

**New York City Brownfield Partnership**  
**Comments on New York State Department of Environmental Conservation’s**  
**Proposed Part 360 Revisions**  
**August 24, 2022**

The New York City Brownfield Partnership (the “NYCBP”) is a New York State nonprofit organization whose mission is to serve as a primary resource for information on brownfields and brownfields redevelopment in New York City, advance public awareness and understanding of benefits, opportunities, and best practices of brownfield redevelopment, promote excellence in brownfield redevelopment by honoring successful brownfield projects, support the education and training of brownfield professionals, workers, and students, and foster collaborative relationships among brownfield developers, property owners, government agencies, and community groups. Its membership includes the leading environmental, scientific and engineering practitioners, governmental agencies and community groups who regularly work on remedial investigation, remediation, and redevelopment projects throughout New York. The NYCBP created a Legislative/Regulatory Committee Part 360 Task Force (the “Task Force”) to comment on the New York State Department of Environmental Conservation’s (the “NYSDEC” or “Department”) Revised Proposed Regulations for Solid Waste Management Facilities (the “Proposed Regulations”).

The 6 NYCRR Part 360 Solid Waste Management Facilities Regulations were revised and replaced on September 5, 2017. Since that time, the NYSDEC has spent considerable time and effort introducing the public to its anticipated regulatory framework. The regulated community spent much of that time anticipating this regulatory structure and preparing to work within that framework. The Proposed Revisions, however, introduce new regulatory complexities that may be difficult or impossible to follow in practice – such as restricting the reuse of certain fill in an area to be known as the New York City Metropolitan Area Waste Impact Zone (the “NYCMAWIZ”) – which may result in less beneficial reuse with no articulable environmental benefit. To assist the NYSDEC in its revisions to reduce regulatory burdens in situations where protection of human health and the environment would not be impacted, the Task Force reviewed the Proposed Regulations and offers its comments, on behalf of the NYCBP, as set forth below.

**GENERAL COMMENTS**

While the stated purpose of the Proposed Revisions is to reduce the regulatory burden on those utilizing fill material throughout New York, we note that many of the Proposed Revisions impose procedural requirements that will impede the productive and environmentally beneficial reuse and transportation of fill material and have the unintended consequence of increasing the disposal of otherwise usable fill material into New York’s remaining landfills. The Summary of Regulatory Impact Statement indicated under ‘Needs and Benefits’ that the current changes to Part 360 furthers the environmental objectives of the State Solid Waste Management Plan. This Plan provides a hierarchy for material reuse and beneficial use is elevated above disposal. New York State Solid Waste Management Act (ECL 27-0106) which has been in place since 1987. It includes a four tier hierarchy to guide programs and decisions by NYSDEC and other state agencies. This

hierarchy lists the options and goals that should be followed to reduce waste in New York, which are 1) Reduce the amount of solid waste generated; 2) Reuse material for the purpose for which it was originally intended or to recycle the material that cannot be reused; 3) Recover in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled; and 4) to dispose of solid waste that is not being recovered, by land burial or other methods approved by the Department.

When the regulatory framework makes decisions regarding beneficial reuse unable to be made until the material is ready to be excavated or more complicated and variable, this will in turn greatly decrease the volume of material that will be targeted for reuse and will increase the volume that will be transported long distances out of New York and into landfills. Beneficial use within New York State for material generated in New York supports the Solid Waste Management Act and significantly reduces the negative consequences of long distance transportation, including CO<sub>2</sub> and particulate emissions, impact on roadways and filling unnecessary landfill space. In comparison to the current regulations (See Parts 360.12 and 13, which support and encourage material generated outside of New York City to be reused without testing provided certain criteria are met), the current revised regulations appear to significantly complicate reuse.

#### New York City Metropolitan Area Waste Impact Zone

The NYCMAWIZ includes a very large and discontinuous region within New York State with boundaries that are visible on a large scale map but are not readily identifiable on the ground. While there are digitized New York City watershed maps on line revealing drainage patterns, tributaries, topography and connectivity to a chain of water bodies, clear watershed boundaries are not defined leaving contractors bidding on construction projects and professionals working on materials unclear as to whether a property is within the NYCMAWIZ. Requiring testing of material in this geographic area in order to determine if material meets any of the five new categories of fill material prevents the ability to use fill with any reasonable certainty and will lead to transportation of additional material significant distances out of State. The New York City Watershed is already managed and regulated by New York City Department of Environmental Protection (“NYCDEP”). All construction within the impact areas of the reservoirs and connecting infrastructure is already tightly managed and regulated by NYCDEP to protect the watershed. Placing a discontinuous umbrella over the varied watershed areas and creating requirements that make decisions regarding ability to beneficially reuse material will encourage project owners and design teams to opt for out of state landfilling of material previously allowable for reuse or will at a minimum require transportation of material out of State increasing greenhouse gas emissions (GHGs) in order to protect against costly change orders. This will increase fossil fuel consumption, damage and increase wear on roadway systems – all at additional taxpayer cost. We strongly discourage this limitation on reuse of material in the NYCMAWIZ. Existing enforcement mechanisms are more than sufficient to discourage illegal dumping and improper material handling in the NYC Watershed.

## SPECIFIC COMMENTS

<p>360.12(c)(2)(ix) (b)(3)/Page 56</p>	<p>We request that NYSDEC clarify whether it is the Department’s intent that material “received at the location of use” in the New York City (NYC) Watershed, Westchester County, etc. must be used in a specific way (grade adjustment, raising surface elevation, and must be placed above the seasonal high groundwater table, etc.)? Many construction sites are dewatered when excavations are backfilled. Accordingly, the restriction to place material above the seasonal high groundwater table (even for F1 soils) seems prohibitively /unnecessarily restrictive.</p> <p>In addition, paragraph (2) at the bottom of page 55 states “Any fee or other form of consideration for receipt of the material is prohibited.” We note that fill material brought into a NYC construction project is generally paid for, as is fill paid for outside of NYC but within the New York City Metropolitan Area Waste Impact Zone (NYCMAWIZ). We request that the NYSDEC clarify.</p>
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<p>360.13(b)(2)(ii)/ Page 66</p>	<p>Fill Type 2 that is generated within the NYCMAWIZ appears to only qualify as a pre-determined beneficial use determination (BUD) when it is delivered to the site. This requires all material to be managed as regulated waste until delivered. How does that impact the management of the fill prior to delivery? How will this material be manifested during transport or as regulated solid waste? We suggest regulatory language that provides that “All pre-determined BUD material to be delivered for reuse is exempt once the determination is made.”</p>
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<p>360.13, (b)(1) (i) and (ii)/Page 76</p>	<p>Please provide the rationale behind (i) and (ii) where a distinction is made between F1 material generated outside or inside Nassau and Westchester County, and in each case, the material ceases to be solid waste at a different point, either once the determination is made or once delivered to site of reuse.</p>
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360.13, (b)(1) (iii) Page 76	Significant sources of native material are continually being identified and excavated within NYC. Indicating that F1 material cannot be generated within NYC is counter-productive to the opportunity of beneficial reuse as stated in the New York State (NYS) Solid Waste Management Plan. Accordingly, we recommend a revision to add a second category to F1 material. This category would be supported with material generated within NYC that has been adequately tested and characterized as containing no construction and demolition (C&D) material (recognizable asphalt, concrete, brick or other manmade material).
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360.13(b)(3)/ Page 76	<p>We request that NYSDEC clarify whether Fill types 3, 4 and 5 are regulated solid waste for transportation and manifesting requirements.</p> <p>Are Fill types 4 and 5 precluded from reuse in the Watershed, Nassau and Suffolk, and Westchester counties? Further, there is no provided definition of “locality”. We request the NYSDEC clarify to prevent confusion on construction project documents.</p>
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360.13(b)(3) Page 76	<p>This Section describes the exemption for F3-5 material. It appears that following testing and physical evaluation, this material can be taken anywhere in New York State with the exception of F4, which cannot exceed Protection of Groundwater (GW) Soil Cleanup Soil Cleanup Objectives (SCOs) in Nassau or Suffolk as per the table. However, footnotes (1) and (2) further restrict the reuse of F4 material in the NYCMAWIZ. The proposed regulations go back and forth listing the NYCMAWIZ in certain places and the counties in others, or a single county is eliminated.</p> <p>If these regulations are intended to encourage reuse pursuant to the NYS solid waste hierarchy, why is F4 and F5 not allowed to be reused at all within the entire NYCMAWIZ with the exception of NYC? There are significant inconsistencies in the use or exemption requirements for the 5 fill categories, where they are exempt, where they can be reused and under what scenario they can be reused. We recommend that only one new section in the regulations be dedicated to the five fill categories and to define when and where each fill category can and cannot be reused with the goal of reusing as much of all the fill categories as possible to achieve the overall solid waste hierarchy goal of avoiding landfilling at the few remaining landfills left in NYS.</p>
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364-2.1(b)(12)(i)-(iii) Page 5	This Section lists the F soil types that are not exempt from Part 364 Transportation requirements. The way this is presented may lead to confusion, for example, subparagraph (a) states that F1 material within NYC, Nassau, Suffolk and Westchester Counties is listed. This is a unique subset of the NYCMAWIZ. However, this F1 material excludes the NYC Watershed, whereas subparagraph (b) states that F2-5 material is excluded from the exemption inside of the NYCMAWIZ (only difference is adding the watershed) and subparagraph (c) excludes F4 and F5 outside the NYCMAWIZ. We request that the NYSDEC clarify.
364-2.1(13) Page 5	Similar to the comment above, why is material now granted an exemption under the regulations required to be transported and documented as regulated solid waste in portions of New York? Concrete, asphalt and millings, brick and rock can be transported upstate all around the upper watershed areas with no Part 364 documentation as exempt material, but when it crosses into the upstate watershed it is required to be covered under the Part 364 requirements. This will be extremely complicated to manage and regulate. This is likely to lead to additional out of state disposal. A similar condition in Long Island exists where material cannot be used for grade adjustment but must be transported as regulated material. We request that the NYSDEC clarify.

General C&D and Reuse

360.12(c)(2)(x) /Page 56	We request clarification as to whether this section is applicable to bricks, concrete and asphalt generated onsite.
360.12(c)(ix)(b) (5)/Page 56	“The user must notify the appropriate Department regional office if the use is greater than 2500 yards.” We request clarification as to the form upon which the notification must be made and the email address, by region, to which the form should be emailed.
360.12(c) (5)/Page 64	We recommend that the NYSDEC provide a form for this activity for clarity.
360.12(d) (8)/Page 60	We recommend that the NYSDEC provide a form for this activity for clarity.
360.12(c)(1)(a) Page 59	We recommend that the NYSDEC provide specific examples and further elaborate as to how material ceases to be a solid waste.

<p>360.12(c)(2)(ix) Page 61</p>	<p>We request clarity as to the additional restrictions for reuse of not only concrete, asphalt, brick, but also F1, F2 and F3 fill, including whether these materials can be reused in NYC, Nassau County, Suffolk County, Westchester County and the NYCMAWIZ. We also request clarification as to what type of recycled concrete aggregate (RCA), asphalt and brick are allowed in all other areas of the State other than the exempt area.</p> <p>Subparagraph (2) in this section states that material ceases to be a waste when used in the manner listed, but is F1-3 material still a waste in the excluded areas? If so, how is material allowed to be reused in these areas and if it cannot be reused, where does NYSDEC propose material from these excluded areas to be reused/disposed?</p>
<p>360.12(c)(2)(ix) (4), (5) Page 61</p>	<p>We request clarity regarding the notifications required under this section. “The user must notify the appropriate Department regional office if the use is greater than 2500 yards.” Please clarify when this notification should be made, i.e. after the final importation, and what type of notification and submission is appropriate? Please also clarify what method of communication is required - an informal telephone call, email or formal submittal.</p>
<p>360.12(c)(2)(x) Page 61</p>	<p>Please clarify whether recycled material listed in this section may be used in the excluded counties and the NYCMAWIZ, under road surfaces? Please also clarify whether this exemption is Statewide or are the restrictions in this section excluded from reuse in these areas?</p>
<p>360.12(d)(4)(vi) Page 67</p>	<p>For the submission of data in a Case Specific BUD petition, this section indicated heavy metals must not be above the residential and Protection of Groundwater soil cleanup objectives in Part 375-6.8(b). However, NYSDEC already has significant data from numerous investigations throughout the State that background concentrations of heavy metals exist throughout NYS in excess of Protection of Groundwater. We recommend that land use play a role in these regulations as it does in the Brownfield Cleanup Program (BCP).</p>

<p>360.13(b)(1)(i) - (iii) Page 76</p>	<p>This Section provides initial waste cessation descriptions for F1 material. In general, the Fill Type 1 material is identified with several different distinctions that will make using this classification, applying it to reuse opportunities and ensuring that the generation location and reuse location meet the requirements very complicated. Subparagraph (i) discusses F1 material generated outside Nassau and Westchester counties after the determination is made, subparagraph (ii) discusses F1 material generated within Nassau and Westchester once it is delivered for reuse, and subparagraph (iii) states F1 material cannot be generated within NYC. Clarification is needed as to why are Nassau and Westchester Counties treated differently than Suffolk and why is there no F1 material in NYC. This treatment suggests that F1 may be generated in those two counties, but it is not exempt until it is reused. Effectively the same F1 material generated in different parts of the State is either exempt from being a solid waste at the point of generation or only at the time it is reused except for NYC where the NYSDEC has concluded it does not exist at all. The designation in NYC should allow for the identification of F1 fill in NYC following testing and that it meets the requirements of Table 6.8(a) (Unrestricted SCOs).</p>
<p>360.13(b)(2)(i) - (ii) Page 76</p>	<p>This Section provides the exemption of F2 material. Clarity should be provided as to why material tested and found to have met the F2 criteria generated within the NYCMAWIZ, has to be transported as regulated material and only become exempt at the point if reuse before it is exempt.</p>

NYC Clean Soil Bank

<p>360.12(c)(3) (xiii) Page 57</p>	<p>The NYC Clean Soil Bank soil has received an exemption in this section</p> <p>(3): The following ceases to be waste when the material meets the requirements for the intended use identified in this paragraph.</p> <p>(xiii) “excavated material meeting specifications of and used pursuant to a municipal soil reuse program approved by the Department and administered by the municipality under an agreement with the Department.” We request clarity as to whether other NYC agencies could obtain an exemption similar to the Clean Soil Bank for clean fill it generates from other construction projects.</p>
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<p>360.13(c)(1) and (2)</p> <p>Page 76</p>	<p>We note that the paperwork process required in this section is not significantly different from a Case Specific BUD. It is unreasonable to think that projects can be bid and expected to have submittals delivered to the Department for review and comment before material can be moved. This will create large scale, out-of-state disposal of fill, which can be built into a budget and schedule but will increase the cost to construct projects in NYS. We recommend the inclusion of specific criteria that must be met, sampling, etc. and when that information is generated and material meets the criteria, it is then exempt and may be moved and reused. If the Department cannot create a procedure that can be followed with certainty and submissions are always required, then movement of all fill in NYS is essentially following the onerous a Case Specific BUD process, which will significantly slow down projects.</p>
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Asbestos

<p>360.13(e)(2)(ii)</p> <p>Page 78</p>	<p>The requirement to have a NYS Department of Labor (NYSDOL) certified asbestos inspector present during a soil sampling investigation so that a determination can be made that asbestos-containing material (ACM) is present or not in the soil is onerous and is typically not a requirement. As drafted, this new requirement is not limited to only building demolition material but also for all soil and fill handling. ACM content in soil/fill has a very specific determination, which is 1% by weight. ACM will not be present in quantities in the ground sufficient to meet this definition unless there is approximately 30 pounds of asbestos per cubic yard of soil. Therefore, it is only in rare instances when asbestos is present at this level in fill so requiring an inspector on every site is likely unnecessary.</p> <p>Furthermore, we request that the Department clarify whether it wants asbestos analysis of the fill that contains suspect ACM, or the actual suspected ACM. We note that even if ACM is contained within a building, it should not be presumed that there is a nexus to the soils underlying that building. Asbestos is a solid, not a vapor or liquid and is incapable of penetrating into soil without purposeful mixing.</p>
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Beneficial Use Tables 1 and 2

<p>TABLE 2: FILL BENEFICIAL USE  Page 79</p>	<p>Fill Type 3 – We request clarification as to what specifically constitutes “de minimis”. We suggest a revision would include the following language, De minimis is intended to mean that during excavation, material does not contain pockets or layers of brick, concrete or other non-soil constituents and only contains soil. Individual pieces of brick or concrete, etc. that are above this material that fall in the excavation are considered for this reference to be “de minimis.”</p>
<p>TABLE 2: FILL BENEFICIAL USE  Page 80</p>	<p>Fill Type 3 is the same as F2, regarding chemical quality, which means it is “clean.” Therefore, we request that the NYSDEC provide clarification as to why F3 must be covered by F1 or F2 if placed on residential property.</p> <p>We recommend that the Department consider F3 fill for reuse without F1 or F2 cover if the de minimus amount of debris is pre-screened from the material or on commercial and industrial sites.</p> <p>We further request clarity with respect to the reference to “commercial soil” as it relates to the use of F3 Fill on residential property as well as the Part 375 Regulations.</p>
<p>TABLE 2: FILL BENEFICIAL USE Footnote 1/pg. 71)</p>	<p>Currently, the non-soil constituents specifically excluded are materials that readily degrade or produce odors. We recommend expanding the definition to provide additional examples of what would not be acceptable (e.g., bricks, concrete debris/asphalt greater than a specific size), as applicable.</p>

<p>360.13(c) Table 2 Page 79-80</p>	<p>As noted above, F1 material cannot be generated within New York City under these draft regulations and the F1 definition. Category F1 does not require testing but this category of soil, if tested, would likely need to meet the same chemical quality as the former General fill category (Residential SCOs in Part 375-6.8[b]). Since there is soil in NYC that would meet these SCOs if tested, one addition to the F1 category (or addition of a sub F1 category) that would drastically increase the opportunity to reuse soil, would be to include a NYC soil-only category for material that has been fully tested in accordance with Table 1 in 360.13 and meets all parameters of Part 375-6.8(b) Residential and Protection of Groundwater (POGW) SCOs. This new or subcategory could be added as a pre-determined classification, allowing it to be reused without having to prepare and present a case specific BUD application. Projects within NYC often generate significant volumes of deeper native clean soil in order to create multiple basement levels. Projects generating over 10,000 cubic yards of material, which meets the current General Fill residential and POGW SCOs, or even better native clean soil, are very common. Under the current proposed regulatory categories, this material can only be reused under Case Specific BUD applications. Construction projects do not have schedule flexibility to assemble this information and wait for NYSDEC review and comment and DEC does not have staff to respond under active construction schedules. Excavation is quite often the initial effort on a project and time/schedule do not have this type of flexibility. If this category can be incorporated into regulations, it can also be added to project specifications allowing decisions to be made early and to capture this usable material rather than unnecessarily shipping it out of State.</p>
<p>360.13(c) Table 2(4) Page 79</p>	<p>Notes associated with Table 2 include a restriction that payment or any form of compensation cannot be received for the reuse of F3-5 material. Payment often includes transportation and trucking. We recommend that this note should be revised to indicate that payment for transportation of fill is allowed. The current language suggests that even trucking costs cannot be paid and trucking of fill which is often equally as costly as the fill material itself, and it is unclear why the generator should have to pay this cost if the receiving site is willing to pay to ship the material to their site. Fill material generally has a cost associated with it, especially when it is required to meet engineering specs.</p>

<p>360.13(c) Table Footnotes (3) Page 79</p>	<p>Footnote 3 requires placement of fill within 365 days and after that, prohibits use. We recommend that this be expanded to allow material to be delivered to construction projects for use as backfill as long as the construction project is continuing. If a project is halted or delayed, an extension request should be able to be submitted to the Department particularly if project schedule is greater than 365 days provided all dust and soil erosion control requirements are being met until material is reused. This would open additional opportunities for reuse where material can be identified for reuse and staged to allow flexibility rather than having to find material when it is needed. The larger time period would assist specifically in the reuse of soil within NYC, where multiple agencies coordinate project, soil availability and staging to meet project schedules that often do not match up exactly.</p>
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Emerging Contaminants

360.13(d) Table 1 Page 78	<p>Table 1 lists analyses that are in the current New York Codes, Rules and Regulations (NYCRR) 375-6.8(b) tables. Those parameters are currently being recommended for revision and will potentially be expanded to include a number of all new parameters referred to as Emerging Contaminants (ECs). These compounds have very little history with regard to testing in New York and many laboratories are unable to analyze for them for multiple reasons (equipment costs, EPA methods not final, etc.). EPA is also adopting a new draft methodology (EPA Method 1633) which will double the number of compounds from 21 to approximately 40, but which is not currently a validated methodology and is under review and modification. Currently, NYSDEC lists only two compounds as having new SCOs, and the remaining 19 do not have any proposed SCOs. When the new Method 1633 is included (September 2022), there will be 40 compounds being reported, with only two compounds having part per trillion limits and possibly even lower levels. The sources of these compounds are still available in the marketplace and are ubiquitously re-contaminating all property from rainwater deposition, meaning they are being continually added to the environment without restriction. If the Part 375 table is adopted and applied to construction projects, fill material will be required to be tested for the full list of ECs, it may become common that soil which has no history of impacts can contain trace concentrations of these compounds at the part per trillion level, making the soil unable to be reused and requiring disposal. EPA has recently completed a study indicating unacceptable levels of ECs are present in rain which could impact virgin soil or soils in rural areas. Given the current lack of information, complete availability of these compounds in the marketplace, draft EPA methodology and the very recent discussion from EPA to lowering the allowable levels to part per quadrillion (which is far below any laboratory detection capability using the current EPA methods), it does not seem to be prudent to add these analyses to the sampling requirements at this time. Such an addition could come in the future when more realistic standards are created for these compounds, which will hopefully start to be restricted in the marketplace. In addition, several F classifications (F3, 4 and 5) are all required to be under impermeable surfaces, transportation corridors and above seasonal high-water table, making their potential to contribute to any groundwater in the vicinity extremely difficult.</p> <p>We also recommend that these compounds should not be added for fill material reuse.</p>
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360.13(e) (2)(i)	<p>We request that NYSDEC note that these contaminants will not be applied to the F2-F5 fill types, otherwise, their inclusion will generate tremendous volumes of contaminated soil and make management of the Part 360 program unwieldy and generate unnecessary contaminated soil that will be sent out of state.</p> <p>Accordingly, we recommend the addition clarifying language as follows,</p> <ul style="list-style-type: none"><li>• The Emerging Contaminants (PFOS and PFOAs and 1-4 Dioxane) found in Part 375-6.8(b) soil cleanup objective table under the Semi-Volatile Organic list will not be applied to the solid waste program sampling requirements unless these sites are regulated under Part 375 Brownfield or Superfund programs.</li></ul>
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