

## SUMMARY OF EXPRESS TERMS – 6 NYCRR PART 350

### FOOD DONATION AND FOOD SCRAPS RECYCLING

This rulemaking adds a new 6 NYCRR Part 350 Food Donation and Food Scraps Recycling law to set forth the requirements of Title 22 of Article 27 of the Environmental Conservation Law.

Subpart 350-1 provides the general provisions that apply to the Part including purpose, exemptions, prohibitions, definitions, inspection, and severability. In accordance with the law, the exemptions include cities with a population of one million or more, hospitals, nursing homes, adult care facilities, and elementary and secondary schools.

Subpart 350-2 outlines the requirements that apply to designated food scraps generators. The Subpart outlines how designated food scraps generators are determined and the requirements for those generators. The requirements include the need to donate excess food, to recycle food scraps if an organics facility is available, and annual reporting. The Subpart also includes a temporary waiver provision for generators that can demonstrate a need to be excluded from the requirements of the law.

Subpart 350-3 clarifies that the lists of generators, organic recyclers, and transporters will be maintained by the Department.

Subpart 350-4 outlines the requirements that apply to transporters, organic recyclers, transfer facilities, landfills, and combustion facilities. These requirements mandate that once the food scraps are separated by the generator they must be ultimately recycled and not disposed.

Revised Express Terms

A new Part 350 is being added as follows:

**PART 350**

**FOOD DONATION AND FOOD SCRAPS RECYCLING**

Statutory authority: Environmental Conservation Law title 1 of article 1; title 3 of article 3; title 22 of article 27, and title 27 of article 71.

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## **SUBPART 350-1**

### **GENERAL**

#### **350-1.1 Purpose and Applicability**

#### **350-1.2 Definitions**

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#### **350-1.4 Prohibitions**

#### **350-1.5 Inspection**

#### **350-1.6 Severability**

### **Section 350-1.1 Purpose and applicability**

#### **(a) Purpose**

This Part sets forth criteria to increase the donation of wholesome food to those in need and to increase the recycling of food scraps.

#### **(b) Applicability**

(1) This Part applies to a person that generates two tons of food scraps (wet weight basis) per week or more and related solid waste management operations and facilities, including, but not limited to, waste transporters, transfer facilities, combustion facilities, and landfills.

(2) The design and operational criteria for solid waste management facilities and transporters, including organics recyclers, landfills, transfer facilities, combustion facilities, and transporters are found in Parts 360 – 364 of this Title.

## Section 350-1.2 Definitions

(a) ***Beneficial manner*** means use as a soil amendment, a source of animal feed, or other use approved by the department, and not landfilled or combusted (other than biogas).

(b) ***Capacity*** means the amount of food scraps that an organics recycler or intermediary facility is able to receive based on available space, permitting limitations, and the facility's desire and ability to manage the waste.

(c) ***Combustion facility*** means a facility for the thermal treatment of waste, as defined in Part 360 of this Title.

(d) ***Department*** means the New York State Department of Environmental Conservation.

(e) ***Designated food scraps generator*** means a person who generates at a single location an annual average of two tons per week or more of food scraps, on a wet weight basis. These entities include, but are not limited to, supermarkets, food service businesses such as restaurants, higher education institutions, hotels, food processors, correctional facilities, and sports or entertainment venues.

For a location with multiple independent food service businesses, such as a mall or college campus, the entity responsible for contracting for solid waste transportation services is responsible for managing food scraps from the independent businesses. The quantity of food scraps generated is determined by how much food scraps are collected by each waste transporter servicing the location. If any transporter collects greater than an annual average of two tons per week or more of food scraps, on a wet weight basis, all the food service businesses at a single location using that transporter are required to comply with this Part.

(f) ***Food processing waste*** means food waste components from manufacturing, as defined in Part 360 of this Title.

(g) ***Food relief organization*** means a religious organization or other not-for-profit that provides food for free to needy individuals, including, but not limited to, a food pantry, food bank, or soup kitchen or community-based organization that provides food for free to needy individuals.

(h) ***Food scraps*** means inedible food, trimmings from the preparation of food, food-soiled paper, edible food that is not donated, and food processing waste. Food scraps does not include used cooking oil, yellow grease, or any food which is subject to a recall or seizure due to the presence of pathogens.

(i) ***Intermediary facility*** means a facility that is not located at the point of generation, such as a regional depackaging facility, that is used to process or manage food scraps prior to subsequent acceptance at an organics recycling facility.

(j) ***Landfill*** means a disposal facility, as defined in Part 360 of this Title.

(k) ***Maximum extent practicable*** means the degree to which the maximum amount of edible food can be donated for human consumption, without jeopardizing human health and the environment, by implementing best management practices, taking into account cost effectiveness and feasibility.

(l) ***On-site*** means the same or geographically contiguous property under the control or ownership of the same person. It may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a crossroads intersection, and access is gained by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which that person controls and to which the public does not have access are also considered on-site property.

(m) **Organics recycler** means a facility that recycles food scraps through use as animal feed or a feed ingredient, rendering, land application, composting, aerobic digestion, anaerobic digestion, fermentation, ethanol production, and other processes approved by the department.

(n) **Person** means any business entity, partnership, company, corporation, not-for-profit corporation, association, governmental entity, public benefit corporation, public authority, firm, or organization.

(o) **Single location** means contiguous property under common ownership, which may include one or more buildings.

(p) **Transfer facility** means a facility for the transfer of waste, as defined in Part 360 of this Title.

(q) **Transporter** means a person engaged in the transportation of waste, as defined in Part 360 of this Title.

(r) **Vector** means a carrier organism that is capable of transmitting a pathogen to another organism and includes, but is not limited to, flies and other insects, rodents, birds, and vermin.

### **Section 350-1.3 Exemptions**

This Part does not apply to:

(a) any designated food scraps generators located in a city with a population of one million or more which has a local law, ordinance or regulation in place which requires the diversion of edible food and food scraps from disposal; or

(b) hospitals, nursing homes, adult care facilities, and elementary and secondary schools.

#### **Section 350-1.4 Prohibitions**

(a) Animal feed must not include prohibited items, such as offal or carcasses, as set forth in section 72-a of Article 5 of the New York State Department of Agriculture and Markets Law.

(b) The product of the organics recycler must be used in a beneficial manner. If the food scraps are sent to a facility that accepts multiple waste streams (an anaerobic digester, for example), the fraction of the resultant material or product equal to the fraction of food scraps in the incoming waste stream (dry weight basis) must be used in a beneficial manner.

#### **Section 350-1.5 Inspection**

Department personnel can enter any designated food scraps generator's property or inspect records, at all reasonable times and locations, whether announced or unannounced, for the purpose of determining compliance with this Part. For solid waste management facilities, the department may inspect the facility to determine compliance with this Part, in accordance with the criteria outlined in section 360.7 of this Title.

#### **Section 350-1.6 Severability**

If any provision of this Part or the application of any provision of this Part to any person or circumstance is held invalid, the remainder of this Part and the application of those provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

## **SUBPART 350-2**

### **DESIGNATED FOOD SCRAPS GENERATORS**

- 350-2.1 Food Scraps Generation Methodology**
- 350-2.2 List of Designated Food Scraps Generators**
- 350-2.3 Separation of Edible Food for Donation**
- 350-2.4 Separation of Food Scraps for Recycling**
- 350-2.5 Annual Reporting**
- 350-2.6 Temporary Waiver Criteria**

#### **Section 350-2.1 Food scraps generation methodology**

The department will use proxy food scraps generation factors and public and private databases available that provide information such as number of employees, college students, inmates, etc per location that equate to food scraps generation, to estimate the amount of food scraps generated from a source. Those calculations will be available on the department's website. If factors are not available or are not appropriate, the department will use other information, such as phone interviews and publicized research, to estimate food scraps generation. If more accurate site-specific data, such as weight receipts are available for a certain designated food scraps generator or type of generator (franchise stores, etc.), that data will be used by the department to estimate the amount of food scraps generated.



### **Section 350-2.2 List of designated food scraps generators**

The department will maintain a list of all designated food scraps generators and make the list available on or before June 1 of each year, beginning in 2021. The department will notify all designated food scraps generators by June 1 of each year if they are required to comply with some or all of the requirements in sections 350-2.3, 2.4, and 2.5 of this Part. This determination shall be based on the department's assessment of the quantity of food scraps that can be accepted at each organics recycler or intermediary facility. A designated food scraps generator has until December 31 of the year they are first placed on the list to comply with this Part.

### **Section 350-2.3 Separation of edible food for donation**

On or after January 1, 2022, all designated food scraps generators must separate their edible food for donation for human consumption from food scraps designated for recycling or disposal to the maximum extent practicable, as determined by the department using comparable data from similar generators. Food donation must be in accordance with applicable laws, rules and regulations. Designated food scraps generators must work with food relief organizations to comply with the donation criteria required by those organizations, be responsive to the needs, staffing limitations, and storage capacities of those organizations, and to minimize the amount of food that will lead to waste at the relief organization.

## **Section 350-2.4 Separation of food scraps for recycling**

(a) Except as provided in subdivision (c) of this section, on or after January 1, 2022, any designated food scraps generator that is within 25 miles (measured in a straight line) of an organics recycler(s) or an intermediary facility used prior to recycling such as a regional depackaging facility or a transfer facility, to the extent that the facility has capacity to accept all of the generator's food scraps based on the department's yearly estimate of an organic recycler's or intermediary facility's capacity in accordance with this part, must do the following:

(1) Separate its food scraps from other non-organic solid waste. The materials separated will depend on the capabilities of the organics recycler or intermediary facility used by the designated food scraps generator. For example, post-consumer food scraps do not have to be collected by the designated food scraps generator unless the organics recycling facility is capable of removing contaminants (plastics, etc.) that are likely to be present with the food scraps. The designated food scraps generator can determine the most efficient and appropriate separation methods for their operation.

(2) Ensure proper storage of food scraps on-site to prevent scraps from becoming odorous or attracting vectors. Proper storage includes, for example, a container that has a lid and a latch that keeps the lid closed and is resistant to tampering by rodents or other wildlife and has sufficient capacity.

(3) Follow applicable New York State Department of Health and New York State Department of Agriculture and Markets regulations and standards.

(4) Have information available and provide training for employees concerning the proper methods to separate and store food scraps.

(5) Obtain the services of a transporter that will deliver food scraps to an organics recycler or intermediary facility, self-haul its food scraps to an organics recycler or intermediary facility, or provide for organics recycling at the designated food scraps generator's location. If a transporter is not available, the designated food scraps generator is not required to self-haul or recycle at their location.

(b) Use of on-site treatment systems. If a designated food scraps generator is required to recycle under subdivision (a) of this section and chooses to use an on-site treatment system, the following criteria apply.

(1) If the on-site treatment system does not treat at least 80 percent, by volume, of the food scraps generated annually, the remainder must be sent to an off-site organics recycler or intermediary facility with sufficient capacity if one exists within 25 miles of the generator (measured in a straight line).

(2) For on-site treatment systems that discharge to the public sewer system, the designated food scraps generator must obtain approval in writing from the appropriate local government entity to use the public sewer system for this purpose, including applying for and obtaining any necessary permits or other authorizations.

(3) The materials generated from an on-site treatment system that are not discharged to the sewer system must be used in a beneficial manner or sent to an organics recycler or intermediary facility.

(4) If the on-site treatment system does not significantly reduce the volatile solids content of the food scraps and grinds the waste or otherwise transfers it to a sewer system or treatment plant with little or no biological treatment, the fraction of the resultant biosolids equal to the fraction of

food scraps in the incoming waste stream (dry weight basis) must be used in a beneficial manner. The treatment plant is not required to recycle biosolids.

(c) Separation of food scraps by the designated food scraps generator is not required for a generator that sends all of its food scraps to be processed in a solid waste composting, solid waste anaerobic digestion facility, or other organics recycler or intermediary facility capable of managing the waste without source separation.

### **Section 350-2.5 Annual reporting**

All designated food scraps generators must submit an annual report to the department on or before March 1 of each year, beginning in 2023, in an electronic format acceptable to the department. The annual report must include, at a minimum, the following information:

- (a) the amount of edible food donated and name(s) of the food relief organization(s);
- (b) the amount of food scraps recycled;
- (c) the name of any transporter used for food scraps;
- (d) the name of the organics recycler(s), intermediary facility, or description of the on-site treatment system where the food scraps were processed; and
- (e) a description of any implementation issues (e.g., contamination in food scraps, inconsistent pick-ups, odors.) and actions taken to address those issues.

## **Section 350-2.6 Temporary waiver**

### **(a) General**

(1) A designated food scraps generator may petition the department for a temporary waiver from some or all requirements of this Part, on forms acceptable to the department. The petition must include evidence of on one or more of the justifications identified in subdivision (b) of this section.

(2) Other than emergency waivers, a waiver petition must be submitted to the department by October 1 of the year prior to the calendar year for which the waiver is requested. If approved, the waiver will be valid from January 1 through December 31 of the following year. For emergency waivers, the petition may be submitted at any time and the waiver, if approved, will be valid for up to one year.

### **(b) Justifications. Acceptable justifications include the following.**

(1) Justification 1. Even though the generator is listed as a designated food scraps generator by the department, the generator does not produce two tons (on a wet weight basis) or more of food scraps per week based on an annual average. Increased food donation cannot be used to reduce the calculation of food scraps produced by the generator for purposes of this justification.

(2) Justification 2. The total cost of solid waste management including organics recycling is at least 10 percent greater than the total cost of disposal without organics recycling.

(3) Justification 3. The organics recycler(s) or intermediary facility(ies) within 25 miles (measured in a straight line), as identified by the department in the list, does not have available capacity.

(4) Justification 4. A food scraps transporter is not available to the designated food scraps generator.

(5) Justification 5. Other circumstances unique to the designated food scraps generator.

(c) Information that must be submitted with the petition. The petition must include at least one justification along with the documentation (at a minimum) set forth in this subdivision.

(1) Justification 1. The following information must be submitted.

(i) If food scraps are not separated from other wastes at the point of generation:

(‘a’) documentation from the transporter or other verified source that indicates the amount of total waste removed from the generator for the previous year;

(‘b’) documentation that indicates the quantity of food donated for the previous year;

(‘c’) an estimate of the proportion of food scraps (including food-soiled paper) in the waste stream to the nearest 10% (waste is 60% food scraps, as an example);

(‘d’) calculations showing the annual average weekly food scraps generation;

(‘e’) a description of any seasonal variation expected in the waste stream quantity and food scraps content, if applicable; and

(‘f’) other relevant information to justify the amount of food scraps generated.

(ii) If food scraps are separated from other wastes at the point of generation:

(‘a’) documentation, e.g., email, invoice from the transporter or other verified source that indicates the amount of food scraps removed from the generator for the previous year;

(‘b’) a description of any seasonal variation expected in the food scraps quantity produced, if applicable;

(‘c’) calculations showing the annual average weekly food scraps generation; and

(‘d’) other relevant information to justify the amount of food scraps generated.

(2) Justification 2. The following information must be submitted.

(i) An analysis of the cost of disposal including documentation from the transporter or other verified source that indicates the total cost for disposal of all solid waste removed from the designated food scraps generator for the previous year.

(ii) An analysis of the cost of recycling of food scraps including documentation from all food scraps transporters available to the designated food scraps generator, indicating the average monthly cost, as measured over a calendar year, for recycling of food scraps and managing the remainder of the waste stream removed from the generator. The analysis must include:

(‘a’) an evaluation of the amount of waste reduced and cost savings through increased food donation and

(‘b’) an evaluation of the cost savings by reducing the frequency of waste collection and reduce the cost of waste disposal since food scraps are removed from the waste stream.

(iii) An analysis with supporting calculations showing the cost of recycling food scraps compared to the cost of disposing of the food scraps as solid waste for the designated food scraps generator.

(3) Justification 3. The following information must be submitted.

(i) documentation from any transporter and/or organics recycler or intermediary facility contacted by the designated food scraps generator indicating why the organics recycler or intermediary facility cannot accept the generator's food scraps at the present time and whether they will be able to do so during the coming calendar year when the waiver would be in effect.

(4) Justification 4. The following information must be submitted.

(i) documentation from the transporter currently used by the designated food scraps generator indicating that they do not provide food scraps transport; and

(ii) documentation (email, etc.) from each food scraps transporter available in the designated food scraps generator's area indicating that they cannot provide food scraps transport for the generator during the coming calendar year when the waiver would be in effect.

(5) Justification 5. The designated food scraps generator must submit a detailed explanation of the unique circumstances, and why it is seeking a waiver from compliance with this part.

(d) Emergency waivers

A designated food scraps generator may petition the department to obtain a waiver without submitting the information outlined in subdivisions (a) – (c) of this section for situations that require immediate relief, such as unexpected closure of an organics recycler or intermediary facility or an emergency response event. An emergency waiver request may be submitted at any time of the year.



## **SUBPART 350-3**

### **DESIGNATED FOOD SCRAPS GENERATORS, ORGANICS RECYCLERS, AND TRANSPORTERS LISTS**

#### **350-3.1 Designated Food Scraps Generators List**

#### **350-3.2 Organics Recyclers List**

#### **350-3.3 Food Scraps Transporters List**

##### **Section 350-3.1 Designated food scraps generators list**

The department will maintain a list of all designated food scraps generators and make an updated list available on or before June 1 of each year, beginning in 2021.

##### **Section 350-3.2 Organics recyclers list**

The department will maintain a list of organics recyclers and intermediary facilities and make an updated list available on or before June 1 of each year, beginning in 2021.

##### **Section 350-3.3 Food scraps transporters list**

The department will maintain a list of transporters that handle source separated food scraps and make an updated list available on or before June 1 of each year, beginning in 2021.

## **SUBPART 350-4**

### **TRANSPORTER AND SOLID WASTE MANAGEMENT FACILITY**

#### **RESPONSIBILITIES**

##### **350-4.1 Waste Transporters**

##### **350-4.2 Organics Recyclers**

##### **350-4.3 Transfer Facilities and Other Intermediaries**

##### **350-4.4 Landfills and Combustion Facilities**

#### **Section 350-4.1 Waste transporters**

Any waste transporter that collects food scraps from a designated food scraps generator required to send its food scraps to an organics recycler or from an intermediary facility used prior to recycling such as a depackaging facility or a transfer facility must comply with the following:

- (a) transport the food scraps directly to an organics recycler or to a transfer facility or other intermediary facility, and notify the facility of the requirement to deliver the food scraps to an organics recycler;
- (b) take all reasonable precautions to not deliver the food scraps to a combustion facility or a landfill;
- (c) keep the food scraps separate from other solid waste unless the comingled waste can be processed by an organics recycler or intermediary facility or unless such designated food scraps generator has received a temporary waiver pursuant to this Part; and

(d) comply with the requirements of Part 364 of this Title.

### **Section 350-4.2 Organics recyclers**

(a) The product or material created by the recycling of food scraps must be used in a beneficial manner. If the food scraps are sent to a facility that accepts multiple waste streams (an anaerobic digester, for example), the portion of the resultant material or product derived from food scraps must be used in a beneficial manner.

(b) Upon request, any organics recycler must provide information to the department concerning the amount of food scraps they are processing at the time of the department's request, the additional capacity (if any) available for food scraps, the types of food scraps accepted, the amount of food scraps accepted from designated food scraps generators (if readily available), and the names and locations of those designated food scraps generators. This requirement applies to registered and permitted solid waste management facilities under Parts 360 and 361 of this Title.

### **Section 350-4.3 Transfer facilities and other intermediary facilities**

Any transfer facility or other intermediary facility that receives notification that food scraps are required to be sent to an organics recycler must ensure that the food scraps are taken to an organics recycler. A transfer facility must take all reasonable precautions to not commingle the material with any other solid waste unless such commingled waste can be processed by the organics recycler.

#### **Section 350-4.4 Landfills and combustion facilities**

Combustion facilities and landfills must take all reasonable precautions to not accept food scraps from designated food scraps generators who are required to send their food scraps to an organics recycler or intermediary facility.



Assessment of Public Comment

On the

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

6 NYCRR Part 350

Food Donation and Food Scraps Recycling

June 2021

## Introduction

The New York State Department of Environmental Conservation has prepared this responsiveness summary to address the comments that were received on the proposed 6 NYCRR Part 350 Food Donation and Food Scraps Recycling regulations.

The proposed regulations were published for public review and comment in the Environmental Notice Bulletin (ENB) on January 27, 2021. DEC provided a 60-day comment period that ended April 27, 2021.

This responsiveness summary generally addresses all comments received, with the exception of editorial comments. The comments have been organized to follow the format of the proposed Part 350 regulations, with general comments addressed at the beginning of the responsiveness summary.

## GENERAL COMMENTS

Comment 1: If we really want to reduce food waste, we need to teach cooking and home economy in middle school and high school. New Yorkers need to learn how to use leftovers efficiently.

Response: Although not an aspect of the Part 350 rulemaking, DEC agrees that reducing waste generation in the home is a very important component in the overall efforts to reduce the production of food scraps. DEC has developed guidance on reducing food scraps at home and there is an increasing amount of guidance available online to support these efforts.

Comment 2: Excellent idea, following the Vermont Law would be even better.

Response: Vermont has a very ambitious food scraps law, tiered to ultimately include all generators, regardless of the amount of waste generated. The Food Donation and Food Scraps Recycling Law in New York State is currently limited

to designated food scrap generators that generate two tons of food scraps per week or more.

Comment 3: I am in favor of Laws encouraging food donations and food scraps recycling. Too much food is wasted because of the time between preparation and donation. Our hands are often tied and we are confused when it comes to food donation. The food donation Laws are too strict and should be changed to help the hungry.

Response: DEC also strongly supports food donation for those in need. The Food Donation and Food Scraps Recycling Law establishes the requirements for food donation. The regulations governing the safe donation of edible food are not under the jurisdiction of DEC however, they are implemented by the New York State Department of Health and the New York State Department of Agriculture and Markets.

Comment 4: DEC is imposing a fine to businesses that create food waste, requiring recycling instead of using a garbage disposal that is already paid for. This impedes the growth of new and existing businesses. Food recycling companies should pay for the food waste.

Response: The Food Donation and Food Scraps Recycling Law establishes the requirements for food donation and food scraps recycling. The proposed Part 350 regulations include a waiver provision for designated food scraps generators to demonstrate that there will be an unreasonable financial burden caused by compliance. There are costs associated with recycling just like there are for disposal, so it is unlikely that a recycling facility could succeed if they were to pay the generators for the waste, unless some other financial support was involved.

Comment 5: I am in support of the Law. It would be nice to be able to support additional organics recyclers.

Response: Agreed. One of the purposes of the Law is to encourage the development of additional organics recycling infrastructure in the State. In addition, DEC and Empire State Development (ESD) provide financial support to assist facility development.

Comment 6: In the past, the State stopped the donation of consumable excess food, deciding the food wasn't safe. Now the State is requiring the forbidden. Bureaucracy and its workers are the stuff of the deep state and a modern manifestation of the noble class.

Response: Food safety is a concern for donated food in an equivalent manner to food that is sold. The New York State Departments of Health (DOH) and Agriculture and Markets (DAM) have long standing regulations for food safety that are needed to reduce the potential for human health impacts.

Comment 7: The proposed rule seems out of sync with NYS COVID and CDC policies. How does COVID-19 virus mitigation and communicable disease measures reconcile food scraps as a potential vector, that may carry human saliva and toxic pathogens.

Response: There are currently no State or federal restrictions on the donation of edible food or the recycling of food scraps due to COVID 19 transmission concerns.

Comment 8: I support the rulemaking proposal because it will decrease greenhouse emissions from landfills, it will increase local food donation, and it will provide more food to those in need.

Response: Thank you.



Comment 9: Municipalities need grants and incentives to adopt curbside composting or even voluntary drop off sites.

Response: DEC has provided grants to support municipal composting systems for several years and intends to award additional grants in 2021.

Comment 10: The Law is a crucial step towards lowering the amount of municipal solid waste and reducing greenhouse gases. Anaerobic digesters are worthwhile but can be expensive. It may be useful to look at a hybrid approach between landfilling and digestion until digesters are less expensive.

Response: The Food Donation and Food Scraps Recycling Law and proposed Part 350 regulations do not limit the organics recycling systems to anaerobic digestion. The cost of any organics recycling system is affected by a number of factors and has led to a variety of systems in operation in the State. DEC anticipates a mixture of organics recycling systems will operate in the State to serve the generators.

Comment 11: I support the initiative to have businesses donate excess food. I also support communities getting additional support to compost and extend organic waste collection citywide.

Response: Thank you. DEC anticipates providing additional municipal grants for organics recycling in 2021, similar to grant programs of the past.

Comment 12: The Law should outline who specifically will enforce this Law and there should be reports on non-compliance available.

Response: DEC is responsible for enforcement of the Food Donation and Food Scraps Recycling Law and the proposed Part 350 regulations. DEC enforcement action documentation could be requested under the Freedom of Information Law.

Comment 13: The proposed Part 350 regulations do not include enforcement provisions. The regulations should clearly state the potential penalties to inform the generators.

Response: Enforcement of Part 350 will be the responsibility of DEC. Enforcement provisions are found in ECL Title 27 of Article 71.

Comment 14: The State should do whatever it can to promote the creation of more organics recycling capabilities, including grants for small nonprofits like community gardens that collect and process food waste.

Response: DEC strongly supports the creation of organics recycling capacity and has provided technical assistance and grant programs to assist. Grant programs administered by the DEC are limited to the groups that are specified in legislation or budget (municipalities and not-for-profit food banks for projects for food donation and the recycling of food scraps etc.). DEC encourages nonprofits to consider partnering with municipalities for grant programs if feasible.

Comment 15: The proposed regulations set forth some requirements to effectuate these statutory requirements, but the rulemaking record lacks specific information on some standards and procedures that will be vital to the program's success. To the extent that these policies are not codified in the regulations, they must be spelled out in detail on the Department's website.

Response: DEC has very active outreach and education, technical assistance, and funding programs in place to assist with the implementation of the Law. We

agree these activities are a key component to the success of this program, in addition to the needed regulations.

Comment 16: Prioritize using compost for agricultural purposes.

Response: DEC supports the increased use of compost in agriculture, but the Food Donations and Food Scraps Recycling Law does not prioritize a particular use.

Comment 17: Municipalities should be required by state law and regulations to use the compost they generate in their land management programs.

Response: Many communities that generate compost already use their compost for municipal projects, give it to residents, and sell or give it to local landscapers. In some cases, the municipality may produce more than they can use, and it makes sense to market beyond the municipal boundaries. Also, the Food Donations and Food Scraps Recycling Law does not prioritize a particular use.

Comment 18: The regulations require that the recycled organic material must be beneficially reused. Prioritize its reuse to replenish soils, particularly in depleted soils such as in brownfields. Prioritize its reuse in soils at farms and gardens for nutrient enhancement and to displace the use of synthetic fertilizers.

Response: The Food Donations and Food Scraps Recycling Law does not prioritize a particular use. Many organic product uses are feasible and advantageous.

Comment 19: Provide clear guidance on which foods can be recycled and how to avoid contaminants.

Response: DEC and the New York State Pollution Prevention Institute (P2I), under contract with DEC, have developed guidance materials for generators, to assist with donation and recycling. P2I is also available to provide limited direct assistance to a generator. In addition, there is guidance available from various trade organizations and others. Resources for both food donation and food scraps recycling can be found on DEC's website.

Comment 20: Combusting recycled food scraps (as in Anaerobic Digesters) should be prohibited or discouraged because its potential to replenish soil conditions is a superior reuse. And, combustion is not recycling.

Response: Anaerobic digestion is not a form of combustion and is considered a form of organics recycling. The organic material from digestion, digestate, does have the potential to improve soil quality through the addition of organic matter and nutrients. Combustion is not considered a form of recycling.

Comment 21: Create markets for composted products by requiring its reuse by the State and municipalities in their land management operations.

Response: The Food Donation and Food Scraps Recycling Law does not give DEC the authority to require specific compost uses. However, the New York State Department of Transportation has established standards that allow the use of compost and many municipalities use their own compost for municipal projects.

Comment 22: New organics recycling facilities should be promoted as economic development opportunities, not solely as an environmental compliance solution. Access to financial incentives should be expanded to small non-profits and funds should be given as an outright grant, not reimbursements. For example, the Food Waste Reduction & Diversion Reimbursement Program should provide a carve-out for small

nonprofits like community gardens that collect and process food waste for free for the general public. A reimbursement program won't work for small nonprofits because they lack upfront funds to invest in infrastructure to process greater amounts of food scraps into compost. Yet, their participation should be encouraged because they are dealing with food waste composting at the household scale and the potential to increase their impact in the neighborhood is untapped. The existing program gives grants to projects that divert food waste from landfill or incineration. Current eligible applicants include NYS businesses, municipalities and non-profits that generate, recycle or haul >1 ton/week of food waste. I suggest that this program should be expanded to small nonprofits operating at the community level of service.

Response: The grant program mentioned is administered by P2I, with funding provided from ESD. ESD funding is limited by statute and regulation to be a reimbursement program.

Comment 23: DEC should create a sustainable materials management hierarchy that either requires or incentivizes generators to send food scraps to an organics recycler that will maximize the environmental benefits of the food scraps.

Response: DEC has a solid waste management hierarchy, outlined in the Environmental Conservation Law, that recognizes recycling (including organics recycling) over combustion and landfilling. DEC and ESD also provide funding to public and private entities involved in organics recycling, including generators.

Comment 24: In order to help achieve the goals of the Law, activated mapping of acceptable organics recycling facilities is needed.

Response: To assist with the implementation of the Food Donation and Food Scraps Recycling Law, DEC has contracted with P2I to maintain an interactive map called the Organics Resource Locator, and other guidance materials. These can be found on the P2I website with links from the DEC website.

Comment 25: To assist local communities with their own laws, the list of generators should be streamlined, user-friendly, readily sortable by county, and include generators down to 0.5 tons per week.

Response: DEC's published list of designated food scraps generators will only include those subject to the Law. However, DEC has contracted with P2I to maintain an interactive map called the Organics Resource Locator which includes generators, including smaller generators.

Comment 26: The regulations should provide clear guidance on which food can be recycled and procedures for avoiding contamination.

Response: DEC believes that guidance for generators is best provided through our website and through our contract with P2I. We are committed to having information available to all that need it.

Comment 27: The regulation should require compost operator certification for compost facilities taking material under this regulation. Compost facilities should be given a year to come into compliance.

Response: A requirement for compost operator certification would be under the purview of the Part 360 series, not the proposed Part 350 regulations.

Comment 28: Under Part 360, food waste generated by a processing facility is considered industrial waste and requires a Form 47-19-7 (i.e. special waste characterization form) for disposal. Under Part 350, is this waste now excluded from waste characterization if the material is intended for a beneficial use/recycled? In addition, the waste currently requires a Part 364 Transporter Permit as a regulated

waste, what is the waste classification for transport if it is not delivered to a landfill for disposal?

Response. The provisions in proposed Part 350 regulations have no effect on the regulatory criteria in Part 360 for solid waste management facilities and Part 364 for waste transporters.

Comment 29. Please provide clarification on how we'll be measuring to ensure food waste going to digesters (including co-digestion with biosolids) can be counted toward diversion under this rule.

Response: DEC can provide additional guidance on a case specific basis. Generally, the percentage of food scraps (on a dry weight basis) in the incoming waste will be used to determine the minimum percentage of the biosolids that must be recycled (dry weight basis).

Comment 30: Food waste is a quintessential environmental justice issue. Food makes up nearly one-fifth of New York's state's solid waste stream, the majority of which is hauled by truck to landfills or incinerators that release huge quantities of greenhouse gases and other airborne toxins. In either case, food waste moves through a network of truck routes and transfer stations that spew pollution in historically overburdened communities of color. New York's Food Donation and Food Scraps Recycling Law presents an opportunity to build a better system. I am here today to urge the Department to include more concrete and specific requirements regarding the separation, transfer, and end use of recycled waste.

Response: The proposed Part 350 regulations follow the requirements outlined in the Food Donation and Food Scraps Recycling Law, which should encourage additional local donation and recycling.

Comment 31: Finally, in addition to ensuring accountability for haulers and facilities, we urge DEC to prioritize community-scale recycling infrastructure as part of the growing organics industry. Micro-haulers and community composters transport and process food scraps locally, which reduces transportation emissions and soil contamination, and helps distribute beneficial waste processing equitably throughout the state. These organizations should be built into the fabric of organics collection and recycling in NY as local experts in the field, including as compensated advisors, consultants, haulers, and processors, based on their capacity.

Response: DEC supports local collection and processing. DEC implements a grant program to help support small municipal projects, including municipal programs that are conducted in conjunction with community nonprofits. The proposed Part 350 regulations are required by and follow the Food Donation and Food Scraps Recycling Law, which does not provide a preference for one organics recycling over another.

Comment 32: We urge the Department to center these innovative, community-scale solutions in the rollout of the Food Scraps Law and its broader food waste policy. Industrial-scale depackaging should be permitted only for groceries and other packaged food—not a catchall solution. For mixed waste, the regulations should require generators to send separated scraps to a non-industrial compost site where there is capacity within twenty-five miles. The Department should permit the use of depackaging and digestion for mixed waste only where there is not local, community-scale capacity.

Response: The proposed Part 350 regulations are authorized by the Food Donation and Food Scraps Recycling Law. The Law does not outline a preference for one type of recycling operation over another. For technical criteria to ensure that all facilities are operated appropriately and producing products that are acceptable for use, Parts 360 and 361 apply.



Comment 33: Through our work in other states, we have observed how businesses can utilize donation to reduce their generation rates below the participation threshold. While we have not directly observed any instances of businesses unfairly donating inedible food, we share New York's concerns about potential negative impacts on the food recovery system. We support the state's decision to separate donation from other diversion strategies, so that all qualifying generators must seek donation outlets following industry best management practices, while also maintaining the requirement to divert inedible food scraps.

Response. Thank you for the information.

Comment 34: We applaud the state's efforts to develop a list of qualifying generators who must comply with the Law. Through our work in other states with waste bans, we recognize that clearly notifying generators of their need to comply with the Law can reduce confusion and increase participation. This is just one example of the outreach the Department has already done around the Law. We have seen the importance of sustained outreach and education over time and encourage the Department to continue this and other strategies to increase awareness.

Response: We agree that outreach and education are key to the success of the program. We will continue to reach out and provide guidance in this area.

Comment 35: One of our business units on the hauling side has to do with the transportation of packaged food waste (expired sodas, syrups, etc.) to anaerobic digesters for depackaging and disposition. We arrange transportation of these products using 3<sup>rd</sup> party haulers (mostly van trailers). I would advocate that if the truck is transporting food products destined for waste disposal but is not transporting source separated organics, that it not fall under the new permit. This is probably something that will not be addressed initially but I wanted to keep that notion in the back of DEC's mind.

Response: The permitting requirements for transporters are found in Part 364.

The proposed Part 350 regulations do not alter the Part 364 requirements.

Comment 36: Contamination of source separated organics. This is our biggest concern as both a hauler and organics recycler. As this transitions from a voluntary to a mandatory practice, there must be control over contamination levels in the source separated organics. As haulers we can certainly help educate (along with DEC and other resources), but we would advocate for a contamination standard of <5% by weight of contamination to be sufficient for collection and organics recycling. Lack of control over contamination standards would lead to a more chaotic rollout of the program, as haulers will be choosy about their customers depending on contamination levels and organics recycling options, and ultimately lead to more costs for the system. As a regulated practice, the onus for adhering to contamination standards needs to fall on the generator. One caveat would be if a food waste generator elects to set up a separate program (Hannaford for example has a Packaged Food Waste or PFW program), that's fine and they can elect to pay the higher cost for depackaging and disposition, but as a general rule there needs to be some expectation that the source separated organics to be collected are relatively free of contamination.

Response: We appreciate your thoughts and experience. As you mention, the level of contamination is crucial for the majority of recycling programs. DEC will continue to explore the best means to assist generators in producing clean materials and whether a standard could be effectively implemented. The Food Donations and Food Scraps Recycling Law does not dictate an acceptable contamination level to be included in the proposed Part 350 regulations.

Comment 37: If you don't think this can happen in New York, think again. It is already happening in Vermont and Massachusetts, states with perhaps better legislative language requiring source separation. In Vermont, the state agency has been supporting and investing in "depackaging" by issuing grants and permitting. I know of at least two on-farm composters in Vermont (and there are more) who have lost market

share to depackagers and large-scale industrial facilities that take contaminated organics. These farmers have been accepting clean streams from these supermarkets for years. Sites that are producing high-quality compost are literally seeing large-scale industrial sites syphoning the flow of materials away from their operations. In Massachusetts, one member of our Community Composter Coalition, the worker-owned CERO (which has for years been delivering food scraps generated from commercial clients in the Boston metro area to a network of farmers for composting or anaerobic digestion) is now losing clients. Their most significant competition is from waste industry companies that have leveraged access to large capital assets and state grants to build huge depackaging facilities. According to CERO, “They tell our customers that they no longer have to worry about separating organics. They can put everything, including plastic wrap, styrofoam and metals all into a dumpster and claim adherence with the organics waste ban.”

Response: The proposed Part 350 regulations and the Food Donation and Food Scraps Recycling Law do not dictate which organics processor or type of recycler must be used. Facilities for the management of food scraps must adhere to the technical requirements found in the Part 360 series and must be able to produce a marketable product.

Comment 38: The story and fate of the Wilmington Organics Recycling Center in Delaware, may serve as another warning sign. The site, designed to receive a whopping 600 tons per day, was at the center of expanded food waste collections in the Mid-Atlantic region, and took materials from New York as well. It accepted organic materials from government institutions, grocery chains, schools, food processors, sports venues, restaurants, and other large food waste generators. The large waste hauler, WMI, became the majority owner, and proceeded to run the facility into the ground by accepting contaminated material. Between mid 2012 and its closure in fall 2014, the facility received hundreds of odor complaints, Notices of Violation from the State of Delaware, and complaints about plastic and glass contamination in the compost. The

State shut down the facility in December 2014, causing disruption in dozens of food scrap recycling programs.

Response: The technical standards for any organics recycler located in New York State can be found in the Part 360 series. The Wilmington facility operated successfully for many years indicating that the technology was workable.

Comment 39: What can you do to avoid such fates in New York? To prevent the waste hauling industry from giving compost a bad name? To encourage less contamination, not more? If implemented, a distributed infrastructure approach would create jobs, reduce private and public sector costs for managing waste, and better tie compost to healthy soils and local food production, thereby reinforcing a community culture of sustainability and engaged environmental stewardship. Moreover, with a diverse infrastructure, problems at one site will not disrupt the whole system as was the case in Wilmington. New York State has a huge opportunity to implement rules that do not privilege sites that want contaminated loads, but that rather support a distributed and locally based infrastructure that wants clean materials for high-quality soil amendments.

Response: The proposed Part 350 regulations do not provide a preference for certain types of organics recycling. New York State currently supports a wide diversity of systems. Organics recycling facility technical compliance issues are the purview of the Part 360 series.

Comment 40: The expansion of local composting infrastructure would increase the effectiveness of New York State's Food Donation and Food Scraps Recycling Law, while also reducing the emissions and costs associated with hauling services. In addition, composting and compost use protects watersheds, improves soil health, and builds local economies. DEC already has allocated some funding to support the development of additional organics recyclers. We urge DEC continue to allocate funding and otherwise incentivize and assist in the development of additional organics recycling

facilities, with an emphasis on helping establish or expand local composting infrastructure.

Response: DEC is committed to continue providing grants to support organics recycling infrastructure, as funding allows.

Comment 41: DEC must prioritize reduction of food waste at the source by incentivizing food donations. New York State's Food Donation and Food Scraps Recycling Law states that "all designated food scraps generators shall separate their excess edible food for donation for human consumption to the maximum extent practicable, and in accordance with applicable Laws, rules and regulations related to food donation." However, without proper oversight and incentives, food scraps generators may opt to recycle edible food instead of donating it due to perceived convenience. To avoid this outcome, we urge DEC to create incentives for food waste generators to reduce food waste at the source and encourage separation of edible food for donation.

Although our current system produces vast amounts of food, in New York State, over 1 in 10 households (10.5%) experience food insecurity. By incentivizing food donations, encouraging partnerships between haulers and food recovery organizations, and providing technical assistance to promote food rescue and food safety, DEC can help to address food insecurity and increase access to nutritious food. DEC should implement these activities without delay.

Response: DEC agrees that food donation should always be the priority. In addition to the criteria in the proposed Part 350 regulations that require donation, DEC has provided significant funding to the food banks and smaller food rescue organizations to increase their ability to reach out for additional donations and handle those donations. DEC has also developed education material for generators promoting appropriate donation efforts.

Comment 42: DEC must provide education, outreach, and training to decrease food waste contamination that impairs composting efforts.

New York State's Food Donation and Food Scraps Recycling Law states that "designated food scraps generators shall separate [their] remaining food scraps from other solid waste." However, this provision does not apply to "any designated food scraps generator that has all of its food scraps processed in a mixed solid waste composting or mixed solid waste anaerobic digestion facility." This loophole increases the risk of contaminated compost and will accelerate the growth of large-scale industrial sites at the expense of community-level and community-owned waste management solutions.

We request increased funding for proper education, outreach, and training to decrease the contamination of food waste with plastics, persistent herbicides, and other harmful substances. Decreased contamination will create a larger market for compost, which improves soil health and reduces the need for energy-intensive fertilizers and hazardous pesticides.

Response: DEC provides guidance to help generators and contracts with P2I to provide information directly to generators on food scraps recycling. DEC recognizes that minimizing contamination is crucial to the success of a recycling system.

The Food Donation and Food Scraps Recycling Law at ECL 27-2203(c) states that source separation is not required for generators that are served by a mixed waste composting or digestion facility. Therefore, the proposed Part 350 regulations includes this provision. An amendment to the Law would be needed to alter this requirement. This provision recognizes that there is a facility in New York State located in Delaware County that is able to handle mixed materials and produce a marketable compost product. Due to the cost and complexity, it is unlikely that these types of facilities will be commonplace.

Comment 43: The tipping fees at landfills continue to fluctuate and municipalities often do not have the capacity to plan long-term for how costly to a community landfilling waste is (markets shift, countries may no longer buy raw goods, etc). Composting, on the other hand, has been shown to be a much more stable market and the “waste” or byproduct of a compost facility has value, whereas landfill byproduct does not.

Response: DEC supports composting as a form of recycling and it is preferred over landfilling in the State’s solid waste management hierarchy.

Comment 44: There should be general education for communities on the food waste hierarchy and just how much more cost effective composting is over landfilling waste. Composting offers a financial benefit, turning the waste into an asset. Whereas, the landfilling of waste continues to fluctuate and hardly ever reflect long-term costs. The NYS Comptroller released a report in 2018 that looked at the landfill costs to local Governments and Municipalities, highlighting the fact that “Landfills are, ultimately, a non-renewable resource. Some are scheduled to close in the next few years, and siting new landfills is a long and difficult process.” It is becoming more apparent that addressing the waste stream in a more diverse range of options (donation, composting, etc) is much more sustainable than simply diverting all waste to landfills.

Response: DEC recognizes recycling, including organics recycling, as a preferred alternative to combustion and landfilling. DEC provides outreach and education and funding to assist communities in enhancing their recycling efforts.

Comment 45: We greatly appreciate the focus and attention that the DEC is putting on the challenges of food waste. While these new rules are focused on pushing food waste to composting facilities and other organics recyclers such as anaerobic digesters, we would respectfully request that the DEC, NYSERDA, New York State Agriculture and Markets and other agencies look beyond the conventional and to be more open to new technologies such as the black soldier fly larvae as a protein source. Technology

development often doesn't fit into conventional sources for grants, especially when the benefits extend beyond the scope of individual agencies.

Response: The proposed Part 350 regulations include a definition of organics recycler which includes many technologies and could include black soldier fly larvae production for animal feed.

Comment 46: The Food Donation and Food Scraps Recycling Law was amended on February 16, 2021 to add a definition of "Excess Edible Food" and "Food Relief Organization." In addition, an entire new section relating to "Supermarket Excess Edible Food" was added. The regulations were proposed before the Amendment. Also, there are numerous gaps and unanswered questions by the proposed regulations. Therefore, the Department should revise the regulations and provide stakeholders with another opportunity to comment.

Response: The referenced section, ECL 27-2218 expires December 31, 2021. Due to the limited duration and sunset of the requirements, they are not included in the proposed Part 350 regulations. DEC has conducted extensive outreach over multiple years, including stakeholder meetings, webinars, and targeted communications, concerning the content and scope of the proposed Part 350 regulations and has answered questions raised through those avenues as well as through this rulemaking process.

Comment 47: The proposed regulations do not recognize that non-processible contaminants in the stream of organic waste must be separated and disposed/landfilled. The greater the level of contamination, the less efficient the processing operation. Should the burden be placed on the generator, to remove contaminants (limit to 10%, 25%) or should the burden be on the processor? If the processor, increased costs will be passed back to the generator, possibly creating a disincentive to recycle food waste properly, contrary to the purpose of the Law.



Response: The generators are obligated to separate the food scraps in accordance with the requirements of the recycler. Therefore, if the recycler cannot handle a large amount of contaminants, the generator must have a program in place to meet the acceptable level.

Comment 48: Given the many points in the proposed regulations where there are undefined terms utilized and that the Amendment to the Law was passed after the regulations were first proposed, the Department needs to issue a revised set of regulations for further public comment. In addition, further analysis is required to fully determine the detrimental impact these regulations could have on real opportunities to further beneficially use food scraps and waste.

Response: The referenced section, ECL 27-2218 expires December 31, 2021. Due to the limited duration and sunset of the requirements, they are not included in the proposed Part 350.

Comment 49: Impact on Environmental Justice Areas. The final rule should require DEC to publish information on the environmental justice impacts of new processing facilities. The City anticipates that additional processing facilities will be built throughout the State as a result of increased demand for organics recycling generated by this rule. Section 27-2211 of the Food Donation and Food Scraps Recycling Act requires DEC to publish “a list of all designated food scraps generators, organics recyclers, and all waste transporters that manage source-separated organics.” The City requests that, as a part of maintaining this list, DEC publish information on the location of any new processing facilities in designated Environmental Justice Areas to help ensure that these facilities are sited equitably.

Response: The siting and regulatory approval of organics facilities is under the purview of Parts 360 and 361.

Comment 50: We wish to express the concern that on Long Island there is currently no organics recycling facility with sufficient capacity that is capable of receiving the food waste that would be generated by Long Island food waste generators as defined by the Law. An organics recycler includes a composting facility, anaerobic digester, or uses the food scraps as animal feed, for ethanol production or fermentation, or other approved process. Therefore the Long Island region is essentially not covered by the Law until such facilities are established. About 30% of Long Island's waste is made up of organics, and of that about half or 14.5% of LI waste is food scraps (according to data provided by Winter Brothers Waste Management). Long Island's lack of organics recycling infrastructure likely leaves out multiple generators that would otherwise need to comply with the Law were they located elsewhere in the state. New York State should focus on incentivizing this local infrastructure. Doing so would also encourage the development of organics management jobs in the region.

Response: We agree that organics recycling infrastructure is currently lacking on Long Island. It is also an issue in other locations in New York State. One of the intentions of the Food Donation and Food Scraps Recycling Law is to spur more development of food scraps recycling infrastructure. DEC and ESD provide funding for public and private organics recycling facility development. DEC also provides funding supporting food donation. We are hopeful that this combination of activities will lead to significant increases in capacity for recycling.

Comment 51: An important part of effective regulations is enforcement. Enforcement measures should be clearly delineated within the department responsibilities (Section 27-2213) for generators, transporters, as well as for combustion facility or landfills which are no longer to receive source-separated organic waste after the Law takes effect. NYSDEC should coordinate with local municipalities and other stakeholder organizations on its widescale education efforts, and make the required annual reports provided by the generators available to the public via their website or other easily accessible means.

Response: DEC has the authority to enforce Part 350 under Article 71 of the ECL. This authority is outlined in the very beginning of the proposed Part 350 regulations. DEC is committed to continuing with a comprehensive outreach and education effort to increase food donation and food scraps recycling at all levels. DEC is working on electronic reporting for all solid waste programs that would facilitate access to the information for the public.

Comment 52: We are happy to assist in coordination of such efforts. We also note that the Law states that as an alternative to transporting food waste to a recycling facility, that generators may also pursue the option of providing for organics recycling on-site “via in vessel composting, aerobic or anaerobic digestion or any other method of processing organic waste that the department approves by regulation.” We again encourage well coordinated education of generators who choose to pursue this option and stand ready to assist with outreach as needed.

Response. DEC agrees that education is key and appreciate your offer to assist.

Comment 53: Food waste has the potential to sequester large amounts of carbon and replenish our soils. Food waste when it goes to a digester makes energy but does not necessarily solve the waste problem. The digestate that comes out of them has not been proven as any better soil amendment than raw manure, which is heavily regulated. We need to consider the opportunity costs of making energy vs making soil. We can make energy out of lots of different things. We cannot make soil out of as many processes.

Response: Digestate has organic matter and nutrients and is therefore beneficial to soils. The allowable uses for digestate are regulated under Part 361.

Comment 54: I would like to see the food scraps law not include digesters because I think they are making energy and not solving any waste problems. We will still have waste after they are done making energy out of it. Also the need for de-packaging and

other materials just increases the resource usage because digesters require large amounts of metal and other rare earth materials. Additionally, de-packaging has led to lots of micro plastics spreading around.

Response: DEC recognizes anaerobic digestion as a means to treat organic waste that produces energy and produces a more stabilized material for beneficial use as a soil amendment. The Food Donation and Food Scraps Recycling Law at ECL 27-2201(3) recognizes anaerobic digestion as an organics recycler. Depackagers are regulated under the Part 360 series and the amount of contaminants can be controlled by DEC through those regulations.

Comment 55: For the digestate, we recommend DEC also include stated beneficial uses, some of which may include further mechanical, thermal and/or chemical processing. Specifically, we suggest including direct land application in accordance with existing solid waste and nutrient management regulations, production of compost, production of value-added organic soil amendments, biochar, or green chemicals, use as an alternative fuel to generate process heat for anaerobic digestion (i.e. biomass boiler), and other uses which demonstrate beneficial use and avoid disposal.

Response: DEC will provide additional guidance concerning acceptable means for beneficial use. In most cases, if the facility is regulated under Parts 361-2 or 361-3, the resultant material use would qualify as beneficial use.

Comment 56: We ask the Department to consider implementing a hierarchy for beneficial uses of recycled organic waste. In addition to clearer language suggested above, we ask the department to consider implementing a hierarchy for beneficial uses of the diverted organics, as well as a hierarchy for the diversions themselves. We ask that such a definition be written broadly so that it does not limit the technological approaches available. For example, for biogas and digestate created through anaerobic digestion, both can be highly beneficial for replacing products that are associated with

high-carbon supply chains, such as conventional natural gas or synthetic fertilizers. A clear definition would bring added value to resultant products of anaerobic digestion.

We ask that the department create a hierarchy of beneficial reuse using existing metrics determining the total carbon intensity and greenhouse gas emissions associated with diverting organic waste including food scraps and converting these materials in anaerobic digesters. For instance, while direct land application of food scraps can result in utilization of the nutrient content for subsequent crop production, anaerobic digestion provides incremental benefits compared to direct land application:

Reduced formation of nitrous oxides, since decomposition occurs within the digester

Reduced vector attraction and odor potential, since AD greatly reduces the volatile fatty acids

Increased application window, since digestate can be applied during at least a portion of the growing season

Enhanced soil quality benefits, since – compared to the raw waste - the digestate is homogeneous and contains additional micronutrients and humus as a result of the AD process

Capture and beneficial reuse of biogas

Instituting a hierarchy system that either requires or incentivizes organics generators to recycle their organic waste products in the most climate beneficial way would both maximize the environmental benefits of the Food Scraps Recycling Law and the economic benefits of more biogas projects.

In addition to establishing a hierarchy of beneficial uses, we recommend that the Department implement a slightly revised version of the U.S. EPA's Non-Hazardous Materials and Waste Management Hierarchy for determining where to divert organics for optimal management. This hierarchy is supported by the biogas industry, and its inclusion in regulations provides clarity for organics recyclers and helps recycle waste efficiently. One alteration we suggest that the Department consider is prioritizing anaerobic digestion for energy recovery before composting. This is because composting

and anaerobic digestion are complementary solutions, and the digestate that results from the anaerobic digestion of organic waste can be composted after digestion. This hierarchy would allow New York State to generate renewable energy while keeping composting operations supplied with consistent feedstocks.

Response: The preamble to the Food Donation and Food Scraps Recycling Law contains a hierarchy that gives preference for recycling over disposal. However, it does not establish a hierarchy within the recycling sector. DEC does not give preference to one method of recycling over another, there are many factors that will be involved in the development of any given facility and we support that decision process.

Comment 57: We ask the Department to consider whether the requirement placed on wastewater treatment plants to recycle biosolids proportional to what a food scrap generator grinds and disposes of into the sewage system is reasonable.

Response: The proposed Part 350 regulations do not require any wastewater treatment plant to recycle biosolids. It does require a designated food scraps generator to evaluate whether their local wastewater plant is recycling or is willing to recycle biosolids before the generator chooses certain on-site systems that provide little actual treatment.

Comment 58: We must take issue with Section 5 of the Regulatory Impact Statement which states, "There are no mandates that need to be addressed by local governments since the proposed regulations do not apply to these entities." Every town, village, city, county, and public benefit corporation that owns or operates a solid waste management facility, will certainly be directly and significantly impacted by the disposal prohibition mandate as well as other aspects of the Law and regulations.

Response: The requirements in the proposed Part 350 regulations emanate from the Food Donation and Food Scraps Recycling Law. An amendment to the Law

would be needed to change these requirements. Accordingly, the regulations do not provide any new direct mandates. The thrust of the Law is to increase food donation and food scraps recycling from large generators. These are goals that have been embraced by DEC for decades and are embodied in local solid waste management plans. There could be an indirect effect on the few publicly owned and operated landfills in New York State due to loss of revenue from decreased food waste disposal, however, it is expected that significant impacts will not be seen for many years because it takes time to expand organics recycling infrastructure.

Comment 59: The state does not yet know the extent to which the donation aspect of the law will direct food waste for human consumption and reduce the volume to be recycled. Moving forward with the donation aspect of the law before any other requirements would be more logical in the long term.

Response: The Food Donation and Food Scraps Recycling Law requires both food donation and food scraps recycling to be implemented simultaneously. There are mechanisms in the Law, such as waivers, to address difficulties in implementation.

Comment 60: There is a lack of food waste processing capacity and viable compost markets. Although it has been two years since passage of the Law, new processing capacity has not been developed to any significant degree. It would be futile, and in fact counterproductive to mandate food waste separation for generators, haulers and solid waste management facilities unless and until adequate capacity is developed.

Response: The proposed Part 350 regulations and the Food Donation and Food Scraps Recycling Law only require source separation of food scraps if capacity exists within 25 miles to process the material.

Comment 61: In a 2010 report by a private consulting firm for the National Solid Waste Management Association and submitted to DEC, it was estimated that it would cost over \$2 billion to build the infrastructure (anaerobic digestion and aerobic composting) necessary to manage organics in the state with a corresponding unit cost of \$108 per ton—approximately twice the average gate rate for disposal in the state. Local public solid waste management systems would be very hard pressed to afford that cost.

Response: The proposed Part 350 regulations and the Food Donation and Food Scraps Recycling Law do not require organics recycling if it is not reasonably competitive with the cost of disposal. The unit cost will vary significantly depending on location and other factors.

Comment 62: The devastation caused by the COVID virus will continue to impact when, where, how, and how much food waste is generated for years to come. This is especially true with food waste generators associated with professional and collegiate sports, tourism, and hospitality businesses. The state should not be trying to implement new food waste regulations at a time when major sectors of the economy are trying to re-establish their businesses and recover from the severe financial impacts of COVID 19.

Response: The proposed Part 350 regulations are required by the Food Donation and Food Scraps Recycling Law, which is effective January 1, 2022. It would require an amendment to the Law to alter the effective date. DEC recognizes that COVID-19 has had an impact on food scraps generation and will work with generators to determine if they currently produce enough food scraps volume to be subject to the Law.

Comment 63: These rules seriously jeopardize significant prior public investment in renewable energy projects. At a time when local governments and the public haven't even finished paying for the first generation of landfill gas-fueled electric generating plants and have begun investing public money in renewable natural gas projects, New



York State is now pursuing policies to divert organics from landfills. This effectively strands all the investment in landfill-based renewable energy projects, while at the same time asking for more investment into Organics Recycling Facilities.

Response: The proposed Part 350 regulations are required by and follow the Food Donation and Food Scraps Recycling Law. It would require an amendment to the Law to alter these requirements. In practice, the organics in landfills today will continue to produce biogas for decades and the quantity of food scraps diverted under the Law will take years to have an impact on landfill biogas production.

Comment 64: The proposed requirements will undermine initiatives for co-digestion at wastewater treatment plants. The proposed prohibition against disposal of digestate at a landfill facility or a waste to energy facility doesn't make sense. The anaerobic digestion process is estimated to extract 35% - 40% of the methane potential in the food waste. When the digestate is then taken to a part 360 compliant landfill facility, the remaining methane will be recovered at between 75% (in an open cell with intermediate cover and active gas collection) and 95% (in a closed and capped cell). These estimates are conservative. A regulation that makes utilization of this existing capacity difficult or unworkable will force new expenditures for new facilities, thus making the cost of recycling food waste even higher, likely resulting in fewer new facilities being built. Across the state there are over 100 wastewater treatment plants with anaerobic digestion and the state should be doing everything it can to encourage co-digestion.

Response: DEC supports co-digestion at wastewater treatment plants. Portions of these municipal facilities may be eligible for funding under the recycling grants program provided the resultant organic matter is used as a soil amendment or beneficially used. Similarly, to be recognized as a recycling facility, as outlined in the Food Donation and Food Scraps Recycling Law and the proposed Part 350 regulations, it is not enough just to extract biogas from the waste, the resultant organic matter (digestate/biosolids) must also be used as a soil amendment or otherwise beneficially used.

Comment 65: The proposed regulation states that the portion of the resultant material or product derived must be used in a beneficial manner if the products are sent to a facility that accepts multiple wastes such as co-digestate at an anaerobic digester, unless otherwise approved by the Department. A common beneficial manner practice in New York State is that the product derived from anaerobic digestion – digested bio-solids is land applied under Department regulation to agricultural fields. Part 350 does not address the potential impact of anticipated future regulation regarding emerging contaminants (PFAS) found in the digested bio-solids. It is possible that the land application of bio-solids could be severely curtailed or even eliminated as the data record on PFAS and its impact on the environment, especially groundwater expands. This could result in a regulation that conflicts with portions of Part 350. A specific subsection should be added to the regulation that declares that if the DEC determines that the “beneficial manner” is not possible, then the DEC should be enabled to waive that provision.

Response: DEC recognizes that there may be issues in the future that could curtail the beneficial use of biosolids or other circumstances that may arise. Therefore, proposed Part 350-1.4(b) includes the allowance “unless otherwise approved by the department.”

Comment 66: We look at the draft regulations knowing that it is possible that the food waste separation and recycling mandate will be expanded to apply to all generators, including individual residences. If that happens, whatever is adopted in Part 350 will serve as a pattern for an expansion, and that would significantly impact our members. Before expanding the food waste mandate to all generators, including households, eliminating the exemption of elementary and secondary schools, hospitals and nursing homes makes more sense from an economic and logistical perspective. They are major generators of food waste and, in the experience of our members, schools for example, are continually looking for ways to increase and improve their recycling efforts. If the

State goes forward with this mandate, schools, hospitals, and nursing homes should be added, before households.

Response: The addition of new food scraps generators would require an amendment to the Food Donation and Food Scraps Recycling Law.

Comment 67: At this point and with a number of significant unresolved issues, and with the COVID 19 crisis still raging, it is not the time for New York State to impose a sweeping new mandate. We recommend that DEC take whatever action is necessary to postpone the effective date to at least 2025, and in the interim work to resolve the significant issues and problems at hand.

Response: Extending the effective date would require amendment to the Food Donation and Food Scraps Recycling Law.

Comment 68: A final general comment about the regulation is the direction of food scraps to local farmers as animal feed. My observation has been that the local relief organization will contact the farmer who will pick up certain food scraps that acceptable animal feed but not for human consumption. I have no solution for a more direct farmer receipt from the generator, but note it is not addressed in this regulation.

Response: Sending breads and other bakery products from grocery stores directly to farms for feed is a common practice and has been for decades. Other food scraps (brewery grains, cheese whey, etc.) also have the potential for use as animal feed. Under the proposed Part 350 regulations, use as animal feed is considered a form of organics recycling.

Comment 69: Additionally, some clarification or consideration of the following is requested:

- a. With regard to the definition of “Designated Recyclers”: will this have an in-state requirement or is an out-state option potentially allowable?
- b. With regard to qualifying entities: would distribution centers be captured by this definition?
- c. With regard to the prioritization of handling or mandating outlets: How does the language of the regulations impact stores that are already recycling unsold food and meats? We recommend that the rules contemplate a grandfathering status if businesses are currently recycling their food scraps, depending on the definitions noted.
- d. With regard to the mention of “post-consumer scraps”: this provision indicates that there could be recycling and diversion requirements for stores with tenants. How do tenants, leasing space from stores, fit into the rules?
- e. Lastly, we recommend that the state should include in their list of licensed recyclers and transporters, all licensed animal feed; compost; anaerobic digestion and rendering outlet options.

Response: A designated food scraps generator can choose any organics recycler or intermediary facility desired, whether in-state or elsewhere. A distribution center could be considered a designated food scraps generator. DEC recognizes that there are environmentally conscious grocery stores and others that are already donating food and recycling food scraps. They will be considered to be in compliance with Part 350 and will only need to report annually. For stores with tenants, please see the requirements outlined in the definition of designated food scraps generator. DEC will provide a list of all known organics recyclers that have indicated they have excess capacity.

Comment 70: To reiterate, the retail food industry is a very small profit industry, operating within a 1-2% profit margin on average. The financial impact of this proposal is significant. While many of our members are already engaging in these efforts independently, and strongly support the environmental goals of the state, any efforts to

reduce the burden of cost and other onerous provisions of this Law, are greatly encouraged. We strongly urge your department to consider our recommendations and in addition, we look forward to clarification of questions posed.

Response: DEC applauds the efforts of many in the food retail industry to put forth sustainability initiatives that include food donation and food scraps recycling. We believe we are all moving forward to a more sustainable food management model.

Comment 71: This food reduction hierarchy should be the guiding force in implementing the Law and the Department should work to ensure that excess food is put to its highest and best use. In particular, it is important to note that although the Law focuses on food rescue and food scrap recycling, it also includes important food waste prevention provisions. In addition to codifying the food waste reduction pyramid, with prevention at the top, the Law also requires the Department to share food waste educational materials. These are important provisions of the Law. Preventing food from becoming waste in the first place typically offers the greatest financial benefit by reducing the cost of purchasing, handling, and ultimately disposing of food that isn't utilized. It also helps avoid the use of water, agricultural chemicals, energy, and other resources used to produce, process, transport, package, and dispose of that food.

We urge the Department to publish the legislative objectives for the Law and a visual of the food waste reduction hierarchy, alongside these final regulations. We also remind the Department of their responsibility to develop "education materials on food waste minimization and encourage municipalities to disseminate these materials both on their municipal websites and in any such future mailings to their residents," as set forth in the Law.

Response: DEC strongly supports the hierarchy of food waste management, including waste reduction as the highest priority. We are committed to continuing to provide outreach and education directly and through DEC funding of efforts at Feeding NYS, Cornell University, P2I, and others.

Comment 72: In addition to being consistent with the food waste reduction hierarchy, this preference would also be consistent with the State's long standing solid waste hierarchy set out in Section 27-0106 of the Environmental Conservation Law, which provides "an ordered listing of preferred solid waste management methodologies for managing solid waste in a manner that will reduce dependency on land burial of raw wastes. This hierarchy, in descending order of preference, is:

- a. first, to reduce the amount of waste generated;
- b. second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused (For this purpose, composting and anaerobic digestion is considered a form of recycling.);
- 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, recycled or from which energy is not being recovered, by land burial or other methods approved by the Department (ECL 27-0106.1). (All solid waste management methodologies not specifically identified in the hierarchy under (a), (b) and (c) (for example, non-energy recovery combustion) have equal preference to disposal in a landfill. Note: All forms of composting and anaerobic digestion come under (b) in the hierarchy.)

Response: Agreed.

Comment 73: The phrase "use in a beneficial manner" is used throughout the regulations but is not defined. We suggest it be included in the definitions section as follows: "Use in a beneficial manner means used for soil amendment, a source of animal feed, etc., as determined by the Department, and not landfilled or combusted."

Response: Part 350 will be revised to define the term beneficial use and ensure it is more consistently used throughout.

Comment 74: While we support ending or lowering the food waste in our country, we have concerns about the effects this Law will have on our already stressed network of hunger relief organizations. While there has been a rise in the need for food assistance, the capacity of member agencies has not expanded. Storage space is limited for all dry, refrigerated and freezer goods.

Response: DEC is concerned about the ability of food relief organizations to handle additional donations. To assist, DEC has provided more than \$2.5 million to Feeding NYS and additional funding to 84 smaller scale food relief organizations. If funding is available in the future, DEC will provide additional funding opportunities. DEC has also established a food donation advisory committee to help advise DEC with actions that can be taken to assist food relief organizations.

Comment 75: Will those organizations accepting the donations be required to pick up the donations? If so, the transportation must accommodate, at times, a large amount of food. The majority of our hunger relief organizations only have personal vehicles for use.

Response: Food relief organizations will not be required to collect food. The generator must work with the food relief organization to meet their needs and capabilities.

Comment 76: There are also a few, if any, regulations regarding the receiving end of the product. For example, if hunger relief agencies turned down or said no to a retail donation, for any reason, would that organization be punished?

Response: The organization will not be punished. The organization is required to work with the food relief organization to determine what can be donated, but we recognize that the receiving organization may not always be able to accept the food available.

Comment 77: Also, does the offering to a hunger relief organization, even if they say no, meet the retailer's requirement?

Response: The retailer must donate to the maximum extent practical. If there are no relief organizations in the local area that can accept a particular type or quantity of food, the retailer will still be considered to be in compliance if the food is not donated.

Comment 78: There has been no mention of the infrastructure or the program used to connect the donors to the food waste producer. How will this be done and monitored?

Response. DEC has provided \$500,000 to Feeding NYS to provide assistance with connecting generators to food relief organizations. The amount of food donated will be monitored through annual reporting, inspections, and other means.

Comment 79: Our mission states that we provide nutritious food to our Western New York neighbors in need. We follow that mission when ordering food and accepting donations.

Response: DEC applauds your efforts and expects no change to your mission with the implementation of the Part 350 regulations.

Comment 80: We are concerned that most of the offered food will not be of high nutritional value.

Response: A food relief organization is not obligated to receive any food that is not appropriate for their clientele. We encourage retailers and others to work with food relief organization on donation of fresh fruits and vegetables.



Comment 81: Food safety is also a major concern. Any perishable food that comes to the food bank or a hunger relief organization must have at minimum five days left in its shelf life. This timeline ensures that the food can get to a member agency and home to a client, with a couple of days left to eat the food. Will there be a mandated shelf-life time frame that food must have a certain shelf-life for it to be donated?

Response: Due to their long history and expertise in this area, DEC has contracted with Feeding NYS to provide guidance in this area.

Comment 82: Will there be guidance on the types of food that are allowed to be donated? For instance, leftover food from a buffet could not be accepted at a food bank or food relief organization because it has been exposed

Response: DEC will provide written guidance on food donation and has provided funding to Feeding NYS to provide detailed assistance. Also, a potential donator can also check with the local health department concerning food safety requirements.

Comment 83: DEC should simplify the permitting process so a system can be started within 25 miles of urban areas.

Response: Organics recycling systems are permitted under Parts 360 and 361. The permitting process works most effectively when the requirements are fully understood. Pre-application meetings with DEC are strongly encouraged.

Comment 84: The connection to agriculture and agricultural generators should be considered and defined.

Response: DEC recognizes agriculture as a key component of food generation, food processing, and potentially food scraps recycling. DEC will continue to work

with agricultural groups, Cornell University, the DAM, and others to assist with these activities.

Comment 85: DEC should have the staff and resources for outreach and enforcement.

Response: Agreed.

## SUBPART 350-1 GENERAL

Comment 86: The city of New York should not be exempted from the regulations.

Response: The Food Donation and Food Scraps Recycling Law at ECL § 27-2215, lists the exclusions from the Law which includes designated food scraps generators located in a city with a population of one million or more with a local Law in place. Any changes to the exemptions would need to be added through legislation amending the Law.

Comment 87: There shouldn't be any exemptions to the Law. It should apply to New York City, hospitals, nursing homes, adult care facilities, and all schools.

Response: The Food Donation and Food Scraps Recycling Law at ECL § 27-2215, lists the exclusions from the Law. Any changes to the exemptions would need to be added through legislation amending the Law.

Comment 88: The definition of food scraps should be clear that it includes sludges and other liquid wastes generated from food processing, and waste from the manufacture of pet food.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2201(1) defines designated food scraps generator to include food processors, in

the form of a sludge or liquid waste. The definition does not include pet food manufacturers.

Comment 89: Section 350-1.3. We believe this section would benefit by including a definition of the term “animal feed” in the definitions section (350-1.4), to clarify for the regulated community what material is subject to the prohibitions contained in this section. In addition, a critical component of this legislative scheme is that the resultant product developed by the recycler “be used in a beneficial manner” as “determined by the Department.” While the regulations include a parenthetical with certain examples, the regulations should provide greater clarity on what factors the Department will use to determine beneficial use. Will such determinations be ad hoc, or does the Department plan on issuing more detailed guidance? We believe that such detailed guidance would be a better approach for determining beneficial use of the end product.

Response: The primary responsibility for the regulation of animal feed in New York State is with DAM. DEC confers with DAM on any issues concerning animal feed that have not been addressed previously. For a question about the applicability of a material as an animal feed that has not been already used in this manner, the requestor should contact DEC directly for clarification. We believe this is a more effective approach than adding a definition of animal feed that would likely be relatively broad and still necessitate clarification on a case specific basis.

We agree that more detailed guidance on what constitutes beneficial use is a better avenue than in the regulations. DEC will provide additional information through published guidance.

Comment 90: Section 350-1.4. The regulations define “*Designated food scraps generator*” as “a person who generates at a single location an annual average of two tons per week or more of food scraps, on a wet weight basis.” This definition needs to be clarified to make clear how that average is calculated. For example, is such average

based on a rolling 12-month average, or based on the prior calendar year? We suggest a rolling 12-month basis be used for calculating the “annual average.” We are concerned that aggregating what could be separate businesses at a single location, merely because the businesses all use the same transporter, could have the unintended consequence of incentivizing separate businesses co-located at a location under common ownership (e.g., a shopping center) to use different transporters to avoid coverage under the regulations. The regulations should not incentivize the use of separate transporters to service separately-owned establishments that are co-located. In addition, the definition of “on-site” is difficult to follow, especially with regard to the intent of the reference to the crossroads intersection with entrance gained by crossing rather than moving along the right-of-way.

Response: Part 350 will be clarified to indicate that annual means calendar year. We acknowledge that a rolling 12 month average would be useful but since DEC must publish a list of designated food scraps generators each June 1 and it takes a number of months to establish the list, the generation rate will be based on the previous calendar year.

The Food Donation and Food Scraps Recycling Law at ECL 27-2201(1) provides the definition of designated food scraps generator and the stipulation that for a location with multiple independent food service businesses, such as a mall or college campus, the entity responsible for contracting for solid waste hauling services is responsible for managing food scraps from the independent businesses.

For consistency, the definition of on-site from Part 360 was used for the proposed Part 350 regulations.

Comment 91: Section 350-1.1 Purpose and applicability. The term “person” is defined in Part 360 and Part 350 regulations, for consistency, we suggest the term “entities” be changed to “person” in 350-1.1(b)(1).

Response: Agreed. Part 350-1.1(b)(1) will be revised to person for consistency.

Comment 92: Section 350-1.3 Prohibitions. Perhaps some clarity can be derived from defining the word “portion” as being the same percentage of the tonnage or gallonage of food scraps received vs. the total tonnage or gallonage accepted at the facility. We recommend clarifying this language. Is it the Department’s intent that the ratio of food scraps to total inbound material be less than or equal to the ratio of beneficially used material to total outbound material?

Response: The language in Part 350-1.4(b) will be enhanced to add additional clarity. The requirement is that all food scraps are recycled. If they are a portion of a mixed waste stream, the percentage of the resultant product recycled must be equal to or greater than the percentage of food scraps in the incoming mix.

Comment 93: Section 350-1.2 Exemptions and Section 350-2.3 Separation of edible food for donation. Food Relief Organizations are not currently exempt but stand to generate more food scraps if they accept more donations as a result of this rule. Are these entities required to comply? If so, consider including in 350-1.4(d). If these organizations are exempt, include in 350-1.2(b).

Response. The definition of designated food scraps generator in Section 350-1.2(e) applies to any “person.” The definition of person in Section 350-1.2(n) includes not-for-profit corporations, so a food relief organization could be considered a designated food scraps generator. The only ones large enough are likely to be some of the regional food banks. DEC is working directly with the food banks on options for the recycling of their food scraps.

Comment 94: Section 350-1.4 Definitions. We support using an annualized average to determine compliance with the regulation. Using an annual average provides flexibility for the generator when there are minor upsets in production, seasonal fluctuation or circumstances that may artificially inflate the generation amount for a short period. This

will allow generators the ability to make waste reduction adjustments, evaluate the most appropriate food scraps management options and enable time to prepare. Based on the definition of Food Processing Waste, animal rendering facilities and pet/animal food manufacturing are not subject to this rule.

Response: Thank you for the comment concerning the annual average. You are correct, animal rendering and pet/animal food manufacturing are not subject to proposed Part 350 regulations.

Comment 95: Section 350-1.5 Inspection. What records will the generator or the solid waste management facility be expected to maintain on-site available for DEC inspection? It may be helpful to provide guidance on the records or items subject to inspection. How will DEC address Regional interpretation; will there be a standardized inspection form? The receiving facilities, transporters and the solid waste disposal facilities should not be expected to police this regulation.

Response: The generator will not be required to retain specific records for inspection. The inspections are likely to primarily include looking for the collection system in place to recycle food scraps. DEC will develop an inspection form for regional staff to use to assist with consistency. Receiving facilities, transporters, and disposal facilities are only responsible for the requirements that are applicable to them, not what the generators are obligated to do.

Comment 96: Subpart 350-1 should lower the limit to one ton per week or, if not allowed by legislation, DEC should advise the Legislature to amend the statute. Regardless of the limit, the limit should be defined on a weekly and annual basis to prevent changing operations week to week to avoid regulation.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2201(1) defines a designated food scraps generator as a person who generates an annual average of two tons of food scraps per week. It would take an

amendment of the Law to change the applicable generation rate. The requirement that it is an annual average will account for weekly variations.

Comment 97: Section 350-1.2(a) excludes New York City. This should be amended to apply only if the local jurisdiction is actively and aggressively enforcing its local Law.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-27-2215 excludes designated food scraps generators located in a city with a population of one million or more with a local law in place. A requirement related to the enforcement of the Law would require an amendment to the Law.

Comment 98: Section 350-1.4 includes land application as a recycling of organics. Land application should be deleted from this definition and treated the same as landfilling and combustion because land application results in methane emissions equal to or greater than those emitted by a landfill.

Response: The Food Donation and Food Scraps Recycling Law at ECL 2201(2) recognizes a land application facility as an organics recycler. It would require an amendment to the Law to change the status. DEC is not aware of information that indicates that methane emissions from land application would exceed those from landfilling.

Comment 99: Clarify that depackagers fall under 361-6 Other organics recycling facilities. Depackagers that are used solely or primarily for contaminant removal, as opposed to separation of organic waste from packaging, should not be eligible for exemption or registration.

Response: The proposed Part 350 regulations do not address how depackagers are regulated under the Part 360 series. How they are regulated under Part 360 will depend on where they are located (are they collocated with a digester, for

example), the materials to be processed, and the proposed use of the processed materials.

Comment 100: 6 NYCRR 350-1.3(b) and 350-4.2(a): These provisions state that the product/material resulting from recycling food scraps must be used "in a beneficial manner as determined by the Department and cannot be landfilled." Clarification is needed about what this means. For example, does a "beneficial manner" mean only those beneficial uses authorized per 6 NYCRR 360.12? If so, a better correlation must be provided in the regulations about the interaction between this new Part 350 and the Parts 360/363 regulations. As part of that explanation, Part 360.12 should be modified to provide a categorical determination that ADC is deemed to be a beneficial use under the Part 350 regulations, rather than requiring a case-specific determination under 6 NYCRR 360.12(d). If the regulations are not modified in this manner, the Department should explain how such determinations will be made.

Response: DEC will provide additional guidance on beneficial use. Most beneficial use is tied to a facility regulated under Parts 361-2 and 361-3.

Comment 101: 6 NYCRR 350-1.3(b): This provision states: "If the food scraps are sent to a facility that accepts multiple waste streams (an anaerobic digester, for example), the portion of the resultant material or product derived from food scraps must be used in a beneficial manner and not landfilled or combusted, unless otherwise approved by the department." Regarding the underlined language, this is impossible to comply with in practice because there will be a portion of the material delivered that will need to be landfilled or otherwise managed--for example, plastic and soiled paper packaging that must get screened out or removed prior to being processed for digestion. In addition, if organic slurry were co-digested in an anaerobic digester, the biological destruction and resultant mass within the digester would be for all practical purposes inseparable from that beneficially used from the portion disposed. Thus, there is no way to track what "portion" of the resulting material coming out of a recycling/digester/etc. was "derived



from food scraps. As a result, the second sentence in 350-1.3(b) should be deleted. If it is not deleted, DEC should clarify that the practice should only apply to the proportion of food scraps compared to the facility's total input.

Also, in certain instances, i.e., an upset at an anaerobic digester occurs which may not be the result of the food slurry being incorporated. During an upset condition, the delivery of food waste slurry may be temporarily terminated. Will authorizations be required from the department in each instance or can approved backups be authorized, which may include landfilling or combusting?

Response: DEC will provide additional guidance concerning the recycling requirement. The percentage of the resultant digestate that must be recycled (dry weight basis) must be the same as the percentage of the input waste that is food waste (dry weight basis). Difficulties at any organics recycling facilities will be reviewed by the DEC on a case specific basis.

Comment 102: 6 NYCRR 350-1.4(d): This provision provides the definition for a "designated food scraps generator." It is important to have good waste stream and volume for processing. Would it be reasonable to request (but not require) that food scrap generators limit contamination percentage in the food scraps to, for example, 25% wet waste basis? Typical source separated organics is in the range of 5-10% contamination; higher levels may be able to be handled by an intermediary processor or organic recycler but processing rates drop and the potential for rejection or landfill or combustion disposal increases.

Response: As outlined in Section 350-2.4 (a)(1), the materials separated and the level of contamination depends on the organics recycler or intermediary facility, and the generator must separate in a manner that can meet those requirements. The Food Donation and Food Scraps Recycling Law does not set a contamination threshold.

Comment 103: 6 NYCRR 350-1.4(g): This provision provides the definition for "food scraps." Consider modifying the first sentence in the definition of "food scraps" as follows: "inedible food produced from production, preparation and consumption, trimmings ... "

Response: The definition of food scraps in proposed Part 350-1.2(h) is from The Food Donation and Food Scraps Recycling Law at ECL 27-2201(2). Any revision to the definition would require an amendment to the Law.

Comment 104: 6 NYCRR 350-1.4(h): This provision provides the definition for "intermediary facility" as "a facility that is not located at the point of generation, such (as] a regional depackaging facility, that is used to process or manage food scraps prior to subsequent acceptance at an organics recycling facility." This definition should be modified so that the reference to a regional food scraps processing facility may include a depackaging system.

Response: DEC understands that an organics recycler may have pre-processing steps located on-site such as a depackager. Proposed Part 350-1.2(i) covers the stand-alone intermediary facilities.

Comment 105: 6 NYCRR 350-1.4(1): This provision provides the definition for "organics recycler." The Department should incorporate the term "intermediary facility" into the definition of Organic Recycler or modify the language at the following provisions to include generators sending food scraps to an "intermediary facility and/or" organic recycling facility as indicated below:

- 350-2.2 ("This determination shall be based on the department's assessment of the quantity of food scraps that can be accepted at each intermediary facility or organics recycler.")
- 350-2.4(a)(1) ("For example, post-consumer food scraps do not have to be collected by the generator unless the intermediary facility and/or organics recycling facility is

capable of removing contaminants (plastics, etc.) that are likely to be present with the food scraps."). Otherwise, the language could be interpreted as effectively gives the generator the discretion to decide whether to separate its food scraps.

- 350-2.4(a)(5) ("Obtain the services of a transporter that will deliver food scraps to an intermediary facility and/or organics recycler, self-haul its food scraps to an intermediary facility and/or organics recycler, or provide for organics recycling on-site. Self-hauling or recycling on-site are not required to comply with this Part.")
- 350-2.4(b)(1) ("If the on-site system does not treat at least 80 percent, by volume, of the food scraps generated annually, the remainder must be sent to an off-site intermediary facility and/or organics recycler with sufficient capacity if one exists within a 25-mile radius of the generator, measured in a straight line.")
- 350-2.4(c) ("Separation of food scraps by the generator is not required for a designated food scraps generator that sends all of its food scraps to be processed in a solid waste composting facility, solid waste anaerobic digestion facility, or other intermediary facility and/or organics recycler capable of managing the waste without source separation.")
- 350-2.5(d) ("the name of the intermediary facility and/or organics recycler(s) where the food scraps were processed; and")
- 350-2.6(b)(3) ("Justification 3. The intermediary facility and/or organics recycler(s) within 25 miles (measured in a straight line), as identified by the department in the list, does not have available capacity.")
- 350-2.6(c)(3)(i) ("documentation from any transporter and/or organics recycler contacted by the generator indicating why the intermediary facility and/or organics recycler cannot accept .... ")
- 350-3.2 ("The department will maintain a list of intermediary facilities and/or organics recyclers and make an updated list available on or before June 1 of each year, beginning in 2021.")
- 350-4.1 ("Any waste transporter that collects food scraps from a designated food scraps generator required to send its food scraps to an intermediary facility and/or organics recycler or from an intermediary facility used prior to recycling .... ")

- 350-4.1 (c) ("keep the food scraps separate from other solid waste unless the comingled waste can be processed by an intermediary facility and/or organics recycler....")
- 350-4.2(b) ("Upon request, any intermediary facility and/or organics recycler must provide information to the department concerning the amount of food scraps they are processing .... ")
- 350-4.4 ("Combustion facilities and landfills must take all reasonable precautions to not accept food scraps from designated food scraps generators who are required to send their food scraps to an intermediary facility and/or organics recycler.")

Response: DEC agrees that the intermediary facility may need to be referenced in other provisions and the Part 350 will be revised to clarify that the intermediary facility may be the determining factor in some cases.

Comment 106: Applicability to Liquid Waste. The final rule should specify how applicability is determined for entities that generate liquid food waste. Section 350-1.1(b) of the Proposed Rule states that "This Part applies to entities that generate two tons of food scraps (wet weight basis) per week or more," and a similar definition is used for "designated food scraps generator" in Section 350-1.4. However, Section 350-1.4 defines "food scraps" as including "food processing waste," which is in turn defined by incorporation of Part 360's definition of this term. Part 360 defines "food processing waste" to include "any solid, semisolid, or liquid food sludge or residue that is unrecognizable but identifiable by analysis or can be certified as a byproduct of plant, fruit, vegetable or dairy processing." 6 N.Y.C.R.R. § 360.2. As a result, the Proposed Rule applies to entities that generate liquid food processing waste, but determines eligibility based solely on wet weight measurement, which cannot be easily applied to liquid waste that is sewerage. The City requests that DEC provide additional applicability criteria in the final rule for generators that produce liquid food processing waste, such as volume recorded using a flow measurement device.

Response: As mentioned, Section 350-1.2(f) defines food processing waste by incorporation of the definition from Part 360.2. The definition includes liquid waste. It is the responsibility of the food processor to determine the amount of liquid waste produced and convert that quantity in gallons to wet (total) tons on a weekly basis. We agree that a flow meter or measurement device may be the most common method, but DEC would accept other legitimate means of measurement.

Comment 107: The final rule should also explicitly include food processing waste generated by breweries and distilleries. Breweries and distilleries produce large volumes of liquid waste with high concentrations of organic matter. However, the Proposed Rule's applicability criteria do not clearly cover these entities because the definition of "food processing waste" that is incorporated from Part 360 includes only byproducts of "plant, fruit, vegetable or dairy processing." Although the processing of cereal grains, hops, and other plants to create alcohol arguably falls within this definition already, the City requests that DEC modify the definition of "food processing waste" in Section 350-1.4(f) to ensure that this important form of organic waste is recycled.

Response: DEC has regulated the recycling of food processing waste under Part 360 for many years, including the recycling of brewery waste and distillery waste. We have not experienced any disagreement from the industry about our determination that it falls under the definition of food processing waste in Part 360. However, Part 360 is currently being revised and we will consider adding the example to the definition as part of that rulemaking process.

Comment 108: Defining "Public Authority"

Because no definition is currently provided for "public authority" as used in Section 350-1.2(n)'s definition of "person," the City requests that DEC clarify whether this term refers to all public-authority-operated sites within New York State.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2201(4) defines “person” to mean any business entity, partnership, company, corporation, not-for-profit corporation, association, governmental entity, public benefit corporation, public authority, firm, or organization. ECL 27-2201(1) defines “designated food scraps generator” to mean the entity responsible for contracting for solid waste hauling services is responsible for managing food scraps from the independent businesses. Public-authority-operated sites within New York State are included in the definition of “person.”

Comment 109: Prohibitions (350-1.3). We suggest that you remove the “unless otherwise approved by the Department” language from section 350-1.3(b). The product or material created by the recycling of food scraps should not be landfilled or combusted and the caveat is unnecessary. These same edits should be made in the section on Organics Recyclers (Section 350-4.2).

Response: It has been DEC’s experience that we cannot predict all potential issues that may arise, and it is useful to have the ability to make a determination of applicability. For example, the use of anaerobic digestion for food scraps in the United States was not commonplace only a few years ago.

Comment 110: Definitions (350-1.4). The definition of organics recycler (350-1.4(l)), both in the Law and proposed regulations, includes the terms land application and ethanol production, which are far less environmentally preferable than animal feed, composting, and anaerobic digestion. Land application without prior treatment of residues (e.g. through composting) can spread pathogens and other contaminants, and ethanol production emphasizes the production of energy without guaranteeing the ecologically preferable application of the residual organic matter to soil. We urge the Department to encourage the use of true recycling methods and to discourage the use of land application and ethanol production.

Response: The proposed Part 350 regulations follow the definition of organics recycler found in the Food Donation and Food Scraps Recycling Law and any alteration would require an amendment to the Law. DEC has regulated the land application of waste for their fertilizer value for decades and we believe the practice can be done in an environmentally sound manner.

Comment 111: Section 350-1.3(b). This section, in permitting discretionary approval by the Department should consider adding a threshold standard that is “impracticable” so there is a unit of measure by which to limit DEC’s discretionary authority. Economic, logistic or measurement for impracticable may be inserted.

Response: This provision includes “unless otherwise approved by the department” to allow a processor to present information to DEC to justify that beneficial use is not viable for a mixed organic waste recycler. We do not believe additional descriptions are necessary.

Comment 112: Section 350-1.4(b). The definition of combustion should be refined by the Department and should limit the thermal prohibition. Pyrolysis does not use oxygen and gasification is low oxygen. We suggest that the prohibition only run to traditional, municipal waste combustors and not to non-incineration thermal treatment of biosolids only. This achieves the goal of productive use of material without feeding the traditional mass burn of mixed solid waste.

Response: The definition of combustion in proposed the Part 350 regulations is consistent with the definition found in Part 360 for solid waste management facilities.

Comment 113: Section 350-1.4(1), states: "Organics recycler means a facility that recycles food scraps through use as animal feed or a feed ingredient, rendering, land

application, composting, aerobic digestion, anaerobic digestion, fermentation, ethanol production, other processes approved by the department."

As we commented above concerning full inclusion of non-incineration thermal conversion technologies, the Department's current approach results in viable technologies being left off the table. The Department should evaluate and discuss environmental (carbon) footprints and emissions profiles of non-incineration thermal processes vis-a-vis other digestion and landfilling of organics methods.

Response: Under the definition of organics recycler, DEC can approve other technologies that have the ability to produce materials for beneficial use similar to those listed in the definition of organics recycler.

Comment 114: Section 350-1.4(o) Can transfer facility include an intermediary facility? See usage of "transfer facility" throughout regulations. The Part 360 Regulations define transfer facility as: "a facility that receives solid waste for the purpose of subsequent transfer to another facility for further processing, treatment, transfer, or disposal."

Response: A transfer facility can be considered an intermediary facility if they are approved by DEC to accept source separated food scraps and send them to an organics recycler.

Comment 115: Exemptions. Aligning Exemption with Existing Law

The exemption in the final rule for cities with a population of one million or more should conform to the text of the Environmental Conservation Law, which states that "This title shall not apply to any designated food scraps generators located in a city with a population of one million or more which has a local Law, ordinance or regulation in place which requires the diversion of edible food and food scraps from disposal." N.Y. E.C.L. § 27-2215(1). Based on this provision, all generators within the City are exempt from the requirements of the Food Donation and Food Scraps Recycling Law and of the



Proposed Rule as a result of the City’s Commercial Organics Source Separation Law, which was implemented by Local Law 146 in 2013. The exemption in the Proposed Rule fails to explain how the stringency of the rule would be compared to that of an existing local Law, particularly when local food waste Laws are triggered by different criteria from those utilized by the Proposed Rule. Section 350-1.2 of the Proposed Rule specifies that it does not apply to “any designated food scraps generators located in a city with a population of one million or more which has enacted a local Law, ordinance or regulation at least as stringent as, or more stringent than, the requirements of this Part that requires the diversion of edible food and food scraps from disposal.” New York City’s commercial food waste Law imposes recycling requirements on a variety of establishments based largely on floor area, see NYC Administrative Code 16-306.1 (added by L.L. 146/2013), while the applicability of the Proposed Rule is based on the wet weight of food scraps generated by a given entity. As a result, it is unclear whether the local Law of New York City would be considered “at least as stringent as, or more stringent than” the Proposed Rule. To avoid this issue, the City suggests that the final rule adopt the same scope as the enabling legislation, which bases the exemption on the existence, rather than the stringency, of local food waste Laws.

Response: Agreed. The language in Part 350 will be revised to mirror the language found in ECL 27-2215(1).

Comment 116: Similarly, if New York City’s Laws satisfy the rule’s stringency test, it is unclear to what extent generators, intermediary facilities, and organics recyclers within the City are subject to the rule’s requirements. The City requests that DEC clarify whether the Proposed Rule would exempt all generators within the City, or only those that are subject to equal or more stringent regulation under City Law. For example, while the City’s local Law applies to entities like food retail stores, manufacturers, wholesalers, and service establishments, it does not currently cover entities like higher education institutions that are included within the scope of the Proposed Rule. The City also requests that DEC clarify whether publicly owned treatment works (POTWs) that are operated by a city with equally or more stringent recycling requirements, but that

receive food waste from designated food scraps generators located outside the city, are required to comply with the rule's requirements for organics recyclers, such as Section 350-4.2.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2215(1) states that the Law shall not apply to any designated food scraps generator located in a city with a population of one million or more which has a local Law, ordinance or regulation in place which requires the diversion of edible food and food scraps from disposal. The definition of designated food scraps generator in ECL 27-2201(1) includes entities such as higher education institutions which may not be subject to the City's local Law. Since the exemption applies to all designated food scraps generators without a distinction of the coverage under City Law, these entities are exempt from the State Law in the City provided the local Law exists.

Organic recyclers are not excluded from the Law according to ECL 27-2215(1) and therefore not exempt from the regulations, regardless of location. Therefore, POTWs or other recyclers located in the City that accept food scraps from designated food scraps generators located outside the City are subject to proposed Section 350-4.2.

Comment 117: Please consider reducing the 2 tons per week down to 1.5 tons, then 1 ton, and finally 0.5 tons in 2027.

Response: The Food Donation and Food Scraps Recycling Law at ECL § 27-2201, outlines the two ton limit. Any change to the limit would need to be added through legislation amending the Law.

Comment 118: The regulations specify that the calculation for determining if a food scraps generator is covered by the Law is by individual location and not by ownership. For multiple small entities (mall or college campus) – It depends on who contracts for

waste management. This regulation overlooks the possibility that there are generators like chain restaurants (Panera's for example) that could develop their own collection and transport system for recycling among their area stores, as is similarly done for the delivery and distribution of food to their stores.

Response: DEC recognizes and encourages chain restaurants or other generators to work with their individual stores/locations to promote consistent food donation and recycling practices. However, the Food Donation and Food Scraps Recycling Law specifies how generators are determined which has been incorporated into the proposed Part 350 regulations.

Comment 119: It should be confirmed that the regulations apply to the wet weight of the food scraps without regard to dehydration, mechanical press, or other treatment to reduce the weight of the food scraps.

Response: The proposed Part 350 regulations apply to the total amount of food scraps that are produced by the generator prior to on-site treatment or that would leave the generator for disposal. On-site treatment is acceptable if the regulations are followed.

Comment 120: Encouraging Participation from Exempt Institutions. In addition to the exemption of designated food scraps generators based on the stringency of local Law, the Proposed Rule also exempts "hospitals, nursing homes, adult care facilities, and elementary and secondary schools." New York City requests that, despite these exemptions, the final rule encourage all exempt entities to participate in available food scrap donation and food waste recycling programs where practicable.

Response: DEC agrees that other generators, including those that are exempt from the Law, and smaller generators should be encouraged to donate edible food and recycle food scraps. DEC is encouraging these entities through

outreach and education, technical assistance (including assistance from P21 through contract with DEC), and funding programs.

Comment 121: Section 350-1.1(b)(1). This section should be amended to include anaerobic digestion and other forms of non-combustion, thermal or conversion facilities that currently process source separated organics and/or general biosolids.

Response: The applicability is broad enough to cover all solid waste management facilities including those mentioned if the resultant material is beneficially used.

Comment 122: Proposed new Subsection 350-1.7 to be added. The Department should add the following new subsection to maximize control and beneficial use of organics consistent with existing systems and processes:

350-1.7 - Preemption: "Nothing in these regulations shall be deemed to abrogate, amend, or preempt any Flow Control regulations applicable to Solid Waste existing prior to or enacted after the date of the enactment of these regulations. Organic waste otherwise covered by these regulations is subject to the additional requirements of, valid and enforceable Flow Control regulations enacted in accordance with and subject to other enabling legislation previously approved by the Assembly and or a local legislative body acting pursuant thereto"

Response: All waste management requirements in the proposed Part 350 regulations do not preclude any activity from having to comply with applicable local laws and requirements. DEC does not feel it is necessary to call out any particular local requirement in the regulations.

Comment 123: Section 350-1.1 (b)(1) should read “...that generate two tons of food eligible for donation or food scraps for recycling ...” The distinction of food that is edible and that destined for composting or disposal should be clear throughout the document to avoid misinterpretation of the intent of this regulation. The default use of the term “food scraps” should be corrected throughout the document for clarity.

Response: The definition of food scraps and designated food scraps generator in the proposed Part 350 regulations come from the Food Donation and Food Scraps Recycling Law and a change to the definitions would require an amendment to the Law.

Comment 124: Section 350-1.4(j) defines maximum extent practicable to include use of best management practices which is a term that should be defined. For example, it is not uncommon to receive produce from a local grocery with bacterial soft rot or fungal mycelium and is not appropriate for human consumption but is in the same box as edible produce. Best management practices would separate the spoiled from the edible produce. The Department should consider offering some level of guidance as to the expectation of best management practices.

Response: DEC will provide guidance on food donation. In addition, DEC has provided grant funding of \$500,000 to Feeding New York State specifically to provide hands-on assistance to generators concerning proper donation.

Comment 125: Section 350-1.1 Applicability: This section applies to entities that generate two tons of food scraps per week. Grocers currently make huge donations of healthy food to food banks within their service areas. We strongly believe that these food donations should be discounted from the weight calculation of the 2-ton threshold for applicability to a given food scrap generator. It should be made explicit in this section as well as at other points in the regs such i.e., Section 340-1.4(g) Definitions – “Food Scraps”. It is affirmed in section 2.3 Separation of edible food for donation.

Response: The factors that are used by DEC to estimate food scraps generation typically already account for well-established donation programs. The proposed Part 350 regulations do not allow increased donation as a justification for a waiver because it may drive inedible food to food relief organizations.

Comment 126: Section 350-1.2 Exemptions: We feel strongly that this provision must be stricken. All localities should be pre-empted from setting different standards/requirements. As was the issue with the patchwork framework created by the passage of New York's bag Law, it is unfair and impracticable for companies operating across county lines to comply with inconsistent provisions. This creates an administrative nightmare for stores, making the mandate difficult and complicated to manage effectively. All localities should be aligned under one statewide policy.

Response: The exemptions found in proposed Part 350-1.3 are found in The Food Donation and Food Scraps Recycling Law at ECL 27-2215. An amendment to the Law would be required to alter the definitions.

Comment 127: The definitions should tie to the Part 360 more for clarity.

Response: The definitions will tie to Part 360 where possible, but the proposed Part 350 regulations must include the definitions found in the Food Donation and Food Scraps Recycling Law at ECL 27-2201.

## **SUBPART 350-2 DESIGNATED FOOD SCRAPS GENERATORS**

Comment 128: Section 350-2.1 – please clarify when in the annual cycle the determination of who is a designated generator is made. Is it based on data compiled in August, etc., which becomes outdated by February? Or is it left to the proposed generator to challenge the list after it is published on July 1?

Response: DEC is required to publish the list of designated food scraps generators on June 1 of each year. It takes time to take the rough business lists and develop a final list, so it is anticipated the business list will be from the end of the previous calendar year. DEC does not anticipate a significant change in the six-month period but adjustment can be made as needed.

Comment 129: Section 350-2.2- once the methodology is operational for determination of who must comply, would it be extremely burdensome to compile the list twice yearly, instead of annually?

Response: There is a cost, in both staff resources and monetarily to obtain the business data, each time a list is generated. It is not expected that the number of new large generators that open or close each six months would justify these costs.

Comment 130: Section 350-2.6(b)(2) - why only 10%? Given the multiple emergencies of declining landfill space, preventable methane generation, and hungry people, it seems we should ask more.

Response: The Food Donation and Food Scraps Recycling Law states that the cost for recycling must be “reasonably competitive” with the cost of disposal. There is no definition of reasonably competitive provided in the statute but it has been defined as 10% elsewhere in Environmental Conservation Law for the purchasing of recycled products, and was used for the purposes of the proposed Part 350 regulations.

Comment 131: Section 350-2.4(a) and elsewhere – does the 25-mile distance apply across state lines?

Response: Yes, the Food Donation and Food Scraps Recycling Law does not specify that it must be a facility located in New York State.

Comment 132: Waiver justification 2 – the cost discussion does not mention food donation. It is becoming more common for food rescue organizations to charge a fee to help defray donation costs.

Response: The cost discussion in the Part 350 regulations will be revised to clarify that it must include the cost or cost savings associated with enhanced donation.

Comment 133: It is vital and exciting to see New York State implementing a food scraps and recycling Law. However, one issue that needs to be addressed is the waiver that would exempt them from complying with the law. The data submitted with the waiver is not fact checked by a third party and is not made publicly available. Costs should not include initial costs that DEC has grants for.

Response: All waiver requests must include the information required by DEC and will be approved by DEC if sufficient justification is provided. Also, the waiver is limited to a one-year time period. Unless otherwise restricted by law, information submitted for the waiver is subject to public review. Grants money will be considered as part of the evaluation of the waiver request.

Comment 134: Temporary waivers. First, the Law indicates that the cost of recycling must be reasonably competitive with the cost of disposal. The proposed regulations define this as 10 percent. This percentage should be 25 percent in consideration of the added environmental costs associated with landfilling. The cost savings associated with donation should include the tax incentives associated with the practice. Generators should be encouraged to pursue available grants before seeking a waiver. Pricing information should be kept confidential to the extent allowed. A waste audit should also be part of the waiver request for those that claim they produce less than 2 tons per week.



Response: The Food Donation and Food Scraps Recycling Law states that the cost for recycling must be “reasonably competitive” with the cost of disposal. There is no definition of reasonably competitive provided in the statute, but it has been defined as 10% elsewhere in Environmental Conservation Law for the purchasing of recycled products and was used for the purposes of the proposed Part 350 regulations. Including cost savings due to tax incentives would be difficult for DEC to verify and would likely be a small factor in the overall cost. Generators will be encouraged to pursue available grants and a waste audit may be a needed component of the justification in some instances.

Comment 135: Section 350-2.4(a)(1) limits the source separation requirement for post-consumer waste. However, there are well established best management practices that can limit contamination in this waste stream (multiple bins, consumer education, etc.). This limit should be removed.

Response: Section 350-2.4(a)(1) does not exclude post-consumer food scraps from the recycling requirements. It does recognize that this waste stream is typically more contaminated and takes special efforts on the collection and processing side to handle, so this is considered when a system is put in place.

Comment 136: For the temporary waiver, there should be standardized documentation that is required.

Response: DEC will develop and publish a waiver application with a detailed list of the documentation that must be included with the application.

Comment 137: One key standard relates to the threshold determination of whether an entity is identified as a “designated food scraps generator.” Environmental Conservation Law §27-2201 provides that the basis for such designation is the generation at a single location of an annual average of two tons per week or more of food scraps. The

Department is directed to establish the methodology for these determinations, but both §27-2201(1) and §27-2211(1)(a) make clear that the methodology is to be established pursuant to regulations and that the factors used to determine who is a designated food scrap generator must be published on the Department's website.

Proposed §350-2.1 only sets forth a loose description of the methodology, but provides no useful standards that could be used to determine how a specific entity would be evaluated. Under the proposal an entity might have this determination based on proxy calculations, which might be some unspecified number of employees or students' or it might be based on phone interviews, or on publicized research, if proxy calculations "are not available" or "are not appropriate," or if more accurate site-specific data such as weight receipts are available, that data "may be used" by the Department.

The proposed regulations provide only that the proxy calculations will be made available on the website, but these are only one component of the overall methodology described in §350-2.1. The details of the methodology the Department envisions utilizing in implementing this program should have been included in the proposed regulations. This would enable interested parties and the public to weigh in on the merits of this potential approach and to suggest possible improvements. Also, the full methodology should be published on the Department's website as required by the statute.

Response: As required by the Law, DEC has provided the detailed methodology used to develop the designated food scraps generators list on our website and will provide additional information to assist food scraps generators. Additional clarification in Part 350 will include more detail on the methodology to determine which entities are designated food scraps generators.

Comment 138: Similar concerns arise with the treatment of waivers in the proposed rules. Proposed §350-2.6 sets forth the process for a designated food scraps generator

to petition for a temporary waiver from some or all of the statutory requirements. The proposed regulations generally follow the statutory requirements, but some more detail should be added to ensure that not only the letter but also the spirit of the Law is upheld. For example, under the proposal a generator could seek and receive a waiver from the "maximum food donation" requirement of the Law -- even if it was seeking a waiver because of cost or transporter issues on the recycling end. Any waiver of the excess edible food donation requirement should be based solely on the justification in §27-2203(3)(a), that the generator does not meet the two tons per week threshold, and should be off limits to other petitioners.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2203(3) explicitly states that a designated food scraps generator may petition the department for a temporary waiver from some or all of the requirements of this title.

Comment 139: The "emergency waiver" language in this section is also too sparse. A generator may seek immediate relief from the regulations through an emergency waiver, but nothing in the proposal addresses the duration of these waivers -- unlike the other waivers provided for in the statute, which are limited to one year subject to renewal. The rules should provide that an emergency waiver will be issued for no longer than is necessary to respond to the emergency situation.

Response: Section 350-2.6(a)(2) will be revised to clarify that all waivers, including emergency waivers, will be no longer than one year in duration, subject to renewal.

Comment 140: 350-2.1. The title of this subsection, referencing "methodology," is inconsistent with the title in the table of contents, which uses the word "calculation."

Response: Thank you for finding the inconsistent naming. The wording will be revised in Part 350 for clarity.

Comment 141: 350-2.2. The Department should include a procedure in the event an organics recycler closes in the middle of the year. In certain locations the closure of a facility may significantly impact the available capacity, and thus the ability of a food scraps generator to reasonably comply with the regulations. The failure to address what occurs in the event of a major facility closure is a significant omission.

Response: The temporary waiver provisions of Section 350-2.6 include a justification for other circumstances unique to the generator, also called an emergency waiver. This could include the sudden closure of an organics recycling facility, which is cited as an example of an emergency waiver reason in 350-2.6(d).

Comment 142: 350-2.3. We believe this provision, addressing food for donation, is not workable. While it is obviously prudent for generators to separate food going to recyclers versus donated food, the decision on whether and how much food should be donated should be left to the generator and such donation should not be mandated by these regulations as long as such waste is sent to a recycler.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2203(1)(a) requires that all designated food scraps generators shall separate their excess edible food for donation for human consumption to the maximum extent practicable. An amendment to the Law would be required to alter this requirement.

Comment 143: 350-2.4. Subsection (a) should also include cost as well as available capacity to trigger compliance with the remaining requirements of this subpart. As written, a generator would be required to send its food waste to the facility even if its pricing is unreasonable or otherwise not consistent with pricing in other areas of the state. The Department should include cost as a factor in order to prevent potential

gouging by a recycler when it is the only available facility within a reasonable distance from the generator. Although cost can be used as a justification for a waiver, we believe that it should also be considered in the context of the initial applicability determination, thereby obviating the need for a generator to obtain a waiver.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2203(1)(b) does not include cost in the requirements applicable to the designated food scraps generators. The designated food scraps generator is not obligated to use a facility that is within 25 miles and may use a more cost-effective alternative elsewhere. The waiver is the mechanism for the designated food scraps generator to demonstrate that the cost is not reasonably competitive.

Comment 144: 350-2.6. The waiver provision in subsection (2) should allow submission after the November 1 deadline “for good cause shown,” to provide an exception to the deadline where just and reasonable. We believe that it is misguided to not allow a generator to exempt itself from the regulatory scheme by donating food sufficient to bring it under the two ton regulatory threshold. The Department should encourage food donation and reuse and allowing donations to bring a generator under the regulatory threshold should be encouraged rather than discouraged. We agree with using the 10% increase in cost as an appropriate justification for a waiver, but believe the regulations should clarify when a recycling facility is deemed unavailable to the generator. If the Department intends to apply the twenty-five mile distance threshold to determine availability, the regulations should make that clear. We also believe that the list of necessary documentation to support a waiver request should allow the generator to submit the information or an explanation of why such information could not be provided. Adding the ability to explain why information was not provided addresses circumstances where a facility or transporter may be unwilling to provide the generator with the information required pursuant to this subsection.

Response: Section 350-2.6(d) outlines that an emergency waiver can be submitted at any time of the year. 350-2.6(a)(2) will be revised to clarify that emergency waivers are not subject to the November 1 deadline.

Great concern has been expressed to DEC by the food recovery sector that using food donation as a means for a generator to drop below the two ton threshold will lead to inappropriate donation of food that is not fit for human consumption which is a financial and logistical burden on those receiving entities. Therefore, it is not allowed under the proposed Part 350 regulations.

Section 350-2.6(b)(3) specifies that the organics recyclers considered are within 25 miles of the generator, as required by the Food Donation and Food Scraps Recycling Law. A generator can include in any waiver petition an explanation of any difficulties in obtaining data to support the request.

Comment 145: In section 2.4(a)(1), certified compostable products should be identified as non-contaminants if the receiving facility has the capacity to compost them.

Response: Under Section 350-2.4(a)(1), the materials that must be separated depends on the capabilities of the organics recycler or intermediary facility. If the recycler is capable of processing compostable products used by the generator, they must be separated with the food scraps.

Comment 146: Section 350-2(b)(2): The influx of food waste mixed into the public water system has the potential to change the biology at the wastewater treatment facility. Additionally, the food waste so processed becomes part of the digestate which is often difficult to land apply in the state of New York. It seems that allowing the authorization or permitting for this type of disposal runs counter to the DEC's desire to convert food scraps to beneficial use.

Response: Proposed Section 350-2.4(b) requires any generator that is discharging untreated food scraps to the sewer system to obtain approval from the local government to ensure the system can handle the waste. To qualify as recycling, the solids resulting from the treatment of food scraps at the wastewater treatment plant must also be recycled.

Comment 147: Section 350-2.3 Separation of edible food for donation. If a company is responsible for the safety of the foods they produce, how will food donation requirements or enforcement account for this? The receiving facilities, transporters and the solid waste disposal facilities should not be expected to police this regulation.

Response: Generators will be responsible for food donation. The proposed Part 350 regulations require that donation is performed to the maximum extent practicable, but the generators must still meet all food safety requirements outlined by the DOH and DAM. Receiving facilities, transporters and the solid waste disposal facilities are not be expected to have a required role in food donation.

Comment 148: Section 350-2.4 Separation of food scraps for recycling. If a generator is located within 25 miles from a facility (measured in a straight line), however a lake or actual travel route exceeds 25 miles, will DEC consider this by waiver request under Part 350-2.6?

Response: A generator can send their food scraps farther than 25 miles to an organics recycling facility or intermediary facility, the generator is not obligated to use a closer facility. The 25-mile requirement to obligate the generator to recycle is calculated in a straight line. The issue with large lakes is understandable but The Food Donation and Food Scraps Recycling Law does not make an exception for this situation.

Comment 149: Section 350-2.6 Temporary waiver. Given that the definition of 'food scraps' does not include edible food, is the amount of donated edible food included in the 2-ton/week threshold?

Response: The factors for food scraps generation already account for well-established donation practices. Increasing donation cannot be used as part of a

justification for a waiver. DEC has received concerns from the donation community that if this was allowed it would lead to the donation of inedible food to avoid the regulatory requirements, which is a logistical and financial burden on the food relief sector.

Comment 150: Section 350-2.4 Separation of food scraps for recycling. Last sentence in 350-2.4(a)(5) is unclear and requires clarification; a generator that self-hauls is not required to separate food scraps for recycling?

Response. The language will be clarified in Part 350. The intent is to make it clear that a generator is not required to self-haul or process on-site, they can use a commercial hauler. Regardless of the method used, they must source separate.

Comment 151: Section 350-2.4 Separation of food scraps for recycling. The terms 'on-site recycling systems', 'on-site system', and 'on-site treatment system' seem to be used interchangeably. Perhaps this justifies a definition. If DEC and/or Pollution Prevention Institute has research information on various on-site recycling technologies that meet the regulations (or determined those that do not meet the regulations), could this list be made publicly available as a Guidance Document?

Response: Part 350 will be revised to clarify the terminology for on-site systems. DEC will develop additional guidance on the on-site systems.

Comment 152: Section 350-2.5 – Annual Report. Part 350-2.5(d) requires the generator to report the organics recycler. If food scraps go to an intermediary location, is it acceptable to report the intermediary as the destination? The generator may not know which organics recycler the food scraps end up. Likewise, if an intermediary utilizes multiple end-use recyclers, the intermediary will not be able to identify the specific outlet for a specific generator, especially if the material is delivered by a 3rd party transporter.



Response: It is acceptable for the generator to list the intermediary facility only on the annual report. Thank you for pointing out this issue.

Comment 153: Section 350-2.5: Annual Reporting. An important accountability piece in other states where there is a food donation and waste program is listing the entities where food is donated. We suggest that in section 350-2.5(a) the Department include not only the amount of food donated but also the name of the entity it was donated to.

Response: The annual report form will require a listing of entities used for donation.

Comment 154: Section 350-2.6: Temporary Waiver. We recognize that there may be instances where large generators may need to apply for a temporary waiver. While not ideal (we would like to see the temporary waiver eventually phased out), we do understand that currently, not all communities have access to an organics recycling facility. There should be an incentive or at least general education for communities on just how beneficial - both in terms of long term costs and long-term environmental benefits - organics recycling/composting is. Minimally, the waiver application should state how access to an organics recycling facility will ultimately be accomplished along with a reasonable timeline for its implementation. The implementation of this plan should become one of the conditions of the waiver.

Response: DEC has a technical assistance and education role to promote organics recycling and we agree that more infrastructure is needed. The waiver is limited to one year in duration. The Food Donation and Food Scraps Recycling Law at ECL 27-2203(3) does not allow waivers conditioned on facility plans.

Comment 155: Regulation 350-2.1. The regulation states that other methods of determining the amount of food scraps generated by a Food Scrap Generator may be used if DEC's proxy calculations are "not appropriate." However, no detail is given in the

regulation as to how DEC would determine that their proxy calculations would be inappropriate vis-à-vis a particular generator. The regulations should include guidelines on how this is determined, perhaps through creating a process by which generators prove why the DEC's proxy calculations are not appropriate.

Response: The details of the methodology, including the generation factors, is available on DEC's website.

Comment 156: Regulation 350-2.4. Generally: The regulation requires that Food Scrap Generators provide training to their staff on property handling and separation, but does not provide any guidance on what that training should be. Instead, the kinds of food scraps that may be disposed of and how they are to be handled and recycled is, impliedly, largely left to the judgment of the organics recycler by proposed 350-2.4(a)(1). Guidelines on separation and materials that need to be separated should be developed by DEC to provide uniformity and to allow DEC to retain control over the regulatory process.

Response: DEC agrees that technical assistance for the generators is very important. DEC will provide guidance, but also contracted with Feeding New York State and P2I as resources as well.

Comment 157: Regulation 350-2.4(a) – this regulation imposes requirements on Food Scrap Generators that are within 25 miles of a transfer facility or intermediary as well as an organics recycler. This is inconsistent with Environmental Conservation Law Section 27-2203(1)(b), which states that the Legislation's requirements only apply to Food Scrap Generators within 25 miles of an organics recycler. This impermissibly expands the scope of the Legislation beyond those that the Legislation explicitly binds, and should be revised to be consistent with the Legislation. In addition, the regulation measures the 25 mile limit using a straight line. While we are sure that this is an effort to impose uniformity of location, this method of measurement would unduly burden generators in sparse locations with limited truck routes, forcing those generators to

travel longer distances to organics recyclers in more densely populated areas with more extensive truck routes. This regulation should be amended such that it applies to Food Scrap Generators that are 25 miles from an organics recycler measured by the shortest available truck route between the generator and the organics facility.

Response: The Food Donation and Food Scraps Recycling Law does not specify how the 25 miles is measured. The proposed Part 350 regulations specify that the 25 miles is measured in a straight line. There is no practical way for DEC to determine all the possible truck routes statewide. There is the possibility for a waiver if the cost is too burdensome. The proposed Part 350 regulations include intermediary facilities under the 25-mile limit because these facilities are often used as an accumulation point for facilities located farther away and are the end point for the transporter that collects from the generator. Again, a waiver is available if the cost is not reasonable compared to disposal.

Comment 158: List of designated food scraps generators (350-2.2). This section states that “the department will notify all designated food scraps generators by July 1 of each year if they are required to comply with some or all of the requirements in sections 350-2.3, 2.4, and 2.5 of this Part. This determination shall be based on the department’s assessment of the quantity of food scraps that can be accepted at each organics recycler.” The Department should specify how it will determine who is required to comply if there is too limited capacity for all designated food scrap generators. We suggest that the largest generators be required to comply first.

Response: DEC will determine the designated food scraps generators located within 25 miles of an organics recycler or intermediary facility that has excess capacity. Starting with the largest generator that the recycler can handle, the generators will be selected until the excess capacity is filled.

Comment 159: Separation of edible food for donation (350-2.3). We suggest that you add additional detail to this section to ensure that any food donation done as a result of

this Law is in service of and does not burden those receiving the donation. We would suggest adding the bolded language to the last sentence of this section. “Designated food scraps generators must work with local food relief organizations to comply with the donation criteria required by those organizations, be responsive to the needs, staffing limitations, and storage capacity of those organizations, and to minimize the amount of food that will lead to waste at the relief organization.”

Response: The provisions will be revised as suggested in Part 350.

Comment 160: Separation of food scraps for recycling (350-2.4). Section 350-2.4(a)(1) should specify that food scraps must be separated from other nonorganic solid waste. Many, though not all, food scrap recyclers accept other forms of organic waste and in those cases, food scraps and other organic waste should be allowed to remain mixed. Additionally, the sentence on post-consumer food scraps should be deleted. The Law does not contain an exemption for post-consumer food scraps and the onus remains on the generator to provide food scraps and other organic material that are acceptable to their processor.

Response: The provisions in Part 350 will be revised to indicate nonorganic solid waste. DEC will work with generators that collect post-consumer food scraps to maximize the quality of this material but DEC recognizes that the generator may have limited control over the material and the organics recycler may not be able to effectively process it.

Comment 161: Section 350-2.4(a)(2) is unnecessary and perpetuates misconceptions that food scrap management is higher risk or more challenging than general solid waste management. The requirements for food scrap storage should be identical to whatever requirements already exist for garbage collection/storage and should not be more detailed or onerous. We suggest deleting this section.

Response: DEC agrees that all solid waste management activities at food scraps generators are challenging and must follow DOH and DAM requirements. However, the criteria in 350-2.4(a)(2) come from the Food Donation and Food Scraps Recycling law at ECL 27-2203(1)(b) and would require a change to the Law to be altered.

Comment 162: Section (350-2.4(c)) should be deleted. Mixed waste processing results in unacceptable cross-contamination of materials, often leading to higher rates of residuals disposed of in landfills or incinerators, and should not be an allowable destination for food scraps. Source separation of organics should be required.

Response: Section 350-2.4(c) is found in the Food Donation and Food Scraps Recycling Law at ECL 27-2203(1)(c). It would require an amendment to the Law to remove this exclusion. Although complex, mixed waste processing facilities can produce marketable products, as evidenced by the Delaware County composting facility in New York State.

Comment 163: Annual reporting (350-2.5). We suggest that in section 350-2.5(a) you include not only the amount of food donated but also the name of the entity it was donated to. In other states, this has been an important accountability mechanism.

Response: Agreed. The annual report requirement in Part 350 will be revised to include the food relief organization.

Comment 164: Temporary waiver (350-2.6). We suggest you amend the section related to a cost justification for waiver (350-2.6(b)(2)) and remove the requirement that, for a waiver, the total cost of solid waste management including organics recycling must be at least 10 percent greater than the total cost of disposal without organics recycling. This kind of price distinction can create a de facto price preference and allow those offering the less environmentally preferable service to raise their prices until just below

the 10 percent threshold. Instead, we suggest that the Department evaluate a cost justification for waiver on a case by-case basis, taking into account the ability of a generator to absorb any increased solid waste costs. One important goal of the Law is to drive demand for organics recycling and increase processing capacity in the region. Requiring organics recycling to be so close to cost-competitive in the short term will greatly limit the efficacy of the Law.

Response: The Food Donation and Food Scraps Recycling Law allows a waiver if the cost of recycling is not reasonably competitive. A ten percent differential has been recognized as reasonably competitive with other recycled commodities.

Comment 165: 6 NYCRR 350-2.4(a): Revise as underlined: "Except as provided in subdivision (c) of this section, on or after January 1, 2022, any designated food scraps generator that is within 25 miles (measured in a straight line) of an organics recycler(s) or an intermediary used prior to recycling such as a regional food scrap processing or depackaging facility or a transfer facility ... .

Response: A regional food scraps recycler would be considered an organics recycler so this revision is not needed.

Comment 166: 6 NYCRR 350-2.4(b)(2): This provision should be revised to include language identifying where the "approval in writing" must be sought from the department or the local POTW?

Response: The language will be revised so that it is clear that the approval comes from the appropriate local government entity.

Comment 167: 6 NYCRR 350-2.4(b)(3): "Residuals" needs to be defined. Residuals in the food waste processing system are recognized as the contaminant fraction removed from the organic fraction and sent to recycling or disposal.

Response: The provision will be revised in Part 350 to provide additional clarification that the residuals are the solids produced from on-site treatment.

Comment 168: 6 NYCRR 350-2.4(b)(4): This provision states that if a food scraps generator chooses to use an onsite system for recycling, the generator is subject to the following: "If the on-site system does not significantly reduce the volatile solids content of the food scraps and grinds the waste or otherwise transfers it to a sewer system or treatment plant with little or no biological treatment, the proportion of the resultant solids from the treatment plant that are generated from the food scraps must be recycled." This will be very difficult to track and monitor as it will depend on the volume and volatile solids loading of the food scraps, the volatile solids removal at the treatment plant and calculation of the overall mass balance of solids generated for beneficial reuse. The regulation should be revised to define the means for the generator to track and monitor this.

Response: The volatile solids reduction must occur in the on-site system located at the generator's site, not the reductions that occur at the wastewater treatment plant. The on-site system manufacturer should be able to provide data on volatile solids reduction potential achieved with the system. DEC can assist in providing information on whether the wastewater treatment plant is recycling biosolids.

Comment 169: 6 NYCRR 350-2.5: The following new subparagraph (f) should be added to the list of contents required for the annual report: "(f) for generators using an on-site recycling system under section 350-2.4 (b)(4), reporting should include data supporting the generator's food scraps were treated and recycled."

Response: DEC agrees that the annual report should include required information if an on-site system is used. The requirement will be revised in Part 350.

Comment 170: 6 NYCRR 350-2.6(b)(2): The regulations do not define what "total cost of disposal" entails here (e.g., collection, transportation, containers, taxes, disposal, recycling, etc.).

Response: Additional detail is provided under proposed Part 350-2.6(c)(2).

Comment 171: Section 350-2.1 Food Scraps Generation Methodology: Here, the regulations state that "if more accurate site-specific data, such as weight receipts are available for a certain generator, that data may be used by the department." The use of the term "may" could be read as permission or as left to the DEC's discretion. We request language to indicate that use of such site-specific data, such as weight receipts *shall fulfill the requirement*.

Response: The Part 350 language will be revised to indicate that site specific data will be accepted for review by the department.

Comment 172: Section 340-2.4 Separation of Food Scraps for Recycling (1): Requirement to separate its food scraps from other solid waste: It is onerous to require food scrap generators/donors to bear the cost of separating food waste from extraneous packaging. We strongly believe that industry should not have to incur these costs. Keeping in mind that the food grocery industry operates within a 1-2% profit margin, such additional costs add up.

Response: Generators will not be required to depackage large quantities of food.

Comment 173: Section 350-2.6 Temporary Waiver. (b) (1) specifies that increased food donation cannot be used to reduce the calculation of food scraps produced by the generator for purposes of this justification. Reiterating the objection stated above, food donations should not be included in the calculation of determining status of food scraps based on weight. Donated foods are not even measured by weight, only by value of contribution and "shrink". Donated foods should not be included in the food scrap



definition nor should it logically be referenced here. The inclusion of this provision suggests a mixed use of the terminology.

Response: DEC recognizes that food donation may not always be readily quantifiable. However, for a waiver application, the proposed Part 350 regulation do not allow increased donation of a certain weight (given by the generator) to justify a food scraps generation rate below 2 tons per week, due to a concern that donation for this purpose will lead to inedible food being pushed on food relief organizations .

Comment 174: Section 350-2.6(d) refers to emergency waivers, which seems onerous. At times, due to no fault of the grocery industry, weather or other unforeseen and uncontrollable events can cause power loss. When this happens large quantities of food must be moved out of the store quickly. Our members have difficulty getting their service provider to multiple locations in a short period of time, especially when an entire region is impacted as is typical with these types of events. We strongly suggest that there be an automatic waiver in place of power loss events. The grocery industry has major operational priorities during these events and it is very likely that the waiver process would be lost in the confusion. Further we request clarification to know whether waivers can happen after the fact.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2203 does not provide for an automatic waiver for power outages, so it is not specifically included in the proposed Part 350 regulations. However, DEC recognizes that these emergencies do occur and will work with generators to expedite needed approvals and/or issue emergency waivers if necessary.

Comment 175: Section 350-2.6(b)(2) Temporary waiver Justification 2, indicates that a waiver may be issued if “the total cost of solid waste management including organics recycling is at least 10% greater than the total cost of disposal without organics recycling.” Based on reading this section, we felt it was unclear if potential cost savings

as a result of donation would be expected to be included in the calculation. From our experience working in other states with organics recycling Laws, it is important to factor all potential materials management adjustments into the equation when calculating cost implications. We recommend clarifying the language in this justification. For example, an amendment to this text might read as follows:

“Justification 2. The total cost of solid waste management including organics is at least 10% greater than the total cost of disposal without organics recycling. Cost calculations for organics recycling must also reflect any potential cost savings that will be realized through donation programs.”

We would also encourage the NYS DEC to consider providing technical assistance to generators before granting a waiver to ensure that they have the tools required to provide a competitive and accurate cost comparison.

Response: DEC will revise the justification language in Part 350 to ensure all costs are considered. We will provide additional guidance on cost data, etc. that is needed for the justification.

Comment 176: First, the regulations must ensure that generators receive clear and accurate instructions about separation requirements. Section 350-2.4 stipulates that “the materials separated will depend on the capabilities of the organics recycler used by the generator.” But the complex system for transport, transfer, and depackaging can make it difficult for generators to understand how much they must separate on-site. The Department should require recyclers to provide *written* instructions that detail all accepted and not-accepted materials to all designated generators and transporters from whom they intend to accept scraps. These instructions are critical to minimize contamination in the resulting compost and enable enforcement of the separation requirement.

Response: DEC will be providing additional guidance to the generators on the proper methods for separating food scraps. We agree that the relationship between the generator, transporter, and organics recycler is critical. Part 361

governs the requirements applicable to the organics recyclers. One of the items that must be submitted to DEC for approval is a description of how they will educate those entities that use facility concerning what can be accepted and what cannot.

Comment 177: Second, while the regulations state that the resulting material be used in a “beneficial manner,” there are no documentation requirements to ensure compliance. While recyclers must document the food scraps they accept, there is no requirement that they document the destination or end use of the resulting byproducts. To ensure that regulated food waste does not ultimately end up in landfills, Sections 350-2.5 and 4.2 should require recyclers to document their compliance with the “beneficial use” requirement.

Response: Part 361 contains the technical requirements for organics recycling facilities. Part 361 includes an annual reporting requirement. The annual report must include information on how the product is used.

Comment 178: I own a small organics recycler in a rural part of New York State. I am having difficulty planning, given the 25-mile radius requirement. The radius should be greater in rural areas because hauling waste a longer distance in those areas is routine.

Response: The Food Donation and Food Scraps Recycling Law at ECL § 27-2203 specifies the 25-mile limit. Any change to the limit would need to be added through legislation amending the Law.

Comment 179 The requirement that food scraps generators must work with local food relief organizations should include food rescue organizations as an option. Subpart 350-3 should include lists of food rescue organizations/food relief organizations.

Response: DEC agrees that food rescue is an option in addition to food relief. Placing a list of food rescue organizations in Part 350 is problematic because any

change to the list would require an amendment to the regulations. Instead, DEC has provided grant funding to Feeding New York State to have staff dedicated to assisting generators in finding local relief organizations.

Comment 180: There is no incentive for composting facilities to be built because of the 25-mile restriction.

Response: There are already organics recycling facilities located within 25 miles of a number of designated food scraps generators, although DEC understands that the restriction can reduce the availability of sites. The Food Donation and Food Scraps Recycling Law at ECL § 27-2203 specifies the 25-mile limit. Any change to the limit would need to be added through legislation amending the Law.

Comment 181: It is critical that more organic recycling facilities be developed in the region. Generators are affected by the law if they are located within 25 miles of an organics recycler. But what happens if there is no capacity left at the facility to receive more waste? Is the generator off the hook?

Response: DEC agrees that recycling capacity needs to increase, and we believe that the Food Donation and Food Scraps Recycling Law, the Part 350 regulations, additional funding, and other efforts will help this increase occur. If there is not capacity for recycling as outlined in the Law, the generator is not obligated to recycle.

Comment 182: I may be missing something, but this seems like an unenforceable mandate that will affect few corporations and that is full of loopholes for any corporation that is intent on avoiding the regulation. Especially the 25-mile requirement. Corporations should take responsibility for the waste they generate, whether they generate two tons or two pounds.

Response: DEC estimates that approximately 1300 generators will be required to donate edible food under the Food Donation and Food Scraps Recovery Law and the Part 350 regulations. Waivers are possible but must be justified and must be approved by DEC. The Food Donation and Food Scraps Recycling Law at ECL § 27-2203 specifies the 25-mile limit. Any change to the limit would need to be added through legislation amending the Law.

Comment 183: The requirement that the products of organic recycling must be beneficially used is good, but it must be clear that biogas from digestion can be combusted.

Response: The Part 350 regulations will be revised to clarify that biogas combustion is acceptable.

Comment 184: There are so few organics recyclers on Long Island that the 25-mile limit would essentially exclude the generators on Long Island. There should be incentives and provisions to increase donation and recycling operations.

Response: The Food Donation and Food Scraps Recycling Law at ECL § 27-2203 specifies the 25-mile limit. Any change to the limit would need to be added through legislation amending the Law. The State provides grants to municipalities, nonprofits, and businesses to support food donation and food scraps recycling.

Comment 185: More could and should be done to discourage mixed solid waste composting. History shows that most mixed waste composting ventures have had a very high failure rate and one of the primary reasons for this is that the compost they produced was so contaminated it was unmarketable.

Response: DEC agrees that the history of mixed solid waste composting in the United States includes a number of facilities that were not able to produce a

consistently marketable product. In New York State, there is an exception to that history. Delaware County, due to their investment in a comprehensive system to remove contaminants and continued improvements in operation, has successfully marketed compost for many years. Mixed solid waste composting facilities are subject to permitting under Part 361-3 and must demonstrate their ability to produce a viable product to be considered recycling operations.

Comment 186: Generators should not be allowed to bypass separation since it will not produce product beneficial to soils and could drive some organics facilities out of business.

Response: Under the Food Donation and Food Scraps Recycling Law, only those generators that are serviced by a facility that has proven that they can manage contaminants and can produce a compost product that will be used beneficially will be not be required to source separate. A facility that processes mixed waste is subject to regulation under the Part 360 series and is only considered a recycling facility if the resultant product can be effectively marketed.

Comment 187: Depackaging should be reserved to remove packaging from inedible packaged food, not as a method for treating mixed solid waste. Depackagers remove compostable packaging as waste instead of sending it to a recycling facility. Source separation of organics must be required for all generators, regardless of the end destination.

Response: Depackaging facilities are subject to regulation under the Part 360 series. As part of the that regulatory process, the facility must demonstrate that they are capable of effectively processing the waste proposed. The Food Donation and Food Scraps Recycling Law at ECL 27-2203(1)(c), does not require source separation if the waste is sent to a mixed waste composter or anaerobic digestion facility.

Comment 188: The generator is not required to send their waste to an organics facility that is within 25 miles. This is a disincentive for investment since there is no guarantee the waste will be available. Consider requiring a waiver with a 10 percent differential if the recycler is more than 25 miles away.

Response: The Food Donation and Food Scraps Recycling Law at ECL § 27-2203 specifies the 25-mile limit. Any change to the limit would need to be added through legislation amending the Law.

Comment 189: Use of on-site recycling systems. What is DEC's expectation for an 'approval' from the public sewer system owner? Will the written authorization need to be submitted to or approved by DEC?

Response: DEC expects the generator to reach out to their local government and verify that their proposed discharge is allowable. The approval does not need to be routinely submitted to DEC. DEC may request a copy of the approval if there is a concern that the discharge has not been approved.

Comment 190: The discussion of transfer stations as a qualified organics recycler under the Law when coupled with use of depackaging. This is a multi-layered issue from our standpoint. Yes we agree that it does sometimes make economic sense to provide a central hub for disposition of source separated organics in an urban/suburban setting, it skirts the initial intent of the Law, which (in my opinion) was the direct delivery of source separated organics to an organics recycler within 25 miles of the generator. We believe that organics recyclers should be sited close to major food waste generation locations, to reduce the carbon emissions impact on the environment via lower transportation miles. Those facilities – if they don't exist today – will be developed in the near future. We also believe that depackaging technologies are not universally advanced to the point where the resulting slurry is free of inorganics. The quality of the slurry would be harder to control at the transfer station level and therefore we believe the organics

recycling facility would be the more appropriate site to implement these depackaging technologies as they can better control the output. Therefore we do not support inclusion of transfer stations with depackaging in the definition of organics recycler.

Response: DEC agrees that location of organics recycling facilities near the food scraps source is most desirable. However, it has been our experience that it is not always feasible or economical. The use of transfer facilities or other intermediary facilities will facilitate recycling. DEC regulates depackagers under the Part 360 series and is looking closer at the issue of residual contaminants.

Comment 191: Composting can be small scale and large scale and everything in between but too often home composting, onsite composting, community scale composting, on-farm composting, and medium-scaled sites are overlooked. Anaerobic digestion systems come in different sizes as well. One of the biggest obstacles to having a healthy and distributed organic materials recycling infrastructure is rules and policies that privilege large-scale industrial sites. SIZE MATTERS. The draft rules as written will lead to mixed waste processors, contaminated compost, and large-scale industrial sites at the expense of better operated smaller-scale and medium-scale sites (and a diverse healthy infrastructure).

Response: The Food Donation and Food Scraps Recycling Law and the implementing regulations, the proposed Part 350 regulations, recognize that organics recycling can occur at multiple scales and using multiple technologies, without outlining a preference for one over the other. Currently in New York State, the development of organic recycling infrastructure has shown that a mixture of operation will develop and can exist together. All facilities must comply with the technical requirements of the Part 360 series.

Comment 192: I urge the agency to develop rules to encourage well-operated sites that handle clean material streams. If implemented as currently written, the rules will directly encourage mixed waste composting and mixed waste anaerobic digestion facilities, and



thus, the lowest common denominator for organics recycling facilities rather than the highest and best use. They would undoubtedly lead to commingling of clean organics with non-compostable items that will in turn be sent to depackagers and large-scale sites that claim they can handle contaminated loads. There is a role for depackaging systems. That role should not be in processing all of a supermarket's material nor in encouraging the commingling of clean streams with packaged streams.

Response: The proposed Part 350 regulations follow the Food Donation and Food Scraps Recycling Law at ECL 27-2203(c) in regard to mixed waste facilities. It would require an amend to the Law to change this provision. New York State has a successful mixed waste composting facility located in Delaware County. However, due to the cost and complexity of these facilities it is unlikely that the operations will become commonplace.

Comments 193: I further urge the agency to disallow depackagers and mixed waste transfer stations from counting as capacity within the 25 mile radius. The New England Laws on which New York State's Law is based – Vermont's, Rhode Island's, and Connecticut's – included a mile radius threshold as a strategy to encourage close-in capacity and infrastructure. A depackager is not an organics recycling facility. A transfer station is not an organics recycling facility. As pointed out above, composting and anaerobic facilities come in all sizes. Rules could and should be developed to encourage locally based facilities and close-in infrastructure, not infrastructure encouraging commingling of clean materials with contaminated materials and designed to feed mixed solid waste (aka dirty) large-scale far-away facilities.

Response: DEC encourages local organics recycling facilities, but we recognize that this is not always feasible or economical. In addition, the Food Donation and Food Scraps Recycling Law does not recognize a preference for one type of recycler. Allowing intermediary facilities such as transfer facilities and depackager will increase the potential for recycling food scraps. These intermediary facilities do not necessarily provide material to a mixed waste recycler.

Comment 194: DEC must encourage the development of additional organics recycling facilities, particularly local composting infrastructure. New York State's Food Donation and Food Scraps Recycling Law states that "each designated food scraps generator that is within twenty-five miles of an organics recycler . . . shall . . . obtain a transporter that will deliver food scraps to an organics recycler, self-haul its food scraps to an organics recycler, or provide for organics recycling on-site via in vessel composting, aerobic or anaerobic digestion or any other method of processing organic waste that [DEC] approves by regulation." This 25-mile recycling requirement functionally exempts most food waste generators because, at present, there are few organics recyclers. Indeed, according to the New York State Pollution Prevention Institute, there are only 219 organics recyclers in New York State, and vast swathes of the State are located more than 25 miles from these facilities.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2203(1)(b) specifies the 25-mile requirement. An amendment to the Law would be required to alter this mileage limit.

Comment 195: To apply for the temporary waiver, these institutions must submit a report to the Department that justifies why they should be exempt. This data is not factchecked by a third party and is not made publicly available. We believe that this information should be publicly available on the DEC's website. We believe there should be transparency and established reporting protocols.

Response: DEC technical staff will review all waiver requests and determine if the waiver is justified. The Food Donation and Food Scraps Recycling Law gives DEC this authority. The information submitted to DEC is subject to freedom of information provisions related to public access.

Comment 196: Impact on Publicly Owned Treatment Works. The final rule should clearly establish a system for notifying POTWs of the need to recycle food waste following a generator's on-site recycling. When a designated food scraps generator is required to recycle and chooses to use an on-site system, Section 350-2.4(b)(4) of the Proposed Rule requires that: If the on-site system does not significantly reduce the volatile solids content of the food scraps and grinds the waste or otherwise transfers it to a sewer system or treatment plant with little or no biological treatment, the proportion of the resultant solids from the treatment plant that are generated from the food scraps must be recycled. This requirement does not adequately clarify the responsibilities of POTWs in monitoring the on-site treatment of generators in their vicinities. The City requests that DEC clarify that POTWs are not required to monitor the on-site treatment undertaken by local generators in order to ensure that an adequate proportion of resultant solids from treatment are recycled.

Response: Section 350-2 outlines the requirements that are applicable to designated food scraps generators that are required to recycle their food scraps. It does not put any requirements on a wastewater treatment plant. The expectation is that the generator, or their representative, will contact the wastewater treatment plant to determine if recycling is occurring or could occur, to allow the generator to demonstrate compliance with the requirement if needed. Part 350-2.4(b)(4) will be revised to provide additional clarification that the responsibility is with the generator.

Comment 197: New York City requests that the final rule specify that DEC will notify POTWs if any designated food scraps generator that transfers waste to the POTW is utilizing on-site recycling to comply. As written, Section 350-2.4 may impose costs on local governments that are not currently accounted for in the Proposed Rule's Regulatory Impact Statement and other supporting documents. Under the Proposed Rule, it is unclear whether POTWs, which may include facilities operated by local governments, must bear the cost of diverting the required portion of biosolids for recycling when a generator transfers food waste to a sewer system or treatment plant.

The City requests that DEC specify in the final rule whether POTWs are responsible for these costs, and if so, update the Regulatory Impact Statement to reflect the anticipated costs to local governments. Due to limited regional capacity for beneficial use processing, local governments may also incur costs in developing programs, facilities, and markets to accommodate the increased demand generated by the Proposed Rule's requirements.

Response: Section 350-2 outlines the requirements that are applicable to designated food scraps generators that are required to recycle their food scraps. It does not put any requirements on a wastewater treatment plant. It does not require any municipal entity to alter their biosolids management practices. The expectation is the generator, or their representative, would contact the wastewater treatment plant to determine if recycling is occurring or could occur, for the generator to demonstrate compliance with the requirement if needed. If the wastewater treatment plant does not recycle biosolids, the generator must find an alternate method for recycling their food scraps. Part 350-2.4(b)(4) will be revised to provide additional clarity.

Comment 198: The waiver justification of "the total cost of organics recycling is at least 10% greater than the total cost of landfilling or combustion" should be carefully reviewed. While no one wishes to create excessive burdens on businesses, especially given the recent pandemic, it is of concern that if standard disposal costs are greater than 10% lower than organics recycling then the intention and goals of the Law could be undermined. We are a strong supporter of community composting, and hope that the Law may also spur further community composting efforts in the Long Island region.

Response: The Food Donation and Food Scraps Recycling Law states that the cost of recycling must be reasonably competitive with the cost of disposal. The proposed Part 350 regulations uses 10 percent for the threshold, similar to other recycling initiatives. DEC will review all data submitted with a waiver request to determine acceptability.

Comment 199: Section 350-2.4(a) Are capacity determinations rolling or static? Does it depend on remaining capacity or committed capacity? When does a regular transfer facility become an intermediary facility? This needs to be clarified in the regulations. An MSW or recyclables transfer facility incapable of handling organics should be distinguished.

Response: The capacity determinations are done by DEC primarily once a year, for publication on June 1. However, DEC will do additional calculations during the year if new facilities come on-line.

Comment 200: Section 350-2.4(a)(2) There should be standardized specifications for containers. Material, ability to contain odor when sealed, should all be factors to consider.

Response: DEC does not have the authority to specify a certain type of food scraps collection container and, as with all waste containers, the generator, in consultation with their waste transporter is best suited to determine which containers best suit their needs.

Comment 201: Section 350-2.4(b)(2) In permitting this type of facility, the Department should consider whether, and at what level such a facility may trigger IPP status in local sewer use regulation? See defined standards.

Response: DEC does permit the on-site systems used by food scraps generators. Therefore, it is the responsibility of the generator to work with their local municipality to determine if the discharge is acceptable.

Comment 202: Section 350-2.4(b)(4) Implementation of on-site systems should be delayed until WWTP and WRF have an opportunity to amend sewer use regulations to address this new eventuality. The "grind and flush" processes being marketed to large food waste generators may have a negative effect on sewerage systems and wastewater treatment plants. In addition, 2.4(b)(4) makes the WWTP responsible for the recycling of resultant solids from the food waste would be put into their system by the "grind and flush" processes.

Response: On-site systems are not currently regulated by DEC. The Food Donation and Food Scraps Recycling Law requires generators that are interested in these systems to contact the involved municipality to make sure they are acceptable to the specific system. The proposed Part 350 regulations do not require the wastewater treatment plant to recycle any of their biosolids, the requirement applies to the generators as they chose a management alternative.

Comment 203: Section 350-2.4(c) Again, the regulations continue to shut the door on other forms of non-incineration technology platforms that may be developed or are developing in the industry. Case in point: Aries gasification technologies under development in other states.

Response: In accordance with the Food Donation and Food Scraps Recycling Law, the proposed Part 350 regulations allow organics recycling technologies that lead to beneficial use of the product as a soil amendment, animal feed, or similar.

Comment 204: Section 350-2.6(b)(l). Must define time period for waiver. Check other sections of regulations (annual or rolling average).

Response: Proposed Part 350-2.6(a)(2) outlines the timing of the waiver requests. The only exception is emergency waivers, that can be submitted at any time.

Comment 205: Temporary Waiver. Section 350-2.6(b)(5). This is too broad of a catchall without fundamental test/threshold to measure an excusable waiver. E.g., impracticable, uneconomic etc.

Response: DEC will make the determination whether the waiver request is justified and will ask for documentation needed to make that determination.

Comment 206: Section 350-2.6(c)(5). Temporary Waiver. Section 350-2.6(c)(5). Even though unique, there must be an objective basis for the decision, i.e. “commercially impracticable” or less burden: “commercially unreasonable”

Response: As outlined in the proposed Part 350 regulations, DEC must approve the waiver request and will request proper documentation to demonstrate that the request is justified.

Comment 207: Environmental Conservation Law Section 27-2203(1)(b) states that the Legislation’s requirements only apply to Food Scrap Generators within 25 miles of an organics recycler. Section 350-2.4 appears to expand the scope of the legislation to include any intermediary facility, which includes a depackaging facility or transfer station. This extends beyond the intended reach of the original legislation and should be revised to be consistent with the Legislation.

Response: This provision was added to the proposed Part 350 regulations to recognize that it is common in solid waste management to have an intermediary facility (transfer facility, etc.) prior to the waste arriving at the destination facility. It

adds no additional burden on the generator. A waiver is still available if the cost is unreasonable.

Comment 208: In addition, the regulation measures the 25 mile limit using a straight line. While we are sure that this is an effort to impose uniformity of location, this method of measurement would unduly burden generators in sparse locations with limited truck routes, forcing those generators to travel longer distances to organics recyclers in more densely populated areas with more extensive truck routes. This regulation should be amended such that it applies to Food Scrap Generators that are 25 miles from an organic's recycler measured by the shortest available truck route between the generator and the organics facility.

Response: The waiver provision of the proposed Part 350 regulations allows a generator to demonstrate that the cost of recycling, including transportation, is unreasonable compared to the cost of disposal. It is impractical for DEC to determine the most efficient and allowable routes on a statewide basis.

Comment 209: Section 350-2.2 List of designated food scraps generators. Generators will be added to the list based on the threshold of 2 tons per week as identified by the Department. Has there been consideration of allowing for food generators with less volume (particularly of edible food) or only occasional excess food to be added to the list on a voluntary basis? It is possible that a small restaurant or neighborhood grocer may learn of this initiative and connect with a local relief organization through this initiative.

Response: DEC encourages all food scraps generators to pursue food donation and food scraps recycling. DEC will work with any interested generator to help them with these initiatives.



Comment 210: Section 350-2.3 Separation of edible food for donation. The requirement that generators “must work with local relief organizations to comply” is too vague. The Department is encouraged to also provide a list of local relief organizations that will accept food donations – by using existing connections through the Regional Food Bank or stakeholder outreach – to facilitate the connection between donors and recipients. Local relief organizations are typically non-profits with limited staff resources; having the list of organizations in addition to the list of generators would be helpful. It has been my experience that at times the volume of edible food is too much for a single organization to accept and facilitated communication among recipients (through a list maintained by the Department) can manage better distribution of edible food.

Response: DEC believes the most effective method to convey this information is to provide grant funding to Feeding New York State to establish a call center and outreach and education materials. DEC has provided grant funding of \$500,000 to Feeding New York State for this effort.

Comment 211: Section 350.-2.4 Separation of food scraps for recycling. It is not uncommon for a local relief organization to receive food that is not acceptable for human consumption. Local farms may use the food for animal feed if appropriate, but often there is organic waste left over. The Department should consider maintaining a list of organics recycling facilities as an option for the relief organizations to direct unusable organic waste.

Response: DEC will work with any interested food relief organization to find an organics recycler that can accept their food scraps.

Comment 212: Section 350-2.5 Annual reporting. The Department should consider a requirement to identify the recipient of food donations. As written, the recycler and the volume of food scraps are identified by the generator, but the identity of the edible food donation recipient is not. A full accounting of the total volume generated and how/to

whom the volume was parsed will make for a more complete verification of compliance with the regulation.

Response: The annual report requirement in the Part 350 will be revised to include the name of the food relief organization(s) in addition to the quantity donated.

Comment 213: Further, under “introduction” the regulations require “large generators of food scraps to donate excess edible food and recycle *all* remaining food scraps if they are located within 25 miles of an organics recycler.” This current language reads as requiring 100% food waste diversion and does not allow room for error or potential waste landfill. While FIA’s members share the goal of donating all that is possible, and diverting the remainder, the reality is that some scraps will inevitably end up going to landfill (if it contains broken glass; metal; or otherwise contaminated product). To ensure that member can effectively comply we suggest adding the word “acceptable” or “applicable” to the language. i.e., “separate and recycle all remaining acceptable/applicable food scraps if within 25 miles of an organics recycler.”

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2203 requires all remaining food scraps to be recycled if an organics recycling facility is located within 25 miles. DEC recognizes that there may be circumstances when certain food scraps must be disposed and will work with the generators in determining when this is acceptable.

Comment 214: The annual reporting should include the source type (restaurant, etc.) and the planning unit it is generated in.

Response: It is not clear that the generator will be aware of what planning unit they are located in. DEC will provide the generator’s annual report data to the planning units, including the source type.

## SUBPART 350-3 GENERATORS, ORGANICS RECYCLERS, AND TRANSPORTER LISTS

Comment 215: Subpart 350-3 Generators, Organics Recyclers, and Transporters Lists. Will the DEC provide a list of Food Relief Organizations as well as lists of generators, transporters, and organics recyclers?

Response: DEC has researched the ability to provide a list of food relief organizations, but it is difficult to provide a useful list because the size, hours of operation, food accepted, and collection methods vary widely and change. Instead, DEC has provided \$500,000 in grant funding to Feeding New York State to hire dedicated staff to answer calls and provide information directly to generators concerning the availability of donation sites in their area for the type of food available.

Comment 216: Section 350-3.2 Organics recyclers list. Will this list include the intermediary facilities, such as depackaging or transfer stations that accept food scraps?

Response: Yes, DEC will include a list of the known depackagers and transfer facilities that manage food scraps separately.

Comment 217: Section 350-3.2: Organics Recyclers List. As proposed in the regulations, the Department will maintain a list of organics recyclers, and update that list before June 1 of each year. However, in addition to listing the current facilities, the Department should also do all they can to incentivize regions to promote the build out of organics recycling facilities as quickly as is feasible. Ideally, there should be a timeline for the development of organics recyclers. Currently, there is no incentive to build an organics recycling facility. The ability to apply for a temporary waiver if there is not a facility within 25 miles of an institution may serve as a disincentive to build a facility (i.e. "If we build a facility in our region, then we would be forced to comply.").

Response: In addition to the requirements in Part 350, DEC supports the development of organics recycling infrastructure through grants and outreach and education. The generators (grocery stores, etc.) are not typically those that run organics recycling facilities so the 25-mile restriction should not be a means for generators to control recycling facility development.

Comment 218: The data used for the proxy calculations does not reflect the most recent data (such as COVID impacts), therefore the State should provide resources for the generators to more accurately determine their generation. This could include an online calculator and waste audit submissions.

Response: DEC agrees that COVID impacts will certainly impact waste generation rates. We will provide calculation factors on our website to assist generators estimate their current food scraps generation. Waste audits can be a very effective for a generator as well.

Comment 219: Under this proposed language “the department will use proxy calculations...to estimate the amount of food scraps generated” but could not utilize data such as from the waste audits performed by a third party at a representative sample of Darden restaurants.

We are confident, and the third-party has verified, that this data provides an accurate representation of the amount of food waste generated per ‘guest’ or ‘meal served’ at each of our restaurant locations including those in New York State. However, under the proposed regulation, the use of this type of comprehensive waste study cannot be used to determine food scraps generated by Darden Restaurants in New York because it is not ‘site-specific’.

As such, we request that the Department modify the proposed food scraps generation methodology to allow for “more accurate” data whether it’s “site specific” or representative of site operations. This change would allow Darden to present findings

from the waste audits to the Department for consideration as an alternative basis for determining food scraps generation.

The revised regulation would read:

“If more accurate site-specific data, such as weight receipts are available for a certain generator, that data may be used by the department.”

Response: DEC agrees that any valid food scraps generation data will be accepted. The Part 350 language will be revised to clarify.

Comment 220: On first glance, it appears that development of the food scrap generator list is a two-step process. First, determine the food scrap generator by volume/exemptions and then second, determine whether they are required to comply based on availability and proximity of a facility. DEC please confirm since the availability of the first "step 1" list may provide the impetus/finance opportunity for facility development. It should be a published, two part list every year. This will encourage facility development.

Response: On June 1 of each year, DEC will publish a list of all designated food scraps generators and indicate which of those are obligated to recycle food scraps. It is anticipated this information will help spur recycling facility development.

Comment 221: Section 350-3.2. Should the list include facility type.

Response: The list of organics recyclers will include the type of facility.

## SUBPART 350-4 TRANSPORTER AND SOLD WASTE MANAGEMENT FACILITY RESPONSIBILITIES

Comment 222: 350-4.2. The Department should reconsider applying subsection (b) to exempt solid waste management facilities, as these facilities have a reasonable expectation that a facility that is exempt under Part 360 not be subject to regulatory provisions requiring it to report on the amount and types of food scraps processed at the exempt facility, or the potential capacity for food scraps at such exempt facility.

Response: Agreed. This section of Part 350 will be revised to exclude exempt facilities.

Comment 223: 350-4.4. The requirement that incinerators and landfills take “reasonable precautions” to not accept food scraps from food scrap generators is unworkable. First, the Department provides no guidance on what constitutes reasonable precautions. Second, it is unclear how such facilities will know that its customer is a food scrap generator regulated under Part 350 or how it can determine at the time of disposal whether a commingled waste stream includes food scraps from a regulated facility. We suggest omitting this requirement, or at least detailing what would constitute “reasonable precautions.”

Response: The Food Donation and Food Scraps Recycling law at ECL 27-2205, 27-2207, and 27-2209 all require the entities to “take all reasonable precautions”. DEC has a long history through the Part 360 regulations concerning prohibitions on wastes that can be accepted at these facilities (hazardous waste, electronic waste, tires, etc.). All facilities are required to have waste acceptance control plans to address the means that will be used to monitor and exclude certain materials. DEC will determine the acceptable means for facilities to include this new waste stream in the prohibited items and will provide guidance to the facilities.

Comment 224: Section 350-4.1 should be clear that deviation of any provisions of that section is an actionable violation of the Law.

Response: Any violation of Part 350 is subject to the applicable enforcement provisions of the Environmental Conservation Law.

Comment 225: Section 350-4.4 should absolutely prohibit landfills and combustion facilities from accepting food scraps. Such facilities should also be required to develop and maintain aggressive programs to prevent any accidental importation of food scraps.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2209 requires all combustors and landfills to take all “reasonable precautions” to not accept food scraps from designated food scraps generators required to recycle. An amendment to the Law would be required to alter this criterion. Landfills and combustion facilities are required under Parts 360 ,362, and 363 to have waste control plans that must address how prohibited materials will be excluded, including food scraps once applicable.

Comment 226: Section 350-4.1 Waste transporters. Compliance with the Law and regulations should fall back on the generator, consistent with the requirements under RCRA; similar to managing hazardous vs non-hazardous waste or recyclables and electronics. It is not appropriate for the transporter to be responsible to notify the facility of the requirements to deliver the food scraps to an organics recycler.

Generators hire a transporter to deliver their material to a specific facility. Generators are responsible to ensure the material they generate is managed in accordance with the regulations, or in accordance with the waiver. Transporters cannot police a generator; they are a contractor for the generator.

Response: The waste transporters are not responsible for notifying the generators of the requirements to recycle food scraps.

Comment 227: Section 350-4.2 Organics recyclers. It should be noted that landfills can beneficially reuse (composted) food scraps for grass growth on cover areas, and that use is appropriate.

Response: DEC recognizes that a composting facility may be located at a landfill and the use of the compost for aiding in the growth of grass is a beneficial use.

Comment 228: Section 350-4.4 Landfills and combustion facilities. What is expected for disposal and combustion facilities to take “reasonable precautions”? Signage at the facility? Disposal Facilities cannot police or enforce.

Response: Under Parts 362 and 363, combustors and landfills must already have a waste control plan that addresses how the facility will implement a system to inspect for and prohibit the acceptance of prohibited items such as hazardous waste, electronic waste, etc. Once the Food Donation and Food Scraps Recycling Law is in effect, these facilities can be expected to include these wastes in their waste control plan, subject to the DEC’s approval.

Comment 229: With respect to Section 350-4.2(b) Organics Recyclers, we recognize the importance of assessing the capacity of processing facilities and the associated impact on the regulated community. We want to note that considering the nature of hauler routing and contracting, it may be challenging for organics recyclers to report a list of all generators and their associated quantities diverted for processing.

Alternative strategies to address the goal of monitoring capacity over time may include:

Allow processors to report aggregate tonnage by hauler delivering materials to an organics processing facility.

Request this data by generator only in cases where it is a direct haul of dedicated loads from a single generator.



Incorporate this data collection with the existing Registered or Permitted Facility Annual Report Forms for compost facilities. This form may only require minor modification to capture the data of interest, and as per our comments above should avoid tying specific amounts to individual generators for the reasons already mentioned.

Consider a reporting option for vertically integrated processors that also haul organics, as these entities may have more detailed data about generators, tonnage, and change over time.

Response: DEC agrees that expecting a recycling facility to know all individual sources is problematic. That section of Part 350 will be revised to clarify.

Comment 230: Subpart 350-4: The definition of food scraps means inedible food, trimmings from the preparation of food, food-soiled paper, edible food that is not donated, and food processing waste. Food scraps does not include used cooking oil, yellow grease, or any food which is subject to a recall or seizure due to the presence of pathogens. There is no clear definition or meaning for waste transporters to take all reasonable precautions to not deliver the food scraps to a combustion facility or a landfill. This should be revised to clarify examples of what are specific actionable steps to prevent food scraps from being delivered to combustion facilities or landfill that would be acceptable to the department.

Response: DEC will provide additional guidance to waste transporters and other involved entities in waste management concerning compliance criteria.

Comment 231: Section 350-4.1(b). The statute actually says “incinerator” or landfill. This means thermal treatment or conversion facilities should not be discouraged/prohibited under regulations.

Response: The term combustion is used in the proposed Part 350 regulations to be consistent with the terminology used to cover thermal facilities found in the Part 360 series.

Comment 232: Section 350-4.2(a). The Department should consider rephrasing. Including, but not limited to is the appropriate way to list examples to ensure there is not a preclusive effect upon technology platforms not enumerated. State Administrative regulations are not the place to say "i.e.", "e.g." or "for example" where to do so would cause a lack of clarity as to other available technology platforms and options. As currently written, the regulations seem to favor or single out just AD platforms.

Response: Anaerobic digestion is the most common, but not the only possible facility, that may accept mixed organic waste. That is the reason for listing digestion but indicating that it is an example.

Comment 233: Section 350-4.3. Need to clarify that transfer facilities not equipped to act as defined, "intermediary facilities" are not covered by these regulations.

Response: Transfer facilities that accept source separated food scraps must be approved to do so under Part 362.

Comment 234: Regulation 350-4.3. While there is no regulation that specifically requires transfer facilities to accept food scraps delivered by a Food Scrap Generator, this regulation can be interpreted by Food Scrap Generators or Waste Transporters as meaning that transfer facilities generally are eligible to receive food scraps. This is problematic because, using the North Hempstead Transfer Station as an example, the Transfer Station's Part 360 permit does not permit the receipt, storage and transportation of food scraps. In addition, significant capital improvement (such as the construction of an enclosed tipping area) and operational changes (such as operations contract amendments, creation of contracts with organics recyclers for disposal and the creation of new tipping fees) would be required for the Transfer Station to accept and transfer food scraps. As such, the regulations should state that transfer facilities that do not have food scrap acceptance, processing and disposal included in their Part 360

permit are not required to accept food scraps from Food Scrap Generators. Said a different way, the Part 350 regulations should be subject to and subordinate to the Part 360 transfer facility permitting regulations.

Response: The proposed Part 350 regulations do not require any transfer facility to accept source separated food scraps.

Comment 235: If these regulations are deemed to require transfer facilities to accept food scraps, regulations should be created to protect transfer facilities against violations of the Part 350 regulations by others and mishandling and misprocessing of food scraps by other so as to not overly burden transfer facilities (as DEC has stated in its materials accompanying the proposed regulations that the regulations would not result in mandates to local governments). These regulations must include the following:

A regulation permitting transfer facilities to reject deliveries of food scraps that are not properly separated or are contaminated with materials other than food scraps.

Organics recyclers must be required to accept deliveries of food scraps from transfer facilities, regardless of their condition, purity or level of contamination, provided that the transfer facility delivers the food scraps to the organics recycler in the condition that it was received by the transfer facility.

Food Scrap Generators must be required to pay organics recyclers directly for disposal of food scraps, relieving both private and municipal transfer stations of the financial burdens of disposal of private food scraps.

Transfer facilities must be permitted to impose fees upon Food Scrap Generators and Waste Transporters to accept food scraps to cover the costs associated with acceptance, storage, processing and delivery of food scraps to an organics recycler.

Response: The proposed Part 350 regulations do not require transfer facilities to accept source separated food scraps.

Comment 236: 6 NYCRR 350-4.1(c): The language in this section is inconsistent with ECL §27-2205. The statute says that transporters "shall take all reasonable precautions to not deliver those food scraps to an incinerator or a landfill nor commingle the material with any other solid waste .... " However, the proposed regulation only connects the "reasonable precautions" language to the obligation for transporters "to not deliver the food scraps to a combustion facility or a landfill"; the regulation then states transporters must "keep the food scraps separate from other solid waste .... " This inconsistency creates more stringent requirements than are found in the statute.

Response: The added requirement in Proposed Part 350-4.1(c) that transporters keep food scraps separate from other waste, unless the receiving facility can process the mixed material, is a reasonable requirement to reduce the contamination of food scraps in a manner that would make them unable to be processed.

Comment 237: 6 NYCRR 350-4.2(a): This provision states: "If the food scraps are sent to a facility that accepts multiple waste streams (an anaerobic digester, for example), the portion of the resultant material or product derived from food scraps must be used in a beneficial manner, and cannot be landfilled or combusted . . . ." The complexity of tracking the volume of food scraps relative to the overall multiple waste streams in a POTW digester for separate beneficial use may be very complicated in practical manner.

Response: DEC can assist in making this determination.

Comment 238: 6 NYCRR 350-4.4: This provision states that landfills must take "all reasonable precautions to not accept food scraps from designated food scraps generators who are required to send their food scraps to an organics recycler." This obligation belongs with the waste hauler, to ensure that food waste is delivered to a recycler or other processor. The hauler knows whether the generator is required to

recycle food waste. The landfill has no way to determine whether a hauler is delivering food waste that should have been recycled.

This provision should contain the same exception language ("unless the designated food scraps generator has received a temporary waiver") as the corresponding statutory provision (ECL § 27-2209).

Revise as underlined here: "Combustion facilities and landfills must take all reasonable precautions to not accept food scraps directly from designated food scraps generators who are required to send their food scraps to an intermediary facility and/or organics recycler."

Response: The obligations for waste transporters, landfills, and combustors are found in the Food Donation and Food Scraps Recycling Law at ECL 27-2205, 27-2207, and 27-23209. These are the criteria used in proposed Part 350 regulations. An alteration of the standards would require an amendment to the Law.

Comment 239: The criteria applicable to waste transporters should be modified to require the waste transporter to verify from DEC what the designated food scraps inventory list is and whether the transporter's customers are covered. The transporter should be required to notify DEC if they are aware of a generator that is not complying with the Law.

Response: DEC is required to publish a list of all generators and those that are required to recycle. This information is available to the public through our website, including waste transporters. Any person, including a waste transporter, can notify DEC if a violation of Part 350 is suspected. The Food Donation and Food Scraps Recycling Law does not give DEC the authority to require this notification.

Comment 240: Third, the regulations should include additional details and documentation requirements for “reasonable precautions” throughout the recycling system. The statute imposes a general duty on the waste transporters, transfer facilities, landfills, and incinerators to “take all reasonable precautions” to ensure that food waste is recycled. The regulations restate this requirement and require transporters to notify facilities “of the requirement to deliver food scraps to an organics recycler.” We urge the Department to include more concrete instructions and accountability mechanisms, such as written or electronic notice and tracking requirements.

Response: DEC will provide additional guidance to waste transporters, etc. concerning the reasonable precautions requirement. In addition, these facilities are regulated under the Part 360 series and each must have a waste control plan or similar, that outlines the procedures that will be used to control unacceptable material, such as source separated food scraps at landfills beginning in 2022.

Comment 241: Defining “Beneficial Manner”. Because no definition is currently provided for “beneficial manner” as used in Section 350-4.2(a), the City requests that DEC include clarifying examples after the term is used in this provision, as it has done following Section 350-1.3(b)’s use of the same term.

Response: A definition for used in a beneficial manner has been added to Part 350 for added consistency.

Comment 242: Organics Recyclers. The final rule should establish clear reporting requirements for designated food scraps generators and intermediary facilities that transfer food scraps to organics recyclers. Section 350- 4.2(b) of the Proposed Rule requires that an organics recycler “provide information to the department concerning . . . the amount of food scraps accepted from designated food scraps generators, and the names and locations of those designated food scraps generators.” However, because the Proposed Rule does not explicitly require designated food scraps generators to provide this information to the organics recycler or the intermediary facility that then

transfers the scraps to the organics recycler, and does not require intermediary facilities to provide this information to the organics recycler, organics recyclers are unlikely to have access to the information they are required to report under this provision. The City therefore requests that DEC clarify the responsibility of designated food scraps generators and intermediary facilities to provide this information to organics recyclers so that it may be reported accurately.

Response: Part 350-4.2 will be revised to clarify that the information that DEC may request from organics recycler is consistent with information that may be required for the facility approval under Part 361. Information concerning waste specifically from designated food scraps generators will only be required if readily available to the organics recycling facility through direct contracting with the generator, etc.

Comment 243: Section 350-4.1(a). The regulations need to clarify, that to fall under this part, the transfer facility must be capable of processing the food scraps.

Response: A transfer facility cannot accept source separated food scraps without approval under Part 362. DEC does not think it is necessary to clarify that the transfer station must be operated legally.

Comment 244: We ask the Department to clarify the scope of resultant materials and the approval process for their beneficial reuse Section 350-4.2 of the Proposed Food Scraps Recycling Regulations says “If the food scraps are sent to a facility that accepts multiple waste streams (an anaerobic digester, for example), the portion of the resultant material or product derived from food scraps must be used in a beneficial manner, and cannot be landfilled or combusted, unless otherwise approved by the department.” Anaerobic digestion of food scraps results in two materials: biogas and digestate. For anaerobic digester project developers and investors to be able to confidently move forward with the design and construction of biogas projects, the rules and requirements for the beneficial use of both biogas and digestate need to be clearly outlined. Assuming

the intent of the current draft included both resultant materials, we offer the following comments to remove the ambiguity and provide clarification on what types of beneficial reuse the department will allow. The suggested changes provide biogas project developers with clear expectations for the operation and financial performance of their projects, which will in turn accelerate development of organics recycling infrastructure development in New York State.

Response: The regulations will be revised to clarify that biogas combustion or use in another manner is acceptable and that the beneficial use as a soil amendment, etc. applies to the digestate.

Comment 245: It will be impossible for disposal facility operators to tell if they've received designated food waste. It would be unfair and unworkable to put facility operators at the risk of violating the Law or the regulation. The key to success is intercepting food waste at the source, not downstream when it may not even be recoverable. The disposal ban should be eliminated.

Response: The Food Donation and Food Scraps Recycling Law at ECL 27-2209 contains the disposal ban. It would require an amendment to the Food Donation and Food Scraps Recycling Law to remove the ban. The primary responsibility for compliance with the proposed Part 350 regulations lies with the food scraps generators. Disposal facilities are currently required under Parts 360 and 363 to have a waste control plan to address how other materials that are banned (e-waste, tires, etc.) are monitored and excluded. This new waste ban will need to be addressed in the waste control plan of those facilities.



## Revised Regulatory Impact Statement

### 6 NYCRR Part 350 - Food Donation and Food Scraps Recycling

#### Introduction

The Department is proposing to adopt 6 NYCRR Part 350 to implement the Food Donation and Scraps Recycling Law, which was enacted in 2019. The law takes effect on January 1, 2022 and requires large generators of food scraps to donate excess edible food and recycle all remaining food scraps if they are located within 25 miles of an organics recycler. Food scraps generators may petition the Department for a one-year waiver from these requirements.

#### 1. Statutory Authority

The proposed regulations are derived directly from Title 22 of Article 27 of the Environmental Conservation Law (ECL). The statutory authority to implement the regulations is found under ECL title 1 of article 1; title 3 of article 3; title 22 of article 27; and title 27 of article 71. The relevant statutory provisions are summarized below.

ECL section 1-0101 declares a policy of the State to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution in order to enhance the health, safety and welfare of the people and their overall economic and social well-being.

ECL Section 3-0301 empowers the Department to adopt regulations as may be necessary to carry out the environmental policy of the State set forth in Section 1-0101.

## ECL Article 27, Title 22 Food Donation and Food Scraps Recycling

Section 27-2201. Definitions. This section provides the definitions needed to implement the statute including designated food scraps generator, food scraps, organics recycler, person, single location, incinerator, landfill, transfer facility, excess edible food, and food relief organization.

Section 27-2203. Designated food scraps generator responsibilities. Effective January 1, 2022, this section outlines the responsibilities of the generators including the requirement to donate excess edible food to the maximum extent practicable; the requirement to separate food scraps from other waste and to send food scraps to an organics recycler if one exists within 25 miles with sufficient capacity; and an exclusion from the separation requirement if the recycler to whom food scraps are sent can process municipal waste.

This section also requires generators to submit an annual report to the Department, beginning on March 1, 2023. The annual report is submitted electronically and must summarize the food donated and information concerning food scraps recycling.

To ensure that a generator is not unduly burdened financially by the statute, this section also includes a waiver provision. A generator can petition the Department for a waiver from compliance due to cost, the availability of an organics recycler and other factors.

Section 27-2205. Waste transporter responsibilities. This section requires waste transporters that collect food scraps from designated food scraps generators to deliver the food scraps to an organics recycling facility or to an intermediary such as a depackaging facility or a transfer facility that will then send the food scraps to a recycler.

Section 27-2207. Transfer facility. This section requires transfer facilities that accept food scraps from designated food scraps generators to send the food scraps to an organics recycler.

Section 27-2209. Food scraps disposal prohibition. This section requires incinerators and landfills to take all reasonable precautions to not accept food scraps from designated food scraps generators.

Section 27-2211. Department responsibilities. This section outlines the responsibility of the Department. The Department must publish information on its website concerning how designated food scraps generators are determined, how the waiver process works, how odors and vectors can be minimized, and a list of all facilities and transporters.

The Department is required to assess the capacity of all organics recyclers annually and to notify generator if they qualify as designated food scraps generators.

The Department must also develop educational materials for the affected generators and on waste minimization.

Section 27-2213. Regulations. The Department must promulgate regulations that include the methodology the department will use to determine who is a designated food scraps generator; the waiver process; procedures to minimize odors and vectors; a list of all designated food scraps generators, organics recyclers, and all waste transporters that manage source-separated organics; and how designated food scraps generators will comply.

Section 27-2215. Exclusions. Cities with a population of one million or more (if they continue to implement their own law), hospitals, nursing homes, adult care facilities, and elementary and secondary schools are not subject to Article 27, Title 22 of the ECL or this Part.

Section 27-2217. Annual Report. Beginning January 1, 2023, requires the Department to report annually to the Governor and Legislature concerning the implementation of the statute.

ECL Section 71-2701 gives the Department the authority to enforce article 27 of the ECL.

## 2. Legislative Objectives

The New York State Legislature included the following introduction to the enabling legislation for the proposed regulations, outlining the objectives:

Approximately 40 percent of the food produced in the United States today goes uneaten. Much of this organic waste is disposed of in solid waste landfills, where its decomposition accounts for over 12 percent of our nation's emissions of methane, a potent greenhouse gas. Meanwhile, an estimated 2.8 million New Yorkers are facing hunger and food insecurity. Recognizing the importance of food scraps to our environment, economy, and the health of New Yorkers, the Food

Donation and Food Scraps Recycling act establishes a food scraps hierarchy for the state of New York. The first tier of the hierarchy is source reduction, reducing the volume of surplus food generated. The second tier is recovery, feeding wholesome food to hungry people. Third is repurposing, feeding animals. Fourth is recycling, processing any leftover food such as by composting or anaerobic digestion to create a nutrient-rich soil amendment. This rulemaking will implement the legislative objectives to address each tier of the hierarchy by facilitating the prevention of food waste generation by commercial generators and residents; directing the recovery of excess edible food from high-volume commercial food waste generators; and ensuring that a significant portion of inedible food waste from large volume food waste generators is managed in a sustainable manner and is not disposed in landfills or sent to combustors. In addition, the Department has supported the recovery of wholesome food by providing grants from the environmental protection fund to increase capacity of food banks and other emergency food providers, conduct food scraps audits of high-volume generators of food scraps, support implementation of pollution prevention projects identified by food scraps audits and expand capacity of generators and municipalities to donate and recycle food.

### 3. Needs and Benefits

The proposed rulemaking is mandatory and required by statute.

Proposed Part 350 affects large generators of food scraps including some grocery stores, restaurants, and colleges. These designated food scraps generators are those that generate at a single location an annual average of two tons per week or more of food scraps. All designated food scraps generators must donate excess edible food and must also send food scraps to an organics recycler if one is available within 25 miles of the generator. The increase in food donation will help

those in need and will result in job creation to assist the non-profits that handle food donations. The requirement that generators must recycle their food scraps by using organics recyclers, such as composting facilities, anaerobic digesters, or depackaging facilities, will reduce the amount of food scraps that end up in landfills and ultimately produce methane, a potent greenhouse gas. Composting facilities and other organics recyclers also produce beneficial organics soil conditioners that are needed to improve the quality of poor soils and reduce erosion.

#### 4. Costs

##### a. Costs to the Regulated Parties

The proposed regulations require designated food scraps generators to donate wholesome food. Increasing food donation from large food generators will not only help those in need, it will be a financial advantage for the food establishment, such as a grocery store or restaurant. Cost savings will be realized through tax deductions and through a reduction in the cost of waste disposal since the food will no longer be disposed.

The statute and the proposed Part 350 regulations also require designated food scraps generators to send their food scraps to an organics recycler if one exists within 25 miles of the generator and the recycler has capacity, as long as the cost is reasonably competitive with disposal. Experience in other states and for some generators in New York State has shown that the cost for sending food scraps to an organics recycler compared to sending those scraps for disposal can vary greatly. The statute and the proposed regulations limit the potential cost increase on the generators. The statute allows any designated food scraps generator to seek a waiver from the Department from the need to send their food scraps to an organics recycler if the cost to recycle is not reasonably competitive with the cost of disposal. The proposed regulations define reasonably competitive to equate to a ten percent

difference. Therefore, if the cost to send their food scraps to an organics recycler is more than ten percent higher than the cost for disposal, the generator can obtain a waiver from the Department. Therefore, if there is a cost increase to the generators it will be limited to an amount consistent with the requirements of the statute. In some cases, cost savings will be realized.

The statute and the proposed Part 350 regulations require the designated food scraps generators to report annually to the Department. There will be a cost associated with obtaining and maintaining the data and providing it to the Department. The cost for obtaining and maintaining the data should not increase with this proposed rulemaking because the data is already maintained by the generators for other purposes – donation data for tax purposes and waste management data for business cost management. For reporting, the proposed Part 350 follows the statute by requiring electronic reporting to decrease the burden on the generators. The Department will also provide the electronic reporting forms to be used. Therefore, the overall increased cost to the generators for recordkeeping and reporting should be minimal.

#### b. Costs to the Department, State and Local Governments

The Department, State and local governments will not incur additional costs due to the issuance of the proposed regulations. The Department will implement the regulations and develop and provide outreach and education on those requirements with existing staff.

#### 5. Local Government Mandates

There are no mandates that need to be addressed by local governments since the proposed regulations do not apply to these entities.

## 6. Paperwork

The proposed regulations, consistent with the underlying statute, requires the designated food scraps generators to report annually to the Department, beginning on March 1, 2023. The annual report must summarize the amount of food donated with the destination and the amount of food recycled with the transporter and organics recycler used. The Department will develop a simple electronic reporting form to assist the generators in submitting the required information. The information should be readily available to the generators from Food Banks and other emergency food providers, and the food scraps haulers.

## 7. Duplication

The proposed regulations do not duplicate, overlap, or conflict with any other State or federal requirements.

## 8. Alternatives

The Department is required by State legislation under Title 22 of Article 27, to promulgate rules and regulations necessary to implement the provisions of the statute. Therefore, there are no other alternatives for this proposed rulemaking.

## 9. Federal Standards

No federal standards will be exceeded by promulgating the proposed rule.



## 10. Compliance Schedule

The statutory requirements set forth in Article 22 of the ECL take effect on January 1, 2022. The rule will be effective 30 days after filing the Notice of Adoption with the Department of State.

## Revised Job Impact Exemption Statement – 6 NYCRR Part 350

### Food Donation and Food Scraps Recycling

Part 350 will increase the donation of edible food to those in need and increase the recycling of food scraps through composting and other means. This will cause job creation.

In accordance with Section 201-a(2)(a) of the State Administrative Procedure Act, a Job Impact Statement has not been prepared for this rule making, as it is not expected to create a substantial adverse impact on jobs and employment opportunities in New York State (the State). To the contrary, proposed 6 NYCRR Part 350 is expected to create, as set forth below, a positive impact on employment opportunities.

The New York State Department of Environmental Conservation (DEC) has determined that the proposed Food Donation and Food Scraps Recycling regulations will have a positive impact on jobs and employment opportunities throughout the State. The purpose of the regulations, based on a State statute of the same name, is to increase edible food donation and food scraps recycling from generators that produce two tons or more of food scraps per week. An increase in food donation will help those in need. It will also increase the number of jobs in the non-profit sector related to the collection, storage, and distribution of wholesome food as well as those organics recycling facilities that are developed or expanded.

The following outline provides information about each section of the proposed regulations and the impact on potential employment opportunities in food donation and food scraps recycling.

Subpart 350-1 contains a description of the purpose and applicability, definitions, inspection criteria, and severability of Part 350. The purpose of this section is to provide background information needed for the administration of Article 27, Title 22 of the Environmental Conservation Law (ECL). There is no negative effect on the generation of employment opportunities under this section.

Subpart 350-2 contains the criteria applicable to designated food scraps generators (those that generate two tons or more of food scraps per week). All designated food scraps generators must donate excess edible food and must also send food scraps to an organics recycler if one is available within 25 miles of the generator. The increase in food donation will help those in need and will result in job creation to assist the non-profits that handle food donations. The requirement that generators must recycle their food scraps by using organics recyclers such as composting facilities, anaerobic digesters, or depackagers, will increase the need for transporters and recycling facilities for the food scraps. These activities will also result in job increases and economic growth.

Subpart 350-3 outlines the lists that will be maintained by DEC, enumerating the designated food scraps generators, food scraps transporters, and organics recycling facilities. Existing DEC staff will maintain these lists.

Subpart 350-4 outlines the responsibilities of the various entities involved in food scraps management including the transporters, recyclers, transfer facilities, combustors, and landfills. The requirements do not represent a significant change to these operations and will not result in job creation, reduction, or elimination.

In consideration of the foregoing, DEC concludes that adoption of this regulatory proposal for food donation and food scraps recycling will not have substantial adverse impacts on jobs within the State. Rather, with the operation of new transporters and organics recycling facilities, various employment opportunities will be created throughout the State.

## Rural Area Flexibility Analysis – 6 NYCRR Part 350

### Food Donation and Food Scraps Recycling

#### 1. Types and Estimated Number of Rural Areas

For purposes of this Rural Area Flexibility Analysis (RAFA), "rural area" means those portions of the state so defined by Executive Law section 481(7). SAPA section 102(10). Under Executive Law section 481(7), rural areas are defined as "counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of two hundred thousand or greater population, 'rural areas' means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein." There are 44 counties in New York State (State) that have populations of less than 200,000 people and 71 towns in non-rural counties where the population densities are less than 150 people per square mile.

Proposed Part 350 affects large generators of food scraps including some grocery stores, restaurants, and colleges. The majority of these generators will not be located in rural areas. They are likely to be found in urban and suburban locations. However, there may be a few larger generators, such as a regional grocery store, that are located in rural areas of the State.

#### 2. Reporting, Recordkeeping, Other Compliance Requirements, and Need for Professional Services

Large food scraps generators are required to report annually to the Department concerning how much food was donated and food scraps were recycled. This reporting will be done electronically to

minimize the burden on the generators. Electronic forms for reporting will be provided by the Department.

The few generators that are located in rural areas will need to begin or increase food donation. Increasing food donation will provide additional food to those in need in the rural areas and will reduce waste disposal costs for the generators.

If a rural generator has a composting facility or other organics recycler within 25 miles, the generator must send their food scraps to the recycler. However, the cost of recycling must be competitive with the cost of disposal, so there should not be an economic burden on the generator.

No professional services are required for compliance with the regulations.

### 3. Costs

#### a. Costs to the Regulated Parties

The proposed regulations require designated food scraps generators to donate wholesome edible food. Increasing food donation from large food generators will not only help those in need, it will be a financial advantage for the food establishment, such as a grocery store or restaurant. Cost savings will be realized through tax deductions and through a reduction in the cost of waste disposal since the food will no longer be disposed.

The statute and the proposed Part 350 regulations also require designated food scraps generators to send their food scraps to an organics recycler if one exists within 25 miles of the generator and the

recycler has capacity, as long as the cost is reasonably competitive with disposal. Experience in other states and for some generators in New York State has shown that the cost for sending food scraps to an organics recycler compared to sending those scraps for disposal can vary greatly. The statute and the proposed regulations limit the potential cost increase on the generators. The statute allows any designated food scraps generator to seek a waiver from the Department from the need to send their food scraps to an organics recycler if the cost to recycle is not reasonably competitive with the cost of disposal. The proposed regulations define reasonably competitive to equate to a ten percent difference. Therefore, if the cost to send their food scraps to an organics recycler is more than ten percent higher than the cost for disposal, the generator can obtain a waiver from the Department. Therefore, if there is a cost increase to the generators it will be limited to an amount consistent with the requirements of the statute. In some cases, cost savings will be realized.

The statute and the proposed Part 350 regulations require the designated food scraps generators to report annually to the Department. There will be a cost associated with obtaining and maintaining the data and providing it to the Department. The cost for obtaining and maintaining the data should not increase with this proposed rulemaking because the data is already maintained by the generators for other purposes – donation data for tax purposes and waste management data for business cost management. For reporting, the proposed Part 350 follows the statute by requiring electronic reporting to decrease the burden on the generators. The Department will also provide the electronic reporting forms to be used. Therefore, the overall increased cost to the generators for recordkeeping and reporting should be minimal.

#### b. Costs to the Department, State and Local Governments

The Department, State and local governments will not incur additional costs due to the issuance of the proposed regulations. The Department will implement the regulations and develop and provide outreach and education on those requirements with existing staff

The regulations may spur the growth of composting facilities or other organics recycling facilities in rural areas. These facilities will increase economic growth and employment opportunities in those rural areas.

#### 4. Minimizing Adverse Impact

As outlined in this analysis, it is the Department's belief that the proposed regulations will not cause a significant economic burden, place any additional burdens on rural areas, or increase the universe of regulatory requirements applicable to such rural areas.

#### 5. Rural Area Participation

The Department has provided significant outreach and will continue to provide a statewide outreach program to all entities affected by the regulations and other interested parties, including public and private interests in rural areas. For the generators in rural areas that may be affected the regulations, the Department has already reached out through their organizations, such as the Restaurant Association or the Food Industry Alliance, and through direct mailings and meetings. An extended public comment period for the rulemaking will be used to allow additional time for the public to review and comment on the regulations.



Since the passing of the law, the Department has held five stakeholder meetings with various stakeholder groups, including: transporters, organics recyclers, municipalities, food recovery, and environmental advocacy organizations. The Department will be presenting at the NYS Organics Summit as well as the NYS Solid Waste Federation Conference on the Food Donation & Food Scraps Recycling Law. The Department intends to continue to engage stakeholders through presentations, association meetings, and other outreach. Even before the passage of the law, the Department worked to engage stakeholders and provide guidance on food waste reduction, food donation, and food scraps recycling.

The Department's website has been updated to include a webpage on the Food Donation and Food Scraps Recycling Law in addition to the creation of a law specific email address encourages interested parties to sign up to a listserv to receive information from the Department concerning the law. The Department also releases the Solid Waste & Recycling Newsletter (minimum frequency biweekly), through the use of DECDelivers, where important updates pertaining to the law are shared with subscribers.

## Food Donation and Food Scraps Recycling

### 1. Effect of rule

Proposed Part 350 affects large generators of food scraps including some grocery stores, restaurants, and colleges. These designated food scraps generators are those that generate two tons or more of food scraps per week. All designated food scraps generators must donate excess edible food and must also send food scraps to an organics recycler if one is available within 25 miles of the generator. The increase in food donation will help those in need and will result in job creation to assist the non-profits that receive and distribute food donations. The requirement that generators must recycle their food scraps by using organics recyclers, such as composting facilities, anaerobic digesters, or repackaging facilities, will increase the need for transporters and recycling facilities for the food scraps.

There are no requirements in proposed Part 350 that directly affect small businesses and local governments. The regulations may increase opportunities for the development of new small businesses, as more organics recycling facilities are needed to handle the food scraps from large generators.

### 2. Compliance Requirements

The implementation of these regulations will not adversely affect small businesses or local governments since there are no standards or reporting and record keeping requirements for small

businesses or local governments. The reporting obligations contained in the regulations apply only to large generators of food scraps.

### 3. Professional Services

There are no professional services required for small businesses and local government

### 4. Compliance Costs

The proposed regulations will have no compliance costs for small businesses and local governments because the regulations do not apply to these entities.

### 5. Economic and Technological Feasibility

There are no economic or technological feasibility issues that need to be addressed by small businesses and local governments since the proposed regulations do not apply to these entities.

### 6. Minimizing Adverse Impact

The proposed regulations will have no adverse economic impacts on small businesses and local governments because the regulations do not apply to these entities.

### 7. Small Business and Local Government Participation

The Department has provided significant outreach and will continue to provide a statewide outreach program to all entities affected by the regulations and other interested parties, including public and private interests in rural areas. For the generators in rural areas that may be affected the regulations, the Department has already reached out through their organizations, such as the Restaurant Association or the Food Industry Alliance, and through direct mailings and meetings. An extended public comment period for the rulemaking will be used to allow additional time for the public to review and comment on the regulations.

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#### 8. Cure Period or Other Opportunity for Ameliorative Action

No cure period is needed since the proposed regulations do not apply to small businesses or local governments.