Part 361.

The transporters handling these materials (i.e., materials destined for a facility under the control of the generator or the person responsible for the generation which are destined for and/or managed prior to reuse under 6 NYCRR 360.12(c)(3)(viii), (ix) and

(x)) are also not subject to the otherwise applicable provisions of 6 NYCRR 360.4, 360.15, and Part 364.

Recognizable, uncontaminated concrete, asphalt, rock, brick and soil used for reclamation at a facility permitted pursuant to the Mined Land Reclamation Law, will not be subject to the otherwise applicable provisions of Parts 360, 361 and 364, if the material has been reviewed, approved and incorporated into the mined land reclamation permit issued to the facility. No fee or any form of consideration may be received by the operator for use of this material. Any material transported to a mine site for such reclamation purposes is subject to monitoring and enforcement by the Department to ensure no unapproved wastes are accepted or disposed of during mining and reclamation activities. The Department reserves the right to disapprove use of such materials if placement of these materials at a mine site may constitute an environmental hazard.

II. Waste tires used to secure tarpaulins.

The new Part 360 Series, which addresses the use of waste tires to secure tarpaulins in common weather protection practices, requires adjustments to better suit the needs of the agricultural community. The Department will utilize its enforcement discretion with respect to the enforcement of 6 NYCRR Subpart 361-6, as long as the use of waste tires to secure tarpaulins is done in accordance with the pre-determined beneficial use found at Part 360.12(c)(2)(iv) or BUD 1137-0-00, dated December 4, 2014, which permits the use of waste tires to anchor plastic film or other cover material for corn silage, haylage or other agricultural feeds if certain conditions are met.

III. Construction and demolition facility fill material sampling requirements.

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

IV. Storage Requirements for Regulated Medical Waste (RMW).

6 NYCRR 365-1.2(b)(8) prohibits storage of untreated RMW as follows: "RMW, except sharps, may be held in patient care areas for a period not to exceed 24 hours and at a laboratory or other generation area for a period not to exceed 72 hours, at which time the RMW shall be moved to an RMW storage area. Not-withstanding these time frames, RMW that generates odors or other evidence of putrefaction must be moved to a storage area as soon as practicable." Additionally, 6 NYCRR 365-1.2(b)(7) states "sharps containers must be removed from the patient care or use areas to a room or area designated for RMW storage when: the container has reached the fill line indicated on the container; the container generates odors or other evidence of putrefaction; or within 90 days of use, whichever occurs first."

Based on concerns raised by small generators (dental offices, etc.) the Department will exercise its enforcement discretion with respect to these provisions and will require that sharps and RMW containers be removed from patient care or use areas to a room or area designated for RMW storage when the container has reached the fill line indicated on the container, is otherwise filled, or the container generates odors or other evidence of putrefaction, whichever occurs first.

Thank you for your cooperation in this matter. If you have any questions, please call Richard Clarkson of the Division of Materials Management at (518) 402-8678.

Sincerely,

Thomas S Berkman
Deputy Commissioner
& General Counsel